Mehdi M. Saeedi	: Office of Public Hearings
	:
v.	: WBR/OPH No. 2008-090
	:
Department of Mental Health and Addiction Services, et al.	: December 9, 2010

FINAL DECISION

Summary of disposition

For the reasons set forth herein, it is found that the complainant, Mehdi M. Saeedi (Dr. Saeedi), established by a preponderance of the evidence that the department of mental health and addiction services (DMHAS), Barbara Forgit, R. N.; Stuart Forman, M.D.; Luis Perez, Leonard Lev, M. D.; and Helene Vartelas, A.P.R.N. (collectively, the respondents) violated General Statutes § 4-61dd.[1] Dr. Saeedi is awarded damages including $12,000 in lost salary resulting from two unpaid suspensions; $40,000 in emotional distress damages; $123,355 in attorneys' fees, $410.25 in costs and $2,641 in prejudgment interest.

Procedural history

On October 16, 2008, Dr. Saeedi filed a complaint with the chief human rights referee alleging that the respondents and Dr. Jane Buss had violated General Statutes § 4-61dd by retaliating against him for his whistleblowing. On November 6, 2008, the initial conference was held to schedule dates for, inter alia, the serving of requests for the production of documents, for compliance with and objection to the request for

documents and for motions to compel the production of documents. In addition, the public hearing was scheduled for July 2009.

On November 19, 2008, the respondents filed their answer (respondents' answer), in which they denied that they had taken or threatened to take personnel action against Dr. Saeedi in retaliation for his whistleblowing. On November 30, 2008, Dr. Buss filed her answer, in which she denied that she had taken or threatened to take personnel action against Dr. Saeedi in retaliation for his whistleblowing. On February 17, 2009, Dr. Saeedi filed a withdrawal of his complaint as to Dr. Buss only.

Dr. Saeedi timely served a request on the respondents to produce documents relevant and material to his case. On January 21, 2009, the respondents filed and served their objections to producing the documents. On February 13, 2009, Dr. Saeedi filed and served a motion to compel the respondents to produce the requested documents. The motion was granted on February 20, 2009, ordering the respondents to produce the documents on or before March 5, 2009 or risk the imposition of sanctions. The respondents failed to comply with the order.

On March 19, 2009, Dr. Saeedi filed a motion for sanctions against the respondents for their failure to comply with the order to produce documents. On April 6, 2009, the motion was granted and sanctions were imposed on the respondents through the finding of facts regarding Dr. Saeedi's own care of patients and Dr. Saeedi's whistleblowing of Dr. Sonido's treatment of patients.

In response to the sanctions, the assistant attorney general representing the respondents filed an interlocutory appeal with the superior court on April 2, 2009 in which she challenged the order to produce documents. On June 16, 2009, the superior court stayed the public hearing pending resolution of the interlocutory appeal. On July 28, 2009, the undersigned issued a fifty-page articulation re: the order granting the complainant's motion to compel the production of redacted documents. As set forth in the detailed articulation, the state and federal statutes and case law cited by the assistant attorney general as the bases for the respondents' failure to comply with the production order, when read in their entirety and in the context of other applicable statutes and cases, did not support the respondents' failure to produce the documents. The superior court dismissed the interlocutory appeal, and the stay was lifted, on September 22, 2009. At a status conference on December 22, 2009, the public hearing was scheduled to commence on May 25, 2010.

On October 20, 2009, the Connecticut Legal Rights Project, Inc. (CLRP), filed a petition to intervene on its own behalf and on behalf of the patients at Connecticut Valley Hospital whose records may have been the subject of the order to produce documents. The petition was denied on November 4, 2009 for the reasons set forth in the denial, including mootness and the lack of any reference to patient records in the exhibit lists that the parties had filed. The ruling denying the motion specifically stated that: "CLRP is reminded that the hearing is open to the public and that its representative

may attend to observe." No representative of CLRP subsequently attended any of the ten days of public hearing.

In March 2010, the assistant attorney general filed with the superior court a complaint for declaratory judgment, again challenging the February 20, 2009 order to produce documents and the April 6, 2009 sanctions for failing to produce the documents. She had raised these same issues in her April 2009 interlocutory appeal with the superior court that the court had dismissed on September 22, 2009. On December 2, 2010, the superior court dismissed the complaint for declaratory judgment.

Although Dr. Saeedi had filed his complaint and its attachments on October 16, 2008, eighteen months later, on May 18, 2010, the assistant attorney general filed a motion to strike various attachments from the complaint, claiming that the documents improperly contained patient identifying information. The motion to strike was denied at the May 25, 2010 hearing. Transcript page (Tr.), 19.

In addition to the motion to strike being untimely filed, the documents challenged in the motion did not appear to contain patient identifying information. However, the assistant attorney general was given the opportunity to proffer documents that redacted the information which she believed to be patient identifying. Her redacted documents could be used in substitution of the complainant's attachments. Tr. 19-20. The assistant attorney general never proffered any redacted documents. Further, although these challenged documents had been in the public file since October 2008, CLEF did not

reference them in its October 2009 motion to intervene as being documents of concern to it or its clients.

Finally, and probably most troubling, one of the attachments to the complaint, Exhibit B, that the assistant attorney general sought to have stricken was listed on her April 9, 2009 exhibit list, was listed on her May 13, 2009 revised exhibit list and was introduced by her at the hearing as one of her own exhibits, R-2. That the assistant attorney general would introduce as an exhibit a document that she has maintained contains patient identifying information prohibited under federal and state law raises questions about the credibility of her motion to strike.

On May 19, 2010, less than a week before the scheduled commencement of the public hearing, the assistant attorney general filed a motion to dismiss. Some of the reasons given by the assistant attorney general to dismiss the complaint had existed since the October 2008 filing of the complaint; other reasons were non-jurisdictional; and other reasons given were, according to Dr Saeedi's objection and attached affidavit by his attorney, simply untrue. The motion was denied at the public hearing on May 25, 2010. Tr. 14-15. The assistant attorney general complained about the lack of time for her to review the complainant's objection to her motion to dismiss; however, the filing of the Dr. Saeedi's objection was obviously contingent upon the timing of her filing her motion. Thus, the assistant attorney general's lack of time to review the objection was the foreseeable result of her decision to file a belated motion to dismiss.

The public hearing was held on May 25, June 1, 2, 3, 10, 11, 17, 22, August 2, and October 14, 2010. The named respondents, Ms. Fogit, Dr. Forman, Mr. Perez, Dr. Lev and Ms. Vartelas, did not testify.

At the public hearing, an issue arose as to the respondents' access to Dr Saeedi's medical records, particularly in regard to his motion to amend his claim for relief to include emotional distress damages. Dr. Saeedi had not produced his medical records in response to the respondents' production request because of the refusal of the assistant attorney general to sign a protective order when proffered by Dr. Saeedi's counsel in January 2009 and February 2009. Tr. 25-26. At the public hearing, Dr. Saeedi's counsel handed the assistant attorney general a proposed protective order for her to sign and again offered to produce the documents if the assistant attorney general would sign the protective order. Tr. 25-27, 34-35. The undersigned told the assistant attorney general that if she needed more time to prepare for cross, the need for additional time and the appropriate amount of preparation time could be discussed. Tr. 35. The assistant attorney general never signed the protective order.

On June 17, 2010, the public hearing recessed prior to the completion of Alphonso Mims' testimony because the assistant attorney general said that she had "at least another hour" more of questioning. Tr. 1417. When Mr. Mims resumed his testimony on August 2, 2010, the assistant attorney general had only one question for him. Tr. 1558-59.

On August 2, 2010, the assistant attorney general objected because she was not the concluding examiner of Mr. Mims. Since she had called Mr. Mims, she felt she should have conducted the final examination. Tr. 1572. However, section 4-61dd-13 (b) of the Regulations of Connecticut State Agencies provides in relevant part that: "Each party shall be afforded the opportunity to call, examine and cross-examine witnesses . . . . The presiding officer may examine witnesses to ensure a full inquiry into all contested facts and to ensure a fair determination of the issues." General Statutes § 4-177c (a) provides in relevant part that each party "shall be afforded the opportunity . . . (2) at a hearing, to respond, to cross-examine other parties, intervenors, and witnesses, and to present evidence and argument on all issues involved."

Pursuant to regulation and statute, Mr. Mims was called and examined by the assistant attorney general, cross-examined by Dr. Saeedi's counsel, subjected to re-direct examination by the assistant attorney general, subjected to re-cross by Dr. Saeedi's counsel, and then questioned by the presiding referee. There is no procedural right under regulations or the Uniform Administrative Procedure Act for a party to conduct, as proposed by the assistant attorney general, a re-re-direct examination of a witness. Indeed, there is no explicit right in § 4-177c even for re-direct examination and re-cross examination of a witness.

Also on August 2, 2010, the assistant attorney general requested that the hearing recess until August 16, 2010 so that she could seek an order from a court compelling the attendance of a proposed witness, Cynthia Hutchins. Tr. 1575-76. . According to the

assistant attorney general, the subpoena had been served on June 10, 2010. Tr. 1573. The assistant attorney general reported that she had left several voicemail messages for Ms. Hutchins, who had not responded. Tr. 1558, 1573. Further, according to the assistant attorney general, Ms. Hutchins was no longer employed by DMHAS, had sold her home; Tr. 1573; and moved out of state; Tr. 1557. The assistant attorney general did not have Ms. Hutchins' current address. Tr. 1573. The assistant attorney general did not proffer a copy of the notice of the subpoena with proof of service. Under these circumstances, the request for a recess was denied, although Ms. Hutchins' written witness statement was admitted as respondents' exhibit 41.

Briefs and the complainant's petition for attorney fees were due and filed on September 23, 2010. The respondents filed their objection on October 5, 2010 and an evidentiary hearing on damages, specifically Dr. Saeedi's petition for attorney's fees and costs, was held on October 14, 2010, at which time the record closed.

In viewing all of the evidence in context, it is clear that Dr. Saeedi established by a preponderance of the evidence that the respondents violated General Statutes § 4-61dd.

Findings of fact (FF)

Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found:[2]

1. At relevant times, Dr. Saeedi was an employee of the State of Connecticut, Department of Mental Health and Addiction Services (DMHAS), Connecticut Valley Hospital (CVH). Tr. 42.
2. The respondent DMHAS is a state agency. The respondents Barbara Forgit, Stuart Forman, M.D., Luiz Perez, Leonard Lev, M.D., and Helene Vartelas, A.P.R.N., are, or were at relevant times, employees of a state agency; specifically, DMHAS. At relevant times, Ms. Forgit was the division director of ambulatory care services at CVH; Dr. Forman was chief of professional services at CVH; Mr. Perez was chief executive officer at CVH; Dr. Lev was the medical director of the addiction services division at CVH; and Ms. Vartelas was chief operations officer at CVH. Complaint and respondents' Answer, ¶ 6.
3. Dr. Saeedi's direct supervisor for administrative affairs was Ms. Forgit. Tr. 44.
4. From mid-2007 to the filing of the whistleblower retaliation complaint in October 2008, Dr. Saeedi's direct supervisor for medical affairs was Dr. Buss, whose title was medical director of ambulatory care services. Tr. 44. Prior to Dr. Buss, Dr. Freedman had been medical director of ambulatory care services and Dr. Saeedi's supervisor for medical affairs. Tr. 370.
5. Dr. Buss reported to Ms. Forgit. Tr. 44.
6. Ms. Forgit's direct supervisor was Ms. Vartelas. Tr. 44.

