Mary K. O'Sullivan	: Office of Public Hearing
	:
v.	: OPH/WBR No. 2008-086
	:
Helene Vartelas, et al	: November 20, 2008

Ruling re: the respondents' motion to dismiss
and
Order re: amending the complaint

Procedural history

On September 8, 2008, the complainant, Mary K. O'Sullivan, an employee of the department of mental health and addiction services (DMHAS), filed a complaint with the chief human rights referee pursuant to General Statutes § 4-61dd (b) (3). In her complaint, she alleged that Helene Vartelas and Stuart Forman, also employees of DMHAS, and DMHAS (collectively, respondents) violated General Statutes § 4-61dd by threatening to retaliate against her for her whistleblowing. The respondents filed their answer and special defenses on September 22, 2008.

On October 30, 2008, the respondents filed a motion to dismiss the complaint (motion). Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies (Regulations) provides: "The presiding officer may, on his own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant: (1) Fails to establish jurisdiction; (2) Fails to state a claim for which relief can be granted; (3) Fails to appear at a lawfully noticed conference or hearing without good cause; or (4) Fails to sustain

his or her burden after presentation of evidence."[1] The respondents argued that the complaint does not allege sufficient facts to satisfy all the elements necessary for a prima facie case. Motion, pp. 3-5. With respect to Forman, the respondents further argue that the complaint does not allege any retaliatory conduct committed by him. Motion, p. 6. The complainant filed her objection to the motion (objection) on November 13, 2008.

Analysis

I

Whistleblower retaliation cases brought under § 4-61dd are typically analyzed under the three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and also under federal and state case law interpreting other anti-retaliatory and anti-discrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990); *Irwin v. Lantz*, OPH/WBR 2007-40 et seq., Final Decision, 11 (May 9, 2008) (2008 WL 2311544). The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of her prima facie case; (2) the respondents' burden in the presentation of their non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving the respondents retaliated against her because of her whistleblowing. *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 11-12. The requirements of

proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. Id., 11.

The complainant's prima facie case of whistleblower retaliation has three elements: (1) the complainant must have engaged in a protected activity as defined by the applicable statute; (2) the complainant must have incurred or been threatened with an adverse personnel action; and (3) there must be a causal connection between the actual or threatened personnel action and the protected activity. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995; *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 12-14.

The four statutory components of a protected activity as defined by § 4-61dd are, first, the respondent must be a state department or agency, a quasi-public agency, a large state contractor or an employee thereof (regulated entity). §§ 4-61dd (b) (1), 4-61dd (h) (2), 1-120. Second, the complainant must be an employee of the regulated entity. § 4-61dd (b). Third, the complainant must have knowledge either of "corruption, unethical practices, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in a state department or agency or a quasi-public agency" or of (2) "corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in a large state contract" (protected information). § 4-61dd (a). Fourth, the complainant must have disclosed the protected information to an employee of (1) the auditors of public accounts; (2) the attorney general; (3) the state agency or

quasi-public agency where she is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) the contracting state agency concerning a large state contractor (whistleblowing). § 4-61dd (b) (1). *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 12.

With respect to the third and fourth statutory components of a protected activity, the complainant "need only establish general corporate knowledge that the [she] has engaged in a protected activity." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008) (2008 WL 793597, 7). Further, the complainant need not show that the conduct she reported actually violated § 4-61dd (a), but only that she had a reasonable, good faith belief that the reported conduct was a violation. § 4-61dd (c) and (g); *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 176; *Pappas v Watson Wyatt & Co.*, supra, 2008 WL 793597, 4-6; *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 13.

To satisfy the second element of her prima facie case of whistleblower retaliation, the complainant must show that she suffered or was threatened with an adverse personnel action by a regulated entity subsequent to her whistleblowing. §4-61dd (b) (1). "[T]he means by which an employer can retaliate against an employee are not limited to discriminatory actions that affect the terms and conditions of employment. . . . Instead, retaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct . . . such as hiring, firing, change in benefits, or reassignment. . . . . Again, the plaintiff must show that [her] employer's

actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, 537 F. Sup.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6); *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 13-14.

