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

Commission on Human Rights and Opportunities, *ex rel.* Beth Miller, Complainant	:	**OPH/WBR 2008-073**
v.		
University of Connecticut Health Center, Respondent	:	**July 25, 2008**

RULING
RE: Respondents' Motion to Dismiss

Preliminary Statement

On June 4, 2008, the respondent filed a motion to dismiss the complaint on the grounds that the complaint allegations are barred by the statute of limitations and that they fail to state a cause of action pursuant to General Statutes § 4-61dd (b) (3). On July 23, 2008, the complainant, a pro se litigant, filed a response to the motion to dismiss.

For the reasons stated herein, the motion to dismiss is hereby Denied.

Procedural History

On May 1, 2008, the complainant filed a whistleblower retaliation complaint (complaint) alleging that the respondent violated § 4-61dd when it retaliated against her on April 4, 2008 and on prior dates listed in her amended complaint filed on June 11, 2008 for having disclosed information to the Auditors of Public Accounts and the

Attorney General on March 6, 2008. On June 20, 2008, the respondent filed an answer to the amended complaint.

DISCUSSION AND CONCLUSION

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. See *Federal Deposit v. Peabody N.E.*, 239 Conn. 93, 99 (1996); see also *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. See *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 her favor; see *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). See also *Magda v. Diageo North America, Inc.*, 2006 WL 4844065 (CHRO No. 0420213, March 16, 2006).

Statute of Limitations

Pursuant to General Satutes § 4-61dd (b) (3) (A), a complaint may be filed "[n]ot 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 . . .." First, the respondent argued the complainant "identified March 6, 2008 as the operative date" that she learned of the threatened or adverse personnel action giving rise to her complaint and

since she filed her complaint on May 1, 2008, it was filed twenty-six days past the thirty-day statute of limitations. However, the respondent is mistaken as to the date the complainant learned of the retaliatory actions. As stated in her complaint, paragraph 9, the complainant learned of the most recent retaliatory action on April 4, 2008. March 6, 2008 is the date that she disclosed information to the Auditors of Public Accounts. Therefore, her complaint is not beyond the statute of limitations.

Failure to State a Cause of Action

Next, in the alternative, the respondent argued that the complainant failed to establish a prima facie case of retaliation under § 4-61dd et seq. The respondent argued that the appropriate standard for a retaliation case is the burden shifting analysis articulated in *McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802-803 (1973). It argued that as part of her prima facie case, the complainant failed to show that she notified the Attorney General of retaliatory personnel actions taken or threatened against her subsequent to her transmitting information to the Auditors of Public Accounts or the Attorney General, and she failed to show that the Attorney General completed his investigation of the retaliatory allegations, pursuant to § 4-61dd (b) (2). In addition, the respondent argued the complainant failed to provide identifying information about the respondent's employees whom she notified about her complaint to the Auditors. The respondent is mistaken as to the complainant's burden of proof for a prima facie case. Pursuant to General Statutes § 4-61dd as amended by P.A. 05-287, the complainant is not required to inform the Attorney General or the respondent's

employees of the retaliatory acts or to wait for the Attorney General to conclude its investigation before filing a complaint with the chief human rights referee.

The respondent further argued that the complainant did not suffer an adverse personnel action because she has not suffered a material loss in benefits, a less distinguished title, diminished material responsibilities or a hostile work environment. It also argued that she did not provide dates or names concerning the alleged negative comments made against her. An adverse personnel action may include termination of employment, decrease in wages or salary or a material loss of benefits. See *Galabya v. New York City Board of Ed*ucation, 202 F.3d 636, 640 (2nd Cir. 2000). Retaliatory personnel actions can also take the form of non-economic actions such as a less distinguished title, significantly diminished material responsibilities; *Galabya v. New York City Board of Ed*ucation, supra, 202 F.3d 640; or the employer's creation of a hostile work environment. See *Gregory v. Daly*, 243 F.3d 687, 701 (2d Cir. 2001); see also *Ray v. Henderson*, 217 F.3d 1234, 1244-46 (9th Cir. 2000). In addition, an adverse action is one that would dissuade a reasonable person from making or supporting a charge of unlawful activity under § 4-61dd (a). See *Toshado v. State of Connecticut*, 2007 WL 969392, 6 (Conn.Super.). In the present case, the complainant alleged that she suffered an adverse employment action when her health benefits were cancelled on April 4, 2008 and that she suffered a hostile work environment by having alleged numerous actions taken against her. The complainant's allegations are sufficient to establish an adverse employment action for purposes of this motion to dismiss.

Next, the respondent argued that the complainant cannot prove a causal connection between the personnel action threatened or taken and her transmitting

information to the Auditors of Public Accounts. The complainant has established a causal connection between the alleged retaliatory act and the transmittal of information. She disclosed information on March 6, 2008 and allegedly was retaliated against on April 4, 2008, less than thirty days later. See *Gordon v. New York City Board of Education*, 232 F.3d 111, 117 (2000) (the protected activity was followed closely by discriminatory treatment). Also, pursuant to § 4-66dd (b) (5), if a "personnel action occurs not later than one year after the employee first transmits facts and information concerning a matter under [§ 4-61dd (a)] to the Auditors of Public Accounts or the Attorney General, there shall be a rebuttable presumption that the personnel action is in retaliation of the action taken by the [complainant] under [§ 4-61dd (a)]." Here, the alleged adverse personnel action occurred within one year of the complainant's transmittal of information to the Auditors of Public Accounts. As a result, the burden of persuasion shifts to the respondent to show that the alleged adverse actions taken were not in retaliation for the complainant having transmitted information to the Auditors of Public Accounts.

The complainant has alleged sufficient facts to establish a cause of action for retaliation. It is the role of the trier of fact at a public hearing to determine whether the complainant's proof of her allegations satisfies the standard necessary to prevail on a whistleblower retaliation claim based upon various adverse actions including a hostile work environment that would include considering the totality of the circumstances, not to be decided at this juncture. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 787-88 (1998); see also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

It is so ORDERED.

Dated at Hartford, this _____ day of July 2008.

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Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

c. Assistant Attorney General Donald R. Green
Ms. Beth Miller