7. CVH is primarily a psychiatric hospital. Tr. 42. It consists of three distinct treatment divisions: the general psychiatry division, the addiction services division and the Whiting Forensic Division. Tr. 339-40.
8. CVH is in a campus-type setting with several free-standing buildings housing patients and employee offices. These buildings include Merritt Hall; Page Hall, an administration building only; Dutcher Hall; two attached buildings, Beers Hall and Shue Hall; Haviland Hall; Woodward Hall; Battell Hall; and Whiting Hall. Tr. 292-93.
9. The addiction services division is located in Merritt Hall and consists of a detoxification unit, unit 2AB, and two rehabilitation units, 2DE and 3AB. The general psychiatry division is located in Merritt Hall, unit 3DE, Battell Hall and a geriatric unit in Woodward Hall. Whiting Forensic Division is located in Whiting Hall and Dutcher Hall. Tr. 339-42.
10. Because of an intolerance to heat and a cardiac condition that can be triggered by cold weather, Dr. Saeedi generally drove from one building to another. Tr. 294, 296.
11. Dr. Saeedi was first licensed to practice medicine in July 1979. Tr. 38.
12. In March 2002, DMHAS hired Dr. Saeedi as a principal physician in ambulatory care services (ACS) at CVH. Tr. 42, 283. Dr. Saeedi has always worked 8:30 AM to 5:00 PM. Tr. 312.

13. Physicians in ACS, such as Dr. Saeedi, provide medical treatment to all the patients. Tr. 43; Ex R-26, p. 2, ¶ 6.
14. In March 2002, during his CVH pre-employment medical examination, Dr. Saeedi was diagnosed as previously having had a massive asymptomatic heart attack that the function of his heart at approximately 25%. Tr. 136, 232, 235.
15. In January 2006, he had a single coronary artery by-pass graft. He was out of work for seven to eight weeks following the surgery, returned to work and then was again out of work for approximately one month in April or May 2006. Tr. 229-30, 237-38.
16. In August 2006, Dr. Saeedi had another cardiac arrest resulting in two surgeries that occurred in September 2006. One surgery was for a prosthesis for his shattered left arm bone and ripped rotator cuff; the second was to place a defibrillator for his heart. Tr. 230-31, 239. He was out of work for approximately one month, returned to work part-time, but could not drive for three months. Tr. 240. When he returned, he was assigned to Merrit 2AB and to Dutcher 1S. Tr. 244.
17. Ms. Forgit was aware of Dr. Saeedi's medical condition. Tr. 243-44.
18. With regard to an August 2007 issue regarding medication and as referenced in the document attached to the motion for sanctions as #4, Dr. Saeedi's

orders for medication were in compliance with the provisions of CVH's rules and regulations. Order and Sanctions, April 6, 2009 (Order), ¶ 15; C-18.

19. While employed by DMHAS at CVH, Dr. Saeedi has been an active member and former co-chair of CVH's continuing medical education committee, a member of its research committee and a member of the executive committee of the medical staff. Tr. 41. He has chaired the sleep disorder task force and was a member of the tobacco abstinence and the treatment of obesity committees. He also has served as a lecturer and a member of the committee to develop colorectal screening guidelines for CVH. Tr. 43-44.

20. Dr. Saeedi is a board certified internist. Tr. 37. He holds certifications in gastroenterology and hepatology. Tr. 38.

21. Dr. Saeedi is a member of the Connecticut State Medical Society, the Middlesex County Medical Association and the American College of Gastroenterology. Tr. 41.

22. Dr. Saeedi is very thorough with his patients and provides excellent patient care. Tr. 696, 849-850, 968; C-20; R-20 (knowledge of work); R-22.

Dr. Saeedi's 2005-06 performance appraisal

23. On or about September 18, 2006, Dr. Saeedi received his annual performance appraisal for the September 2005 to September 2006 period. C-20.

24. On a scale of 1 to 5, Dr. Saeedi received an overall performance rating of 5, "excellent". C-20.

25. The written comments on his appraisal noted that Dr. Saeedi "spends a lot of time with patients. Documentation is always thorough." He is "always willing to help med[ical] dir[ector] of ACS. Working hard on supervision of staff physician." Dr. Saeedi has "excellent interaction with on-call MDs" and "has 'run' with CME [continuing medical education] Committee to achieve higher levels of excellence." He has "outstanding documentation. Clinical care very good. Well-respected by everyone as an outstanding educator. Has done exceptional work with CME committee." Dr. Saeedi is "well informed on all phases of work", "turns out large volume" and his quality of work is "exceptionally accurate, practically no mistakes." His initiative has resulted "in frequent saving in time and money", he "gets along well with associates" and "thinks quickly, logically outstanding." C-20.

Dr. Saeedi's 'whistleblowing'

26. One of Dr. Saeedi's duties was to supervise Romeo Sonido, M.D. Tr. 45. Dr. Saeedi became concerned about the poor quality of medical care Dr. Sonido provided to patients. Tr. 45, 532-37; Order, ¶¶ 1 – 10 and 13; Order, exhibits A, B and C; Order, attachments 2 and 3.

27. Dr. Saeedi attempted to resolve the situation by speaking first with Dr. Sonido. Tr. 561. When Dr. Sonido became belligerent and did not change, Dr.

28. Dr. Saeedi believes that Dr. Freeman never took any retaliatory action against him for his complaints about Dr. Sonido. Tr. 562

29. In August 2007, Dr. Saeedi reported Dr. Sonido to Ms. Forgit and to Dr. Buss. Order, ¶ 1; Tr. 562-63.

30. At that time, Dr. Sonido had many problems with his medical management of his patients. One of his patients had an EKG documenting that he had a heart attack (myocardial infarction and ischemiaz). Dr. Sonido, however, did nothing for nine days while the patient was under his direct care. Dr. Saeedi responded and treated the patient accordingly. Order, ¶ 2; C-4.

31. In August 2007, Dr. Saeedi also conversed with Dr. Buss about this incident and other medical issues involving Dr. Sonido. Dr. Buss said that she took this as a serious issue and told Dr. Saeedi that she would be supervising Dr. Sonido. However, Dr. Saeedi did not observe any such supervision, and no records exist which document such supervision. Order, ¶ 3.

32. Prior to September 2007, Dr. Saeedi had reported technical patient care issues only to the ACS medical director, Dr. Freedman and then Dr. Buss. After Dr. Saeedi complained to Dr. Buss in August 2007, Ms. Forgit called

33. Ms. Forgit then changed the reporting procedure with respect to Dr. Sonido by directing Dr. Saeedi to report to her any concerns about Dr. Sonido's care of patients. Tr. 563; C-3.

34. On or about September 18, 2007, Dr. Saeedi met with Ms. Forgit to discuss the annual performance appraisal he had prepared regarding Dr. Sonido and to report his concerns about patient care. Ms. Forgit directed Dr. Saeedi to increase the performance rating he had given Dr. Sonido in the area of "judgment". Dr. Saeedi had based his rating and comments on problems in Dr. Sonido's care of patients. C-4; R-2.

35. Ms. Forgit wanted the rating increased so that she would not have to take corrective action against Dr. Sonido. R-2.

36. Dr. Saeedi was bothered by Ms. Forgit telling him to give Dr. Sonido a better evaluation and Dr. Saeedi believed that he was being exploited. Tr. 1027-29. After Ms. Forgit directed him to increase Dr. Sonido's rating, he came home less calm and peaceful and became more preoccupied and distant. Tr. 1029.

37. Dr. Saeedi's assessment of Dr. Sonido's performance is true and accurate, including both his e-mail message to Ms. Forgit dated September 18, 2007

(C-4 and attached as Exhibit C to his whistleblower retaliation complaint) and his proposed performance evaluation of Dr. Sonido (attachment Exhibit C to his whistleblower retaliation complaint). Order, ¶ 10.

38. On September 26, 2007, Dr. Saeedi gave additional information about Dr. Sonido to Dr. Buss and Ms. Forgit, as reflected in Exhibit A, dated September 26, 2007, attached to Dr. Saeedi's whistleblower retaliation complaint. Order, ¶ 4; C-3.

39. In November 2007, Dr. Saeedi reported and documented a high risk error which placed a patient at risk due to improper medical treatment at CVH. Order, ¶ 12; Order, attachment #2.

40. Also in November 2007, because Dr. Buss and Ms. Forgit took no action against Dr. Sonido, Dr. Saeedi notified Dr. Lev, of Dr. Sonido's mismanagement of patient care. Order, ¶ 7. There were serious, life-threatening issues that were not being addressed. Dr. Lev relayed Dr. Saeedi's concerns to Dr. Forman. Tr. 563-64.

41. After receiving Dr. Saeedi's concerns about Dr. Sonido, Dr. Lev instructed the director of nursing to have the nursing staff report to him anything that Dr. Saeedi did wrong. Tr. 848-49.

42. On November 30, 2007, Dr. Forman requested that Dr. Saeedi send him correspondence documenting his concerns about Dr. Sonido's treatment of patients. Dr. Saeedi responded on December 4, 2007. He told Dr. Forman

that Dr. Sonido's "practice issues have ranged from not addressing the patients' routine abnormal data and lack of providing basic standard of medical care beyond detoxification to not attending and managing potentially life-threatening conditions." Dr. Sonido's "disregard of patients with chest pain representing possible coronary artery disease exemplify one such condition, compromising the safety of the patient care." R-2.

43. In his December 4, 2007 correspondence, Dr. Saeedi also informed Dr. Forman that he had told Ms. Forgit and Dr. Buss of these problems in August or September 2007, and had provided Dr. Buss with relevant supporting documents. He had also made verbal and written recommendations to Ms. Forgit and Dr. Buss of "the urgent need for direct and enhanced supervision of" Dr. Sonido's practice. R-2.

44. Dr. Saeedi also informed Dr. Forman that since Dr. Sonido's "practice issues, a few of significant concern, have been recurring, the undersigned recently advised Dr. L. Lev, the Medical Director of the ASD, of the extent of the problem." R-2.

45. Dr. Saeedi sent copies of his December 4, 2007 correspondence to Mr. Perez, Dr. Carre, Ms. Forgit, Dr. Buss and Dr. Lev. R-2.

46. Dr. Saeedi's assessment of Dr. Sonido's mismanagement of patients as set forth in his December 4, 2007 correspondence (R-2 and Exhibit B of his whistleblower retaliation complaint) is true and accurate. Order, ¶ 9.

47. On December 18, 2007, Dr. Saeedi again emailed Dr. Lev regarding Dr. Sonido's mismanagement of patient care. The records referred to in this email, and in the December 4, 2007 email, were provided by Dr. Saeedi to Dr. Buss as described in Attachment #3. These records document mismanagement of patients by Dr. Sonido. Order, ¶ 13; Order, attachment #3.

48. Despite Dr. Forman's acknowledgement that Dr. Sonido's conduct warranted "immediate follow-up", Dr. Forman took no steps under Article XIII, subsection 1 section 2 (summary suspension) of the medical staff by-laws to address Dr. Sonido's conduct. Order, ¶ 8; R-2.

49. After Dr. Saeedi complained about Dr. Sonido to Ms. Forgit in August 2007, Ms. Forgit removed Dr. Saeedi from supervising Dr. Sonido. Tr. 48.

50. Dr. Dargan is a physician at CVH. Tr. 801. Ms. Forgit asked Dr. Dargan to supervise Dr. Sonido. Dr. Dargan declined. Tr. 811. Dr. Dargan had observed and saw several problems with Dr. Sonido's work. Tr. 812. Ms. Forgit told Dr. Dargan that she knew about the problems with Dr. Sonido's patient management. Tr. 813.