The third element of a prima facie case of whistleblower retaliation requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and her whistleblowing. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The complainant can establish the inference of causation by three methods: (1) indirectly, for example, by showing that the whistleblowing was followed closely in time by discriminatory treatment or through other circumstantial evidence such as disparate treatment of similarly situated co-workers; *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000); *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondents; *Gordon v. New York City Bd. of Educ.*, supra, 232 F.3d 117; *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; or (3) by operation of statute as a rebuttable presumption; § 4-61dd (b) (5). *Irwin v. Lantz*, supra, OPH/WBR 2007-40, 14.

The complainant's "burden of proof at the prima facie stage is *de minimis*." *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173. Section 4-61dd "is

remedial in nature and as such should be read broadly in favor of those whom the law is intended to protect." *Colson v. Petrovision, Inc.*, 2000 WL 1475850, 3 (Conn. Super.) (28 Conn. L. Rptr. 334) (construing General Statutes § 31-51m).

II

The respondents argue that the complaint does not satisfy all the prerequisites of a prima facie case. The respondents first contend that the complaint does not allege sufficient facts to establish that the complainant had knowledge of protected information. According to the respondents, the complainant simply disagreed with the respondents' selection of a candidate for a position, which is not protected information but a matter within the purview of management. As the complaint makes clear, though, the complainant is alleging not that she voiced mere disagreement with the selection but is alleging that she voiced her belief that the hiring process violated the union contract, thus constituting a potential violation of state regulations and/or abuse of authority.

The respondents next contend that the complainant's disclosing information to Diane Fitzpatrick did not constitute protected whistleblowing as Fitzpatrick is not an employee of the auditors of public accounts, the attorney general, or DMHAS. According to the complaint, though, the complainant also notified DMHAS employees – specifically, its personnel department and Connecticut Valley Hospital's executive leadership.

Finally, the respondents argue that the complaint does not allege facts constituting actual or threatened adverse personnel action. Rather, according to the respondents, it merely recites speculation and hearsay. The complaint, though, alleges that the complainant's supervisors were directed to "reel in" the complainant, "talk to" her about her disclosure and make her more of a "team player". "[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters . . . ." (Internal quotation marks omitted.). *Tosado v. Connecticut,* supra, 2007 WL 969392, 6. In this case, comments such as "reel in", "talk to" and "make a team player" could, depending on the circumstances, lead a reasonable factfinder to find that these comments were threats of adverse employment action that could dissuade a reasonable employee from making or supporting a charge of retaliation.

III

The respondents also argue that the complaint should be dismissed as to Foreman because there is no retaliatory conduct alleged by him. In her objection to the motion, the complainant contends that she "alleges in her Complaint, 9B Part B, that Stuart Forman was personally involved in the retaliatory threats." Objection, 6 n. 1. A review of the complaint, however, does not disclose an allegation that Foreman personally made retaliatory threats or took adverse action against the complainant.

Rather, the complaint's mention of him is limited to a reference that he attended a meeting at which the complainant was discussed.

Ruling and order

The respondents' motion is denied as to its claim that the complaint does not allege sufficient facts to satisfy all the elements necessary for a prima facie case .Rather than implicating this tribunal's personal or subject matter jurisdiction, the respondents' arguments relate more to its belief in the inability of the complainant to prevail on the merits at a hearing. Construing the complaint most favorably to the complainant and expressing no view on the ultimate merits of the complainant's claims, the complainant has alleged sufficient facts to satisfy the de minimis burden she has at this stage of the proceeding.

. Because of the complaint's limited reference to Forman, the motion is denied without prejudice relative to him and the complainant is directed, pursuant to section 4-61dd-4 (b) of the Regulations, to file and serve, on or before December 2, 2008, an amendment to her complaint specifying the retaliatory threats made by Forman himself.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Jamie L. Mills, Esq.
Beth Z. Margulies, Esq.

[1] This procedure differs significantly from procedures in superior court in which motions to dismiss apply to lack of subject matter or personal jurisdiction; Practice Book §§ 10-30 and 10-31; motions to strike are utilized for failure to state a claim for which relief can be granted; Practice Book § 10-39; motions for default or nonsuit are used for failure to appear; Practice Book § 17-19; and motions for summary judgment, motion for judgment of dismissal and motion for directed verdict are utilized for a party's failing to sustain its burden after the presentation of evidence; Practice Book §§17-49 and 15-8 and *Robinson v. Galino*, 275 Conn. 290, 297 (2005).