51. Ms. Sievert, a registered nurse at CVH. Tr. 838. She was familiar with Dr. Sonido's work as she did follow-up treatment on patients who had been treated by Dr. Sonido. From her observations, and those of other staff, Dr. Sonido did not follow up on labs showing abnormal results; he just signed-off

52. Ms. Sievert reported Dr. Sonido's treatment failures to her supervisor, Sue Distiso. Neither Ms. Distiso nor anyone else ever asked her to complete a work rule violation complaint against Dr. Sonido. Tr. 844.

53. The mismanagement of patients by Dr. Sonido described by Dr. Saeedi in Exhibit A to his whistleblower retaliation complaint demonstrated carelessness and negligence in the medical care of CVH patients and posed a grave risk of harm to those patients. Order, ¶ 5.

54. After the communications reflected in Exhibit A, no actions were taken regarding Dr. Sonido. Dr. Sonido continued to mismanage his patients in the ensuing months. Order, ¶ 6; Order, exhibit A.

55. Numerous CVH employees shared Dr. Saeedi's concerns about Dr. Sonido's medical treatment of patients. Tr. 843-44.

56. From Dr. Saeedi's hire in March 2002 until his transmittal of concerns about Dr. Sonido in August 2007, Dr. Saeedi had never been disciplined and had never been accused of any work rule violations. Tr. 49, 159-60.

August 2007

57. In August 2007, a nurse contacted Dr. Saeedi, who was in a different building, regarding a patient's complaints. Based on the information provided

by the nurse, Dr. Saeedi did not believe that it was an emergency situation. Tr. 105-06.

58. Medical records for the patient, attached as Exhibit E to Dr. Saeedi's complaint, establish that Dr. Saeedi's assessment that the patient could wait to be seen until after he had completed his other job duties was appropriate and accurate, given the medical condition of the other patients who needed his attention first. Tr. 112; Order, ¶ 14.

59. At Dr. Saeedi's request, the nurse called Ms. Forgit's secretary to find out who was covering for Dr. Saeedi. Tr. 720-21; C-22.

60. Less than an hour after his conversation with the nurse and after completing his rounds, Dr. Saeedi returned to the patient's unit. Dr. Saeedi was told that the patient had been seen by Dr. Sonido and had been transferred to the emergency room of a local hospital. Tr. 108. Dr. Saeedi contacted the emergency room and learned of the patient's condition. Tr. 108, 110-11. The patient had already returned to CVH by the time Dr. Saeedi returned to work the following day. Tr. 111.

61. Subsequently, the nurse was directed by his nursing supervisor, Sue Distiso, to file a work rule violation complaint against Dr. Saeedi regarding his interaction with the patient. Tr. 113, 710-11, 718-23.

62. Ms. Forgit had told Ms. Distiso to have the nurse file a complaint. Tr. 114, 710-11, 723, 733.

63. Dr. Saeedi was very disturbed and bothered that the nurse had been directed to file a complaint against him. Tr. 1025-27.

Dr. Saeedi's 2006-07 performance appraisal

64. On September 13, 2007, Dr. Saeedi met with Ms. Forgit and Dr. Buss to review and discuss his annual performance appraisal for September 2006 to September 2007. Tr. 82; C-16.

65. Ratings in several areas did not accurately reflect the quality of the work that Dr. Saeedi had performed. Dr. Saeedi had been unfairly downgraded from ratings he had received on his September 2005 - September 2006 appraisal. Tr. 82-87; C-16, C-20.

66. Ms. Forgit refused to change the ratings on the appraisal. Tr. 88.

67. Dr. Saeedi had been rated by Dr. Forman, Dr. Buss and Ms. Forgit, and his appraisal had been reviewed and approved by Ms. Vartelas. C-16.

68. Dr. Saeedi was disappointed that he had received a lower rating. Tr. 1028.

69. Shortly after meeting with Ms. Forgit and Dr. Buss, Dr. Saeedi met with Dr. Forman and Dr. Alexander Carre, president of the medical staff, to discuss the appraisal. They agreed that some changes should be made to the appraisal. Tr. 89.

70. During Dr. Saeedi's meeting with Drs. Forman and Carre, Dr. Forman raised the issue of unit reassignment. Tr. 89. According to Dr. Forman, Mr. Perez, CVH's chief executive officer, wanted to enable the physicians to work more

efficiently by minimizing the time that the physicians spent moving between buildings to see patients. Tr. 90.

71. In March 2008, a second 2006-07 annual performance appraisal was issued that upgraded two job element categories, abilities to learn new duties and initiative. Tr. 91; C-16.

72. In both the September 2007 and the March 2008 appraisals, the comment is written that Dr. Saeedi is a “good internist”. The March 2008 appraisal also notes that Dr. Saeedi is “committed to his patients.” C-16.

73. The two 2006-07 performance appraisals state that Dr. Saeedi needs to complete his patient discharge summaries more timely. C-16. Dr. Saeedi’s discharge summary completions were about the same from September 2005 to September 2006 as they were from September 2006 to September 2007. Tr. 568-69; C-20. While Dr. Saeedi was on medical leave in 2007, other physicians covered his patients but they did not complete the patients’ discharge summaries. Tr. 574. When Dr. Saeedi returned from medical leave, there was a backlog of discharge summaries that needed to be completed. Tr. 577-78.

74. In the September 2006-September 2007 period, Dr. Saeedi’s work load also increased because of a change in procedure that had the day-time physicians assume the preparation of patient admission forms, work that previously was done by the after-hour physicians. Tr. 575-76.

Commissioner's policy statement 48

75. Dr. Saeedi's sister is also employed at CVH as a registered nurse. She has worked in Merritt Hall since December 1997. Tr. 50, 214, 218, 311-12. She does not work in ambulatory care services. Tr. 311-12.

76. Ms. Forgit reassigned Dr. Saeedi to Merritt Hall in January 2004. Tr. 58-59.

77. At the time she reassigned Dr. Saeedi to Merritt Hall, Ms. Forgit was aware that Dr. Saeedi's sister was working at that unit. Ms. Forgit had spoken with the human resources department. She had been told that his working in the same unit as his sister would not be a problem. Tr. 59, 61.

78. Dr. Saeedi's sister has always worked the evening shift. There could have been some slight overlap in his and his sister's work schedules. Tr. 312, 896-97.

79. Dr. Saeedi has never supervised his sister and she has never supervised him. Tr. 50. Neither Dr. Saeedi nor his sister has ever been in a position where one of them could have influenced the working conditions of the other. Tr. 51.

80. In September 2007, Ms. Forgit notified Dr. Saeedi that he was being reassigned from Merritt Hall to Whiting Hall. Tr. 58.

81. According to Ms. Forgit, the reassignment was necessary because under DMHAS policy, specifically Commissioner's policy statement number 48 (policy statement 48), Dr. Saeedi and his sister could not work in the same

unit. Tr. 58. As of September 2007, Dr. Saeedi and his sister had both been working at Merritt Hall for three years. Tr. 58.

82. Ms. Forgit said Ms. Vartelas had told her to reassign Dr. Saeedi. Tr. 62.

83. Dr. Buss told Michael Piscopiello, a DMHAS employee and union delegate, that Dr. Forman made the decision to reassign Dr. Saeedi. Tr. 898-99.

84. Policy statement 48, first promulgated in July 1, 1996, provides, in relevant part, that applicants who are relatives of current employees will not be considered for any position "that would place the applicant under direct supervision of the relative or any position where the employed relative might influence the salary, benefits, working conditions, or personnel transactions such as disciplinary actions of the applicant. The Department of Mental Health and Addiction Services reserves the right to restrict the employment of relatives when such appointment would place the applicant within the same physical work location. . . . For the purposes of this policy, relative shall mean . . . husband or wife (applies not only to legally married spouse but also to any 'partner living with an employee.')" R-3.

85. Ms. Forgit was aware that other employees were violating policy statement 48 without disciplinary action being taken against them, specifically Dr. Sonido and Susan Distiso, a nursing supervisor at Merritt Hall; two social workers in the addictions unit; and a unit supervisor and her direct subordinate. Tr. 895-96.

86. Dr. Sonido and Ms. Distiso's cohabitation had been observed by CVH physicians who lived near them, was known to Ms. Forgit and was common knowledge throughout CVH. Tr. 773-74, 805, 895-96.

87. Even when his patient caseload had been changed, Dr. Saeedi's office had always been located in Havilland Hall. Tr. 292. If he had been assigned to Whiting Hall, Dr. Saeedi's office would have been in a small area in a trailer located near the building. No other physician had an office in a trailer. Tr. 365-66; C-1, C-2.

88. Whiting Hall is a high security building whose patients have committed serious crimes and found not guilty by reason of insanity. Tr. 62.

89. Entry into Whiting Hall requires passing through a metal detector. Dr. Saeedi had previously explained to Ms. Forgit that, as a result of a cardiac arrest, he had a defibrillator, and that passing through a metal detector could cause the defibrillator to give him a shock prematurely or to reprogram the defibrillator so that it would not operate properly when needed. Notwithstanding this information, Ms. Forgit did not change her mind about the reassignment. Tr. 63.

90. Because of the metal detector at Whiting Hall, Dr. Saeedi was very fearful about his health. Tr. 1030-31.

91. People with a pacemaker or defibrillator are excluded from going through a metal detector at airports and are cautioned against walking through metal detectors. Tr. 521, 1080-81.

92. Dr. Saeedi's reassignment to Whiting Hall would have been effective October 1, 2007. The reassignment was delayed because of a meeting scheduled for October 3, 2007 that included representatives from DMHAS' affirmative action office. Tr. 66-67.

93. Attending the meeting on October 3, 2007 were Ms. Forgit; Dr. Saeedi; Michael Piscopiello; Denise Tyburski, a DMHAS human resource representative; and Eric Smith, a DMHAS equal opportunity specialist 2. Tr. 67.

94. At the October 3, 2007 meeting, Dr. Saeedi expressed his opinion that the reassignment was in retaliation for his complaints about Dr. Sonido's care of patients. Tr. 67. He based this opinion on his belief that, despite policy statement 48, the respondents allowed Dr. Sonido and Ms. Distiso, to continue working together despite their cohabitation. Tr. 67-68.

95. At the October 3, 2007 meeting, Dr. Saeedi requested that the situation with Dr. Sonido and Ms. Distiso be investigated. Tr. 74. Ms. Tyburski agreed to an investigation by the human resource office. Tr. 74. Ms. Tyburski, however, did not investigate the relationship. Tr. 82; C-7.

96. Mr. Smith concluded that policy statement 48 did not apply to Dr. Saeedi and his sister and that DMHAS could not rely on policy statement 48 to reassign Dr. Saeedi. Tr. 73, 1192, 1200.

97. On October 12, 2007, Ms. Forgit informed Dr. Saeedi that his reassignment was on hold. Tr. 74; Complaint, attachment 3 ¶ 1.

98. Subsequent to the determination that policy statement 48 did not apply to Dr. Saeedi, Ms. Forgit, in mid-October 2007, again notified Dr. Saeedi that he would be reassigned. She did not give a reason for the reassignment. Tr. 74-75, 80-81; C-6.

99. During the period when the respondents were attempting to reassign Dr. Saeedi to Whiting Hall, Dr. Saeedi was expressing a lot of frustration at home. He and his wife discussed every night what was going on at work. Tr. 1030.

December 2007 reassignment

100. Dr. Buss and Dr. Forman notified medical staff of their patient clinical unit assignments effective December 3, 2007. Tr. 91; R-4

101. Seven of the physicians remained in their then-current assignments and three physicians were moved at their request to the unit each had requested. Dr. Saeedi had requested to remain in Merritt Hall, units 2AB but he was reassigned to Dutcher Hall. Only Dr. Saeedi and an advanced practical registered nurse were moved to assignments they did not request. Dr. Saeedi

had seniority over several of the physicians whose requests had been accommodated. Tr. 92.

102. Dr. Sonido was not reassigned. Tr. 92-93.

103. On or about December 4, 2007, Dr. Saeedi complained to Dr. Buss about the reassignment. C-10

104. Dr. Buss told Dr. Saeedi Dr. that Lev wanted him reassigned because Dr. Buss was receiving daily telephone calls from doctors and nursing staff about him. Dr. Saeedi spoke with Dr. Lev and the head nurse. Both of them did not agree with Dr. Buss and were not aware of any complaints about Dr. Saeedi. Tr. 102-03; C-10.

105. Dr. Buss then told Dr. Saeedi that he was being moved because of complaints by a male head nurse, whom she did not identify. She agreed to permit Dr. Saeedi to hear the voicemails of the complaints, upon approval by Ms. Forgit. Dr. Saeedi was never given access to the voicemails and never given any specifics about the complaints. Tr. 102-03; C-10.

106. When Dr. Saeedi had previously met with Dr. Forman and Dr. Carre, Dr. Forman had told Dr. Saeedi that Mr. Perez wanted reassignments to minimize the time physicians spent moving between buildings so that they could work more efficiently. Tr. 89-90.

107. Dr. Buss told people that Dr. Forman had ordered Dr. Saeedi's reassignment. Tr. 898.

108. Ms. Forgit told people that Sarah Curtis, an employee of the office of labor relations, directed them to reassign Dr. Saeedi. Tr. 899.

109. Dr. Saeedi was also assigned to cover the patient load for all the clinicians in ambulatory care services when they were absent. Dr. Saeedi had to travel from building to building, unit to unit. Tr. 93, 97-100; C-9. Travelling between buildings required Dr. Saeedi to go outside and clear his car of snow more than once a day. Because of his cardiac condition, he was concerned about suffering another heart attack from breathing in the cold air. Tr. 1031-32.

110. The constant travel between buildings to cover the patients of absent doctors significantly impacted Dr. Saeedi's workload and the amount of time he had available for each patient. Tr. 99-100.

111. In response to the reassignment, Dr. Saeedi's union filed a grievance claiming that the reassignment from Merritt Hall to Dutcher Hall was made in an arbitrary and biased manner that violated Article 2, section 1, and Article 18, section 2, of the collective bargaining agreement. C-23. The grievance was based on article 2 of the contract prohibiting discrimination. Tr. 901-02; C-23, C-24. Article 2 appeared to be the appropriate clause based on the arbitrary nature of the reassignment. Tr. 903-04.

112. Dr. Saeedi never told his union delegate that he believed he was being discriminated against based on his national origin or other protected class. Tr. 905, 935-36.

January to April 2008

113. Physicians in ambulatory care services attend official monthly meetings. Following those meetings, informal meetings, essentially “venting” sessions, occur among the doctors. Tr. 813.

114. During the January 2008 venting session, Dr. Saeedi and Dr. Buss discussed the recent reassignments. Shortly thereafter, physicians who had attended the venting session were solicited by Ms. Forgit’s office to file work rule violation complaints against Dr. Saeedi. Tr. 814-16.

115. There was nothing in the conversation between Dr. Saeedi and Dr. Buss that constituted a violation of the work rules. Tr. 814-15.

116. Dr. Saeedi came home and told his wife that he was being targeted, that his co-workers were being solicited to sign a work rule violation complaint against him for venting at an informal meeting. Tr. 813. He was very upset. Tr. 1032.

117. In March and April 2008, an issue arose at Dutcher Hall regarding a patient that Dr. Saeedi and Dr. Peterson had in common. The patient is the subject of the document attached as #1 to the motion and order for sanctions. Dr. Saeedi was concerned about the patient’s condition. The patient had been

prescribed a medication which had a serious, detrimental effect on the patient's liver. Dr. Saeedi discovered this and sought to correct the problem by changing the patient's medication. The respondents attempted to blame Dr. Saeedi for the situation. Tr. 1032-33; Order ¶ 11.

Disciplinary / grievance process generally

118. DMHAS has a policy of progressive discipline based on the seriousness of the employee's misconduct. Tr. 907-08.

119. Under the progressive discipline policy, employees are given the opportunity to correct their behavior, with discipline becoming progressively more severe with subsequent work rule violations. Tr. 1296. Progressive discipline is corrective rather than punitive. Tr. 1311.

120. A supervisor may have some discretion in determining appropriate discipline of a subordinate. Tr. 1308.

121. The disciplinary process generally begins with DMHAS notifying the employee of work rule violations allegedly committed by the employee. This notification is followed by an investigation by DMHAS into the alleged violations. Tr. 1251-52

122. Following the investigation, the DMHAS investigator may recommend disciplinary action. If the investigator recommends disciplinary action, a "Loudermill" conference is then held where the employee has the right to

123. The notice for the Loudermill conference shall provide notice of the charges and an explanation of the evidence against the employee. Tr. 1378.

124. The final decision regarding discipline is not made until after the Loudermill because there may be mitigating factors that might change the disciplinary action. Tr. 1377.

125. If disciplinary action is imposed, the union may file a grievance, a multi-step process. Tr. 1297-98. If the proposed discipline is a suspension or the termination of employment, the union will automatically file a grievance without consulting the employee. Tr. 406, 965.

126. The first-step grievance hearing is before a DMHAS employee. The union can appeal an adverse decision to a second-step grievance hearing. An employee of the state office of labor relations presides at this subsequent second-step grievance hearing. Tr. 1297. The union may decide to arbitrate an adverse outcome. Tr. 1297-98.

127. The grievance process determines whether there is “just cause” to impose discipline; the grievance process does not determine the employer’s motivation in seeking to impose discipline. Tr. 940.

Melluzzo incident

128. In 2008, Ms. Melluzzo was employed by DMHAS as a registered nurse at CVH and assigned to Dutcher Hall. Tr. 616-17.

129. Ms. Melluzzo did not report to Dr. Saeedi; Tr. 628; and he did not evaluate her job performance; Tr. 648.

130. When Dr. Saeedi and Ms. Melluzzo first began working together, they had a professional relationship. Tr. 635.

131. After working together for approximately two months, Ms. Melluzzo became uncomfortable with Dr. Saeedi's attention to her. Although there was nothing sexual or abusive in his attentiveness, she felt that he was paying too much attention to her and being too friendly, and that his attention was interfering with her ability to do her work Tr. 620-21, 627, 642,.

132. The interactions between Dr. Saeedi and Ms. Melluzzo took place in public areas in which other employees were present. Tr. 656.

133. Ms. Melluzzo never told Dr. Saeedi that he was making her feel uncomfortable or interfering with her ability to do her work. Tr. 628-29. He was unaware that she was trying to avoid him. Tr. 632.

134. Although the attention that Dr. Saeedi displayed toward Ms. Melluzzo was widely discussed in the unit; Tr. 620-21; and although employees discussed having someone speak to Dr. Saeedi; Tr. 1467; neither Ms. Melluzzo nor

anyone else ever told Dr. Saeedi that his interactions with Ms. Melluzzo made her uncomfortable; Tr. 150-51.

135. No one ever counseled Dr. Saeedi that his interaction with Ms. Melluzzo was inappropriate. Tr. 159-60.

136. On May 1, 2008, Ms. Melluzzo discussed the matter with her supervisor, Cynthia Hutchins, who encouraged Ms. Melluzzo to file a work rule violation complaint. Tr. 624-25. Ms. Melluzzo told Ms. Hutchins that she planned on speaking with Dr. Saeedi about his behavior when he returned from his vacation. Tr. 663.

137. On May 7, 2008, at approximately 1:50 PM, Ms. Hutchins submitted a written work rule violation complaint against Dr. Saeedi based on her conversation with Ms. Melluzzo. In her complaint, she reported on her conversation with Ms. Melluzzo. R-41.

138. Three times in her complaint, Ms. Hutchins states that her conversation with Ms. Melluzzo occurred on May 1, 2007. R-41.

139. On May 8, 2008, Ms. Forgit telephoned Dr. Saeedi and, in a loud, demeaning voice, demanded that he come to her office immediately. Tr. 386-87.

140. Dr. Saeedi and his union delegate, Ken Kroll, went to Ms. Forgit's office. Also at the meeting was Dr. Patrick Fox, division director of the Whiting Forensic Division. Tr. 126, 1137.

141. Ms. Forgit gave Dr. Saeedi correspondence dated May 8, 2008 and signed by her. In the correspondence, she accused him of violating four work rules identified only by number, notified him that he would be temporarily reassigned to another unit and informed him that he would be meeting with human resources. R-5.

142. Ms. Forgit refused to offer Dr. Saeedi any explanation as to what he had done that had violated the work rules. Tr. 126-28, 393.

143. The first time Dr. Saeedi or his union delegate saw the correspondence was at the meeting. Tr. 1137

144. The correspondence itself, while citing to the work rules, does not contain any description of Dr. Saeedi's conduct that would explain how he violated the rules. Tr. 1137-38; R-5. The correspondence does not provide a date when the alleged offenses occurred. R-5.

145. At least two of the four work rule violations have no factual basis in the written complaint by Ms. Hutchins. R-5, R-41. Ms. Hutchins statement contains no information that would suggest that Dr. Saeedi was engaging in personal errands between himself and clients and no information that would suggest that Dr. Saeedi was involved in a personal relationship with a client. R-5, R-41.

146. The meeting then recessed and resumed shortly thereafter. After the meeting resumed, Dr. Saeedi and Mr. Kroll were handed another

147. In his correspondence, Mr. Tokarz advised Dr. Saeedi that he was being placed on administrative leave and accused him of violating two work rules. Tr. 132; R-7.

148. No one, either at the meeting or in the correspondences, provided Dr. Saeedi with an explanation as to what conduct of his had violated the rules. Tr. 132-33, 393; R-7.

149. Mr. Tokarz's correspondence does not mention any of the work rule violations alleged by Ms. Forgit in her correspondence. R-5, R-7. Mr. Tokarz's correspondence does not provide a date when the alleged violation occurred and does not provide any description of how Dr. Saeedi's conduct allegedly violated the work rules. R-7.

150. It is not typical to have changes made in alleged work rule violations during the same meeting. Tr. 1140-41.

151. Dr. Saeedi was told that the nature of the charges would be explained to him at an investigative meeting on the following day. Tr. 133.

152. The May 8, 2008 meetings began around 9:30 AM or 10:00 AM and lasted between forty-five minutes and an hour and fifteen minutes, including the recess. Tr. 1137-38, 1140. Ms. Melluzzo did not prepare her complaint until 4:10 PM on May 8, 2008. R-30.

153. At the May 8, 2008 meeting, Dr. Saeedi reminded Ms. Forgit that he had a previously approved vacation, out of the country, scheduled for May 12 – May 30, 2008. Ms. Forgit told him to take his vacation and that he would still be on administrative leave when he returned. Tr. 133-34. She also told him not to enter the Dutcher 2 North unit. Tr. 180-81.

154. During both meetings, Dr. Saeedi was visibly distraught, unnerved and upset. Tr. 1141, 1145.

155. Ms. Forgit had Dr. Saeedi turn over his badge to her and gave him permission to return to his office and remove some of his personal belongings. Tr. 135.

156. While in his car to return to his office, Dr. Saeedi experienced chest pains, his heart raced and he used the nitroglycerin spray that he carries with him. Tr. 135.

157. Dr. Saeedi went to his office, collected his belongings, returned to Ms. Forgit's office to deliver his keys and then went home. Tr. 136.

158. When Dr. Saeedi arrived at home, his face was pale and blank. He was despondent and crushed. He was unable to explain to his wife what had happened because he did not know what Ms. Forgit had been talking about at the meetings. He was confused, dismayed, very distraught and visibly shaken by the accusations. Despite being good with words, he was unable to express himself. Tr. 1038-1044.

159. Dr. Saeedi felt like he had been treated as a criminal. He was very upset, distraught, outraged and humiliated at what he knew to be the false accusations of the work rule violations. Tr. 135, 137, 386-87, 393.

160. Dr. Saeedi was unable to eat supper or to sleep that night. Tr. 137, 1041. He just lay in bed. Tr. 1041.

161. On May 9, 2008, Dr. Saeedi returned to Ms. Forgit's office for the investigative meeting. Also present were Ms. Forgit, Ms. DeBarros, and the union delegate Michael Piscopiello. Tr. 137.

162. Ms. DeBarros told Dr. Saeedi that the alleged work rule violations in the May 8, 2008 letter signed by Ms. Forgit (R-5) were false and were not being pursued. Tr. 137-38, 388-89.

163. Ms. DeBarros told Dr. Saeedi that the alleged violations in the correspondence signed by Mr. Tokarz (R-7) were the violations that were being investigated, and she proceeded to ask him questions. Tr. 138.

164. Ms. DeBarros did not explain the violations. Dr. Saeedi was not given any information of the specific nature of the allegations. Tr. 138, 393-94.

165. From the nature of Ms. DeBarros' questions, Dr. Saeedi understood that he was being accused of conduct that had made Ms. Melluzzo uncomfortable. Tr. 139.

166. The interview statement attributed to Dr. Saeedi is in Ms. DeBarros' handwriting, is undated and is not signed by Dr. Saeedi. Tr. 1273; R-37.

167. The investigation significantly impacted Dr. Saeedi while he was on his family vacation celebrating his brother's seventieth birthday. He had sleepless nights. He was preoccupied and absent from the conversations around him. He had chest pains and a racing heart and used his nitroglycerin spray. Tr. 151-53, 1044-45.

168. Dr. Saeedi was not his usual jovial, talkative self. He was very distant, anxious and quiet. Tr. 1045. Despite having been looking forward to going to St. Peter's Basilica, he excused himself and sat in the rotunda, forlorn, in despair, by himself. Tr. 1045. He would pace. Tr. 1045.

169. On return from vacation, Dr. Saeedi thought that he had to be available in case he was called for work or his investigative interview, so he did not leave the house. He withdrew from friends and family. Although he had rarely used the living room, he went off by himself into that room. He would tell his wife to turn the radio off and he would not talk to anybody. Tr. 1046. He would not go for a walk around the neighborhood for fear he might miss a telephone call from work. He was visibly nervous and burdened by what was occurring. He was perplexed, distraught and anxiety-filled. Tr. 1047.

170. On June 11, 2008, Ms. Forgit telephoned Dr. Saeedi and told him to report to her office the following day. Tr. 153-54.

171. On June 12, 2008, Dr. Saeedi went to Ms. Forgit's office. She handed him correspondence notifying him that she was assigning him to work at Merritt Hall 3AB, units that were exclusively female. Tr. 154.

172. As Dr. Saeedi had been accused of, and was being investigated for, allegations of sexual harassment, he was concerned about being assigned to an all-female unit. After reminding Ms. Forgit that it was an all-female unit, she instead assigned him to the detoxification unit, a mixture of male and female patients who were under the influence of alcohol or drugs. Tr. 154-55.

173. Dr. Saeedi was in that unit for approximately a week before being reassigned to a unit in Battell Hall with general psychiatric patients and patients with traumatic brain injury. Tr. 156.

174. When she gave Dr. Saeedi his new assignment, Ms. Forgit did not prohibit him from entering any building. Tr. 180-81.

175. On July 9, 2008, Dr. Saeedi attended a meeting with Ms. DeBarros. Also attending were Mr. Piscopiello and Dr. Timmerman, union delegates. At that meeting, Ms. DeBarros handed him correspondence signed by her and dated July 3, 2008. Tr. 156-57.

176. In that correspondence, she advised Dr. Saeedi that as the result of her investigation and that she had scheduled a Loudermill conference for him on July 9, 2008. R-8.

177. Ms. DeBarros' correspondence also informed Dr. Saeedi that he was found to have violated two work rules and that a five-day suspension without pay was under consideration. R-8.

178. Prior to Ms. DeBarros giving Dr. Saeedi her correspondence on July 9, 2008, neither Dr. Saeedi nor his union delegates were aware that the July 9, 2008 meeting would be a Loudermill conference regarding a proposed suspension. Tr. 157, 907. The union delegates had not had an opportunity to prepare any remarks on Dr. Saeedi's behalf before going into the meeting. The union delegates and Dr. Saeedi did not have any details as to what facts underlie the alleged work rule violations. Tr. 907.

179. Dr. Saeedi and his union delegates asked for time to prepare a defense. Ms. DeBarros said no and proceeded with the conference. Tr. 414-15.

180. Dr. Saeedi and his union delegates asked Ms. DeBarros to explain what specific conduct of Dr. Saeedi had violated the work rules. She refused and told them that the Loudermill conference was Dr. Saeedi's opportunity to explain why he should not be suspended. Dr. Saeedi responded that he could not defend himself since he did not know what conduct had led to the charges. Tr. 158-59, 414-15.

181. Dr. Saeedi was not told what conduct of his had resulted in the finding that he had violated two work rules. Tr. 158; R-8.

182. On July 25, 2008, Mr. Perez notified Dr. Saeedi that he was being suspended without pay for five days as a result of the finding that he had violated two work rules. Tr. 160; R-9. Ms. DeBarros, in her Loudermill conference notice, and Mr. Perez, in his notice of suspension, cite to the statement filed on May 7, 2008. R-8, R-9. The statement filed on May 7, 2008 was that of Ms. Hutchins. R-41. Ms. Melluzzo filed her statement on May 8, 2008. R-30. Typically, the victim writes that statement that forms the basis of the work rule violation. Tr. 1010.

183. The suspension was effective for July 31, 2008; August 1, 2008; and August 5 – 7, 2008. Dr. Saeedi was required to work on, Monday, August 4, 2008. Tr. 160; R-9.

184. DMHAS' policy of progressive discipline was not applied in this case. Dr. Saeedi was not given any counseling, verbal warnings or written warnings prior to the imposition of the unpaid suspension. Tr. 908.

July 16, 2008 Peabody incident

185. On July 16, 2008, Dr. Saeedi was sitting at the nurses' station in Battell Hall reviewing patient records. He was facing a glass wall. To his right was a door with a window leading to a hallway. To the right of the door was a floor fan blowing air on him. There was no air conditioning that day in the nurses' station. Two patients began arguing in the hallway outside of the nurses' station. Ms. Peabody, a registered nurse assigned to that unit, emerged from

an office adjacent to the nurses' station and looked through the window of the door, standing between Dr. Saeedi and the fan. Tr. 123, 183-188, 442-59, 915, 1486, 1488, 1505, 1535; R-18.

186. Dr. Saeedi was feeling faint and experiencing heat stress, and asked Ms. Peabody to move. Because of the argument between the patients, Ms. Peabody did not hear Dr. Saeedi. When she did not move or respond to his request, he placed his hands on her side to nudge her away from the fan. Ms. Peabody was unaware of why Dr. Saeedi had touched her and became very upset. She did not understand why he had touched her as she was attempting to respond to the patients and deescalate their argument. Tr. 183-88, 442-59, 1486; R-18.

187. Ms. Peabody told Dr. Saeedi not to touch her. He apologized. She accepted the apology and felt that the matter had been resolved. They both resumed working. Tr. 183-88, 442-59, 1486-87, 1511, 1522; R-18.

188. On July 16, 2009, Mr. Piscopiello was unit director on Battell 2. Near the end of the shift, Ms. Peabody, who worked first shift, 7:00 AM – 3:30 PM, came to him and said that earlier in the day Dr. Saeedi had put his hands on her to move her out of the way. She said she yelled at him and told him to say excuse me. Mr. Piscopiello asked Ms. Peabody if she wanted him to write a complaint; she said no, she had dealt with it herself. Ms. Peabody did not consider the touching to be sexual in nature, just inappropriate. Tr. 910-11.

189. Ms. Peabody had a professional relationship with Dr. Saeedi following the incident. Tr. 187-89, 914, 1492. Ms. Peabody never again raised the incident with Dr. Saeedi, and she consulted with him once when she had a stomach ache. Tr. 189.

190. Two or three weeks after her July 16, 2008 conversation with Mr. Piscopiello, Ms. Peabody came back to Mr. Piscopiello. She said the she had talked to Dr. Buss, who was going to file a work rule violation against Dr. Saeedi. Tr. 912.

191. Dr Buss told Ms. Peabody to write up a report of the incident. When Ms. Peabody did not write the report, Ms. Forgit told Ms. Peabody to write the report. Tr. 1511-12. Ms. Peabody felt compelled to report the incident after being spoken to by Ms. Forgit. Tr. 1493.

192. Ms. Peabody submitted her report of the incident on July 29, 2008. R-36.

193. Following the submission of her report of the incident, Ms. Peabody told a group of co-workers that she would have no problem working with Dr. Saeedi. Tr. 868. Ms. Peabody said that she did not feel that Dr. Saeedi's reassignment was necessary, and that no one had consulted her. Tr. 869. Ms. Peabody mentioned a fan being in the nurses' station and Dr. Saeedi being warm. Tr. 874, 877.

July 22, 2008 incident

194. On July 22, 2008, Dr. Saeedi and the union delegate, Mr. Piscopiello, had been scheduled to attend a meeting at the office of labor relations in Hartford regarding a grievance. Dr. Saeedi contacted his supervisor, Dr. Buss, to inform her that he would be off-site and asked her to assign someone to cover for him in his absence. She offered to cover his patients for him. During the conversation, Dr. Buss asked Dr. Saeedi if he knew that Ms. Forgit's father had passed away. He did not. Tr. 173.

195. Dr. Saeedi notified the appropriate head nurses and the switchboard operator that he would be leaving the site and left for Hartford to attend the meeting. Tr. 173.

196. Mr. Piscopiello and Dr. Saeedi arrived at the office of labor relations. After waiting for a while, Mr. Piscopiello made inquiries as to when the meeting would begin. He was told that the meeting was canceled because Ms. Forgit's father had died. Tr. 174, 909.

197. No one had told Mr. Piscopiello or Dr. Saeedi that the meeting had been cancelled. Tr. 909.

198. Dr. Saeedi returned to CVH. He notified Dr. Buss and the switchboard that he had returned. Tr. 174.

199. At the re-scheduled meeting, Ms. Forgit did not attend on behalf of DMHAS. Instead, Dr. Forman attended. Tr. 557, 909-10.

July 25, 2008 mock medical emergency incident

200. On July 25, 2008, Dr. Saeedi was driving from his office to Battell Hall. As he was passing Dutcher Hall, his beeper went off, indicating that there was a medical emergency in the administrative section of Dutcher Hall. He parked his car and walked quickly to Dutcher Hall. Upon his arrival, he realized that it was a mock emergency, analogous to a fire drill, and that there was no actual emergency. Because he had walked quickly, he sat in the lobby for a few minutes to catch his breath. He then left for his assignment in Battell Hall. Tr. 179-80.

August 2008

201. On August 4, 2008, Dr. Saeedi received his ongoing professional practice evaluation from Dr. Buss. There are six areas of evaluation: medical/clinical knowledge; patient care/clinical competence/clinical skills; clinical judgment; professional attitude/professionalism; ability to work with others/interpersonal skills; and communication skills. Tr. 196; R-22

202. In all six areas, Dr. Saeedi received the highest rating. Tr. 196; R-22.

203. In the comment section, Dr. Buss noted: "Although Dr. Saeedi received suspension for conduct, my feeling is that his clinical performance was not involved." R-22.

204. On August 9, 2008, Dr. Saeedi was notified that he had been involuntarily removed as co-chair of the continuing medical education committee. He was informed that his term had expired and that he had been replaced. Dr. Saeedi had not requested that he not be reappointed. He had served as co-chair for four years; his predecessor as co-chair had served for ten years. Tr. 189-92; C-13.

Investigations into the Peabody, July 22, 2008 and July 25, 2008 incidents

205. On July 29, 2008, three work rule violation reports were completed against Dr. Saeedi. Mr. Forgit completed two of the reports and Jeanine Larouchelle, the division director of general psychiatry, completed one of the reports. Tr. 1317; R-34, R-35, R-36.

206. In one report, Ms. Forgit also alleged that Dr. Buss had reported that Dr. Saeedi could not be located for two hours on July 22, 2008. Ms Forgit reported that Dr. Buss said that she had told Dr. Saeedi that his grievance meeting had been cancelled for July 22, 2007, but Dr. Saeedi left the worksite anyway. R-35.

207. In the other report, Ms. Forgit alleged that Dr. Buss had reported that Dr. Saeedi improperly entered Dutcher Hall on July 25, 2008. According to Ms. Forgit, she had told Dr. Saeedi on June 12, 2008 that he was not to enter Dutcher Hall. R-34.

208. In her report, Ms. Larouchelle claimed that on some unknown date Dr. Saeedi had improper contact with a nurse, Ms. Peabody. R-36.

209. The three complaints were all prepared on July 29, 2008, even though the alleged work rule violations had occurred one to two weeks earlier. R-34, R-35, R-36.

210. These three violation reports were received by DMHAS' labor relations division on July 30, 2008. R-34, R-35, R-36.

211. On Monday, August 4, 2008, when he returned to work, Ms. Forgit called Dr. Saeedi to meet her at her office. Dr. Saeedi attended with his union delegate Mr. Piscopiello. Also at the meeting was Ms. Larouchelle. Tr. 162.

212. At the meeting, Ms. Larouchelle handed Dr. Saeedi correspondence signed by her and dated July 31, 2008, in which he is alleged to have violated two work rules. Tr. 162; R-10. Neither Ms. Larouchelle nor Ms. Forgit would explain what the conduct was that allegedly violated the work rules. Tr. 162-63.

213. Ms. Forgit then handed Dr. Saeedi two correspondences signed by her and dated August 4 2008, each correspondence alleged that Dr. Saeedi had violated a different work rule. Tr. 163; R-12, R-13. Again, no explanation was provided as to what conduct of his had allegedly violated these work rules. Tr. 163.

214. The correspondences provide no dates when Dr. Saeedi allegedly violated the work rules. They do not provide any description of Dr. Saeedi's conduct that allegedly constituted a violation of these work rules. R-10, R-12, R-13.

215. At that meeting, Ms. Forgit and Ms. Larouchelle gave Dr. Saeedi a memorandum from Alphonso Mims, a human resource associate in DMHAS' human resource division. Mr. Mims' memorandum informed Dr. Saeedi that Mr. Mims had scheduled an investigatory interview to be held on August 8, 2008 to discuss the three separate incidents that had occurred on July 22, 25 and 29, 2008. The memorandum provides no description of the incidents and does not identify the work rules allegedly violated. Tr. 163-64; R-10, R-14.

216. Mr. Mims' correspondence does not describe or identify what allegedly occurred on July 22, 25 or 29, 2008 and does not identify the work rules allegedly violated. R-14.

217. When Dr. Saeedi came home that night, he was stunned and beside himself. He was unable to explain to his wife what had occurred on July 22, 25 and 29, 2008. Tr. 1051-52.

218. As a result of a medical emergency involving a patient, the investigatory interview of Dr. Saeedi was postponed from August 8, 2008 to August 11, 2008. Tr. 164.

219. Mr. Mims conducted three investigations of Dr. Saeedi in response to the three complaints filed against him. Tr. 1244; R-38.

220. With respect to Ms. Forgit's complaint that Dr. Saeedi had improperly entered Dutcher Hall on July 25, 2008 in response to a medical emergency, Mr. Mims interviewed Dr. Saeedi and Dr. Buss. R-34, R-38.

221. Dr. Buss arrived at the interview with a typewritten statement. Tr. 1268; R-34.

222. After he received Dr. Buss' typed statement, Mr. Mims interviewed Dr. Buss and took handwritten notes of her answers to his questions. Tr. 1268.

223. During Mr. Mims' questioning of Dr. Saeedi, Dr. Saeedi initially did not have an exact idea of the actual accusations. Tr. 555-56. He then realized that Ms. Forgit was claiming that she had told him not to enter Dutcher Hall and was accusing him of violating her instructions. Tr. 180-81.

224. Ms. Forgit had never told Dr. Saeedi that he could not enter Dutcher Hall. In May, she had only told him that he could not go into the Dutcher 2 North unit. Tr. 180-81. When she met with him upon his return from administrative leave on June 12, 2008, she had only told him where his new assignment was, she did not tell him where not to go. Tr. 181.

225. With respect to Ms. Forgit's complaint that on July 22, 2008 Dr. Saeedi had left the worksite to attend a meeting at the office of labor relations, Mr. Mims interviewed Dr. Buss and Dr. Saeedi. Tr. 1335; R-35, R-38.

226. Unlike other witnesses, Dr. Buss brought pre-typed statements to her interview with Mr. Mims. Tr. 1267-68, 1335-36; R-34, R-35.

227. Mr. Mims asked Dr. Saeedi specific questions and handwrote his answers to be typed for Dr. Saeedi to review later. Tr. 1333.

228. Ms. Forgit was present during Dr. Saeedi's interview. Tr. 1335-36.

229. Mr. Piscopiello was mentioned in Dr. Buss' statement, but Mr. Mims did not interview Mr. Piscopiello. Tr. 1337.

230. With respect to Ms. Larouchelle's complaint alleging improper contact between Dr. Saeedi and Ms. Peabody, Mr. Mims interviewed Mr. Growczwicz, a clerk in the unit; Mr. Piscopiello; Ms. Peabody and Dr. Saeedi. Tr. 1285-86, 1348-50; R-36, R-38.

231. Mr. Growczwicz did not recall seeing any interaction between Ms. Peabody and Dr. Saeedi. Tr. 1395; R-38.

232. The statements attributed to Mr. Piscopiello in the typed account of his interview; R-32; do not accurately reflect what he said. The account was not signed by him, and was never seen by him prior to his being shown it at the public hearing. Tr. 920-22, 1568.

233. Ms. Forgit was present when Mr. Mims interviewed Ms. Peabody. Tr. 1371.

234. When Mr. Mims met with Ms. Peabody, he took handwritten notes of her responses to his questions, had the notes typed up, and sent Ms. Peabody his typed account for her review and correction. Tr. 1287.

235. The statement attributed to Ms. Peabody that Dr. Saeedi had touched her to "cop a feel"; R-36; was in response to questions from Mr. Mims and Ms. Forgit about why she thought Dr. Saeedi had nudged her. Tr. 1524-25. The "cop a feel" statement was not something that she had said to Mr. Piscopiello on July 16, 2008, the day of the incident, nor was it included in her July 27, 2008 handwritten statement. Tr. 1534-35; R-36.

236. Ms. Peabody returned, unsigned, two of Mr. Mims' typed versions of her responses because they were incorrect. Tr. 1531-32. The third version she received; R-36; was incomplete. She signed it anyway because she was told it was okay for her to sign it so long as what was typed was true. Tr. 1532.

237. Dr. Saeedi did not prepare a written statement on the Peabody incident. Mr. Mims wrote down Dr. Saeedi's responses to questions. Tr. 436.

238. Mr. Mims asked Dr. Saeedi specific questions based upon what other witnesses had told him. Mr. Mims did not review those questions and answers with Dr. Saeedi to confirm the accuracy of the witnesses' statements. Tr. 1367; 1384.

239. Mr. Mims interviewed Dr. Saeedi on August 11, 2008 and on August 26, 2008. Attending the August 11, 2008 interview were Dr. Saeedi, union delegates Ken Kroll and Dr. Timmerman, Ms. Forgit and Mr. Mims. Tr. 164. Attending the August 26, 2008 interview were Mr. Mims, Dr. Saeedi, Dr. Timmerman and Ms. Jerilyn Pagone, the director of nursing. Tr. 172, 1265.

240. At the August 26, 2008 interview, Mr. Mims presented Dr. Saeedi with two typewritten statements summarizing Dr. Saeedi's August 11, 2008 testimony regarding the incidents that had occurred on July 22, 2008 and July 25, 2008. The typewritten statements had not been prepared by Dr. Saeedi. Tr. 172-73. R-15, R-16.

241. Ms. Forgit was present when Dr. Saeedi and other witnesses were interviewed. Tr. 1335-36, 1529, 1562; R-38.

242. Dr. Saeedi was not present when the other witnesses were interviewed; R-38; and was not given the opportunity to question the witnesses or to review Mr. Mims' reports of their statements to determine their accuracy and truthfulness; Tr. 1366-67, 1384

243. Mr. Mims did not audiotape his interviews. Tr. 1333, 1568-69.

244. He handwrote the interviewee's responses to his questions, had his written notes typed up, and later presented his typed account to the interviewee for review and signature, if the interviewee chose to sign. Tr. 1333, 1568-69.

245. Mr. Mims' typed accounts are his notes of the interviewees' answers to questions, but the accounts do not include the questions the interviewees were asked. Tr. 1333, 1568-69.

246. During the August 11, 2008 questioning by Mr. Mims, Dr. Saeedi was very distraught and upset. Tr. 473. The interview was recessed when Dr. Saeedi

suffered a cardiac event. Tr. 1265. He began experiencing chest pain, neck tightness, shoulder pain and shortness of breath. He twice used his nitroglycerin spray, but the symptoms did not go away. Tr. 165, 1265. Dr. Timmerman announced a medical emergency and an ambulance was called to take Dr. Saeedi to a hospital. Tr. 166. By the time the ambulance arrived, Dr. Saeedi had used his nitroglycerin spray four times, the symptoms had not gone away, and he was concerned that he was having a heart attack or congestive heart failure. Tr. 166

247. When he arrived at the hospital, Dr. Saeedi telephoned his wife and told her that he was in the hospital with chest pain. When Mrs. Saeedi arrived at the hospital, Dr. Saeedi looked scared and appeared like a broken man. He thought he was having another heart attack. He said to her, "Sue, they're trying to kill me." He had terror in his face. Tr. 1053

248. At the hospital, Dr. Saeedi was given a blood thinner. He also underwent blood tests, an electrocardiogram and other tests. Tr. 167-68. He was released from the hospital the following day and told to take a few days off before returning to work; Tr. 167-68. He was to return to work the following Monday, August 18, 2008. Tr. 168.

249. While he was recuperating at home, Dr. Saeedi received a telephone call from Dr. Timmerman that Mr. Mims wanted to resume the investigatory interview when Dr. Saeedi returned to work on August 18, 2008. Tr. 168.

250. Dr. Saeedi spoke with Mr. Mims and explained that it would not be medically appropriate for him to be placed in the same stressful situation that had triggered the emergency so soon after being released from the hospital. Mr. Mims told Dr. Saeedi that if he could handle the stress of being a doctor, he should be able to handle the stress of an interview. Tr. 169.

251. Mr. Mims wanted a doctor's note in order to postpone the investigatory interview. Dr. Saeedi provided one issued by the cardiologist who saw him at the hospital. Dr. Saeedi gave the note to the human resource office. Tr. 170, 248-49, 251. Mr. Mims told Dr. Saeedi that the note was insufficient. Mr. Mims required Dr. Saeedi to obtain a second note from his doctor that he could not attend the investigatory interview on August 18, 2008. Mr. Mims said that Dr. Saeedi would have to go to the human resource office, obtain a family and medical leave form, and have the cardiologist complete that form. Tr. 170-71, 249.

252. Dr. Saeedi obtained the second note and the interview was postponed for a week, until August 26, 2008. Tr. 171-72.

253. Dr. Saeedi was upset at the disrespect and treatment being shown to him. Mr. Mims and the other attendees at the August 11 meeting had seen him leave by ambulance. Dr. Saeedi was humiliated at having to get a second note from his cardiologist. Tr. 1055-56.

254. Following his investigation, Mr. Mims prepared a report dated September 9, 2008. R-38.

255. In his report, Mr. Mims recommended no disciplinary action against Dr. Saeedi regarding two of the work rule violation complaints filed on July 29, 2008. Mr. Mims did not find sufficient evidence to establish just cause for discipline relative to the July 12, 2008 incident regarding Dr. Saeedi's entry into Dutcher Hall in response to a medical emergency. He also did not find sufficient evidence to establish just cause relative to the July 25, 2008 incident regarding Dr. Saeedi's attendance at the cancelled meeting at the office of labor relations. Tr. 1338; R-17.

256. As to the third complaint, involving interaction between Dr. Saeedi and Ms. Peabody, Mr. Mims recommended a ten-day suspension. R-38.

257. Mr. Mims recommended a ten-day suspension in the Peabody matter because Dr. Saeedi had already received a five-day suspension for the Melluzzo incident. Tr. 1294.

258. Mr. Mims reviewed his report and recommendations with John Brown, his immediate supervisor, and with Tom Tokarz, DMHAS' human resource director. Tr. 1291-92.

259. No one outside of Mr. Mims' office should have seen the report and recommendation prior to its finalization. Tr. 1292, 1389.

260. On or after September 9, 2008, after review by Messrs. Brown and Tokarz, Mr. Mims transmitted the report to Ms. Vartelas. Tr. 1374

261. By correspondence dated September 11, 2008, Mr. Mims notified Dr. Saeedi that a Loudermill conference would be held on September 16, 2008 as a result of allegations filed against him on July 29, 2008. The penalty under consideration was a ten-day suspension without pay. C-26.

262. A ten-day suspension is harsh for the nudge that Dr. Saeedi had given Ms Peabody. Tr. 961-62.

263. A ten-day suspension is normally given for a physical assault-type situation. Tr. 961-62.

264. Because in state service suspensions are served before they are grieved and the five-day suspension was still in the grievance process, the five-day suspension should not have been considered in evaluating Dr. Saeedi's disciplinary record or in imposing the ten-day suspension. Tr. 1011.

265. The Loudermill notice is dated September 11, 2008 for a hearing on September 16, 2006. C-26. Dr. Saeedi and union delegate William Hill first received the notice when they arrived at the meeting on September 16, 2008. Tr. 189-90, 956-57.

266. Attending the Loudermill conference were Dr. Saeedi; Mr. Hill; Ms. Forgit; and Mr. Mims, who conducted the conference. Tr. 958-61, 1381-82.

267. Dr. Saeedi was very upset about the Loudermill process. Tr. 1049.

268. After the Loudermill, Mr. Mims presented his notes to his supervisor, John Brown, or to Tom Tokarz, and in consultation with them decided to move forward with corrective action. Mr. Mims then drafted the suspension letter to Dr. Saeedi. Tr. 1386.

269. By correspondence dated September 17, 2008, Mr. Perez notified Dr. Saeedi that he was suspended without pay for ten days, to be served on various days between September 25, 2008 and October 9, 2008, for an incident dated July 29, 2008. Ms. Vartelas signed the correspondence on behalf of Mr. Perez. Dr. Saeedi received the notice on September 18, 2008. R-19.

270. According to Mr. Perez, Dr. Saeedi's conduct toward Ms. Peabody violated work rule number 19. R-19. Work rule number 19 states: "Physical violence, verbal abuse, inappropriate or indecent conduct and behavior *that endangers the safety and welfare of persons* or property is prohibited." (Emphasis added.) R-11, R-19.

271. While Dr. Saeedi's nudge offended Ms. Peabody, his conduct and behavior did not endanger her safety or welfare and she never felt that his conduct endangered her safety or welfare. This is evident from the testimony of Ms. Peabody herself, from Mr. Piscopiello's recounting of his conversation with her on the date of the incident, and from Ms. Peabody's conversation

with her co-workers subsequent to the incident. Tr. 868-69, 910-12, 1486-87, 1492, 1507-08.

272. Dr. Saeedi was notified of his suspension on September 18, 2008. Tr. 189-190; R-19.

273. Dr. Saeedi served his ten-day unpaid suspension on September 25, 29, 30 and October 1-3, 6-9, 2008. Tr. 192; R-19.

274. Dr. Saeedi's union grieved Mr. Perez's ten-day suspension of Dr. Saeedi. Tr. 1297-98.

275. Dr. Saeedi's grievances do not allege that the adverse actions were in retaliation for whistleblowing. C-23, R-23, R-24. There is no provision in the applicable collective bargaining agreement that allows a grievance to be brought alleging retaliation for whistleblowing. Tr. 905-06; C-27, C-29.

276. At the step-one grievance hearing, Mr. Mims presented the case in support of the disciplinary action to John Brown, his supervisor and an employee of DMHAS. Tr. 1297-98, 1570.

277. The witnesses interviewed by Mr. Mims did not offer testimony at the step-one grievance. Mr. Mims' typed accounts of their responses to his questions were used as exhibits. Tr. 1297, 1570-71.

278. The suspension was upheld by Mr. Brown at the step-one grievance hearing. Tr. 1297-98.

279. On February 6, 2009, the second-step grievance hearings were held for both the five-day and the ten-day suspensions. Tr. 1281; R-28, R-29. An employee from the office of labor relations conducted the hearing. Tr. 1297-98, 1571.

280. Mr. Brown and Ms. DeBarros presented the case in support of the five-day suspension. Tr. 1282.

281. Mr. Brown presented the case in support of the ten-day suspension. Tr. 1297-98, 1571. The witnesses Mr. Mims interviewed did not present testimony at the hearing. Mr. Mims' typed accounts of their responses to his questions were used as exhibits. Tr. 1297, 1571-72.

282. Concluding that DMHAS had just cause to issue the suspensions, on June 1, 2009, the hearing officer upheld both suspensions. Tr. 1283, 1297-98; R-28, R-29.

Dr. Saeedi's September 2008 performance appraisal

283. On September 19, 2008, Dr. Saeedi met with Ms. Forgit and Dr. Buss to discuss his September 2007-September 2008 annual performance appraisal. Ms. Forgit, Dr. Forman and Ms. Vartelas had rated Dr. Saeedi's performance and/or approved of the ratings. Also present was his union delegate, William Hill. Tr. 193; 965; R-20.

284. Dr. Saeedi was rated in eight job elements, or competencies, on a scale from 1, unsatisfactory, to 5, excellent. In the category of knowledge of work,

he received a rating of 5. In the category of quantity of work, he received a 3. In the category of quality of work, he received a 5. In the category of ability to learn new duties, he received a 4. In the category of initiative, he received a 4. In the category of cooperation, he received a 3. In the category of judgment, he received a 1. In the category of other (attendance), he received a 4. R-20.

285. The overall performance rating is determined by averaging the ratings in these eight elements. Tr. 973. The average of the ratings in Dr. Saeedi's evaluation is a 3.65, which is in the "good" range. Dr. Saeedi, though, received an overall performance rating of "1", unsatisfactory. Tr. 195; R-20.

286. Most of the discussion at the September 19, 2008 meeting focused on section VII, Judgment, in which Dr. Saeedi was given the lowest rating, "1". Tr. 193-94.

287. The rating for judgment is to be based upon the following criteria: (1) whether the employee has the ability to effectively evaluate patient progress medical notes and issues during ward rounds, and document patient progress; (2) whether the employee has the ability to evaluate the need for various test order i.e. laboratory, EEG, EKG, etc, as indicated and make appropriate use of test findings; and (3) whether the employee orders inside or outside consultation for assigned patients, evaluates the need for other

patients assigned to staff physicians, and makes necessary referrals to local general hospitals as needed. R-20.

288. Ms. Forgit and Dr. Buss said the low rating in judgment was because of the violations of work place rules and the five- and ten-day suspensions. The three criteria for judgment, however, relate to patient care; the violations and suspensions, though, were unrelated to patient care. Tr. 193-94; R-20.

289. Dr. Forman, Ms. Vartelas and some one from DMHAS' human resources department had told Ms. Forgit to do the ratings and performance appraisal that way. Tr. 193-94.

290. Dr. Buss told Mr. Hill that she did not agree with the over-all rating of unsatisfactory. Tr. 967-68.

291. Dr. Buss signed off on the performance appraisal because she was told to sign it. Tr. 967-68.

292. Dr. Buss thought Dr. Saeedi did his job as a doctor very well. Tr. 968.

293. Dr. Saeedi's supervisors wrote the reference to the ten-day suspension on the performance appraisal when they signed it on September 1 and September 2, 2008. Tr. 976-77; R-20. Dr. Saeedi, Ms. Forgit and Mr. Hill discussed the suspension at the September 19, 2008 performance appraisal meeting. Tr. 976.

294. Dr. Saeedi loves practicing medicine and helping patients. He always tries to give his patients the best, highest quality of care. Tr. 196-97.

295. Dr. Saeedi felt awful and very hurt about the low judgment rating and the overall unsatisfactory rating. He felt he had received a “slap on the face” from his supervisors who were giving him low ratings not because of patient care but because he had reported a doctor who was doing negligent work. Tr. 197-98.

296. Two successive unsatisfactory performance ratings, if filed within two years of each other, constitute “just cause” for which an employee may be suspended, demoted or dismissed. Tr. 975; R-11(Section 5-240-1a (a) of the State Personnel Regulations). Dr. Saeedi was disturbed and fearful about receiving the overall unsatisfactory rating. He had an ongoing fear that he would lose his job. Tr. 1056.

2009

297. In February 2009, Dr. Saeedi went to a hearing at the office of labor relations. Prior to the commencement of the hearing, he was served with another group of alleged work rule violations. Tr. 528-531.

298. Dr. Saeedi was told that the hearing on these new allegations had been scheduled for a date when Ms. Forgit had known that Dr. Saeedi’s union delegate would be out of town and unavailable. Dr. Saeedi was very upset, starting to have anxiety and emotional distress, and began experiencing chest pain. Tr. 523-531.

Lost wages, attorney fees and costs, additional emotional distress

299. As a result of the five- and ten-days unpaid suspensions, Dr. Saeedi lost $12,000 in salary and wages. Tr. 198.

300. As a result of this action, Dr. Saeedi incurred $123,355 in attorney fees. Tr. 1608-33.

301. As a result of this action, Dr. Saeedi incurred costs of suit of $410.25. Tr. 1608-33.

302. Dr. Gallo is a cardiologist. Tr. 1066. He is board certified in internal medicine, cardiology and nuclear cardiology. He is a fellow in the American College of Cardiology and he sits on the Connecticut Chapter Council for the American College of Cardiology. Tr. 1067.

303. Dr. Saeedi is a patient of Dr. Gallo. Tr. 1067-68. Dr. Gallo took over Dr. Saeedi's care when another physician in his office left clinical practice. Tr. 1068.

304. There is a reasonable medical probability that the cardiac event that led to Dr. Saeedi's admission to the hospital on August 11, 2008 was caused by an emotional stimuli due to a stressful meeting at work that led to an episode of chest discomfort. Tr. 1071-72.

305. A considerable amount of medical literature links episodes of acute emotional distress and a cardiac event like the one experienced by Dr. Saeedi. Tr. 1072.

306. Events occurring months prior to the cardiac event would not have triggered the event. Tr. 1091.

307. It was medically reasonable for Dr. Saeedi to have been concerned about heart damage and to have wanted to go to the emergency room when he experienced the cardiac event on August 11, 2008. Tr. 1072-73.

308. Dr. Saeedi's medical records contain numerous comments that he was in a stressful meeting at the workplace. The stress caused the chest pain syndrome. Tr. 1074.

309. Dr. Saeedi began working for DMHAS in 2002 and initially loved working at CVH. He and his wife had a routine when he came home in the evening: they would sit enjoy each other's company, discuss went what on during the day, and have dinner. Then, Mrs. Saeedi would do her household chores and Dr. Saeedi would study. His passions were reading his medical journals, studying, and preparing for different coursework and presentations that he was doing. Tr. 1021-22. Prior to the summer of 2007, Dr. Saeedi and his wife had led a very joyful and busy life. They did not miss any family events. Tr. 1058.

310. From the summer of 2007 through September 2008, Dr. Saeedi was physically and emotionally exhausted. He paced the house with high anxiety, talking to himself, acting very different from the happy-go-lucky person he had been. Tr. 1058. The joy in his family life had diminished, nothing was

pleasurable anymore. Tr. 1059. He was very preoccupied, fatigued, and no longer reviewing his medical journals for pleasure as he had previously. He had become solemn. He showed no interest in his wife's activities. He would discuss the problems arising at work. Pleasant discussion at dinnertime ceased. Tr. 1034.

311. From the summer of 2007 through September 2008, Dr. Saeedi's social schedule also changed. He and his wife did not celebrate Iranian New Year. They did not attend Iranian New Year celebrations at the University of Connecticut. They did not get together with family or friends despite social obligations. They did not attend parties. They did not prepare special meals. Tr. 1034-35. Dr. Saeedi was emotionally drained, exhausted and frustrated. Tr. 1035.

Analysis

I

Dr. Saeedi alleges that the respondents violated § 4-61dd. Section 4-61dd (b) (1) provides in relevant part: "No state officer or employee . . . shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to . . . (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed . . . ." The statute thus makes it illegal for an employer covered by the statute to retaliate against an employee when

the employee, in good faith, disclosed information (whistleblew) pursuant to § 4-61dd (a) or § 4-61dd (b) (1). Whistleblower retaliation statutes are "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.*, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV 99-0090098 (September 26, 2000) (28 Conn. L. Rptr. 334, 335) (2000 WL 1475850, 3) (construing the anti-whistleblower retaliation provisions of General Statutes § 31-51m).

The legislature wanted "to create a more favorable environment whereby state workers and employees of large state contractors feel free to bring forth important information of waste, fraud, abuse and possible cases of corruption, in order to protect the public tax dollar and the proper running of our government." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857. Legislators intended "to protect people who have found some wrong doing in a state agency, a quasi-public agency or a large state contracting entity. And then they get in trouble for it, they get fired for it, they get punished for it. That's something that we have to stop." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2877-78.

"Most often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat . . . ." (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 708 (2006).

II

Course of conduct/statute of limitations

A

In his complaint, filed on October 16, 2008, Dr. Saeedi alleges that the respondents threatened or took retaliatory personnel acts against him between August 2007 and September 19, 2008. The respondents assert that the statute of limitations bars acts occurring more than thirty days preceding the filing of the complaint, which would be acts occurring prior to September 16, 2008. The statute of limitations does not, however, bar allegations prior to September 16, 2008 because of the applicability in this case of the continuing course of conduct doctrine, which tolls the statute. "The continuing course of conduct doctrine reflects the policy that, during an ongoing relationship, lawsuits are premature because specific tortuous acts or omissions may be difficult to identify and may yet be remedied." (Internal quotation marks omitted.) *Bednarz v. Eye Physicians of Central Connecticut, P.C.*, 287 Conn. 158, 170 (2008).

"In its modern formation, we have held that in order [t]o support a finding of continuing course of conduct that may toll the statute of limitations there must be evidence of the breach of a duty that remained in existence after commission of the original wrong related thereto. That duty must not have terminated prior to commencement of the period allowed for bringing an action for such wrong. . . . Where we have upheld a finding that a duty continued to exist after the cessation of the act or omission relied upon, there has been evidence of either a special relationship between

the parties giving rise to such a continuing duty or some later wrongful conduct of a defendant related to the prior act." (Internal quotation marks omitted.) Id. To "establish a continuous course of conduct, the defendant must have: (1) committed an initial wrong upon the plaintiff; (2) owed a continuing duty to the plaintiff that was related to the alleged original wrong; and (3) continually breached that duty." (Internal quotation marks omitted.) Id., 170 n. 10.

The "application of the continuing course of conduct doctrine [is] conspicuously fact-bound." (Internal quotation marks omitted.) *Sherwood v. Danbury Hospital*, 252 Conn. 193, 210 (2000). Under "the continuing course of conduct doctrine, the plaintiff's cause of action is not limited to the damages that flow from the continuing conduct. Rather, the statute [of limitations] does not begin to run until [the] course of conduct is completed. . . . Therefore, if the jury determines upon remand that the continuing course of conduct doctrine applies and that the defendant is liable, the plaintiff may collect damages that flow from the defendant's initial wrongful conduct as well as those that flow from the defendant's continuing conduct that relates to the initial wrong." Id., 206 n. 12.

The use of the continuing course of conduct doctrine in the employment context is a reasonable application of the doctrine and its policy. Employment relationships are on-going, and determining the underlying motivation of a personnel action may be difficult to ascertain. A disputed personnel action may also be susceptible to a mutually acceptable resolution through the employer's internal processes. In this case, for

example, Dr. Saeedi first attempted to resolve the retaliation issue internally by asking, futilely, for Ms. Tyburski, a DMHAS human resource department representative, to investigate the Sonido/Distiso violation of policy statement 48. FF 95. He also, again unsuccessfully, raised the retaliation issue with Mr. Smith, a DMHAS affirmative action officer. Tr. 1213-13; C-28.

Section 4-61dd protects state employees who report "any matter involving 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 any state department or agency . . . ." § 4-61dd (a). The application of the continuing course of conduct doctrine is, therefore, also consistent with the remedial purposes of the whistleblower retaliation statute and the stated legislative policy to protect "the proper running of our government;" 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857; and to stop retaliatory actions; 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2877-78.

B

In this case, Dr. Saeedi has alleged and, as will be discussed, infra, has established by a preponderance of the evidence that the respondents committed an initial wrong against him by violating § 4-61dd when they retaliated against him for his whistleblowing. The respondents have a continuing legal duty not to retaliate against him for whistleblowing, which they breached throughout the course of a year by repeatedly taking or threatening adverse personnel action against him for his whistleblowing.

The continuing course of retaliatory conduct commenced in August 2007 when Ms. Disisto and Ms. Forgit, without cause, directed a nurse to file a complaint against Dr. Saeedi. FF 58, 61, 62. Then, Ms. Forgit gave him low ratings on his September 2006-September 2007 performance appraisal that inaccurately reflected the quality of his work. FF 64, 65, 69. Thereafter, the respondents improperly attempted to use policy statement 48 to reassign Dr. Saeedi. FF 77-84, 96.

The course of conduct continued with the December 2007 medical staff reassignments. All but two medical personnel either were left in the building where they had been or were reassigned to the building of their choice. Dr. Saeedi, the only physician, and an advanced practical registered nurse did not remain in their buildings and were not reassigned to a building of their choice. FF 101. In early 2008, Ms. Forgit solicited Dr. Saeedi's co-workers to file complaints against him for comments he made at an informal meeting. FF 114, 115. When a patient began experiencing complications to medication, Dr. Saeedi was unfairly blamed when he corrected the prescription. FF 117.

With respect to the Melluzzo incident, on May 8, 2008, Dr. Saeedi was served with four work rule violations which, on May 9, 2008, DMHAS' human resources representative acknowledged were false. FF 141, 162. Dr. Saeedi was given no notice or time to prepare for his July 2008 Loudermill conference which, despite no prior disciplinary action against him, resulted in a five-day suspension rather than counseling or a warning. FF 175-184.

With respect to the Peabody incident, in July 2008, Ms. Peabody's supervisors sought out and directed her to file a complaint against Dr. Saeedi over a misunderstanding that she had already resolved to her satisfaction. FF 185-191. Although the Melluzzo suspension was still in the grievance process, the five-day suspension was improperly used as a basis to impose a ten-day suspension. FF 264. Also in July 2008, Ms. Forgit filed false complaints against Dr. Saeedi regarding his absence from the worksite to attend a meeting at the office of labor relations and his entry into Dutcher Hall to respond to a medical emergency alert. FF 197, 206, 207, 224. In August 2008, Dr. Saeedi was involuntarily removed as chair of the continuing medical education committee. FF 204

Finally, in September 2008, Dr. Saeedi received an overall rating of unsatisfactory on his September 2007-September 2008 personnel appraisal improperly based on a five-day suspension still in the grievance process; FF 264; and a ten-day suspension that had not been announced as of the date his supervisors had signed and referenced it in his appraisal; FF 260, 261, 293. Also, based on the ratings in the job elements, the overall performance rating had been improperly calculated. FF 285.

Dr. Saeedi filed his complaint on October 16, 2008, within thirty days of the occurrence of his notice of his ten-day suspension, served on nonconsecutive days between September 25-October 9, 2008, and his annual performance review with its overall performance rating of unsatisfactory.

Therefore, based on the continuing course of conduct doctrine and the filing of his complaint within thirty days of an adverse personnel action occurring or threatened, Dr. Saeedi may pursue all the retaliatory personnel actions that he alleged in his complaint.

C

In summary, the doctrine of continuing course of conduct tolls the thirty-day statute of limitations. The statute of limitations does not begin to run until the course of conduct is completed. Nevertheless, at least one retaliatory personnel action must have been threatened or occurred within thirty days preceding the filing of the complaint with the chief human rights referee. As this doctrine provides, a complainant may collect damages that flow from a respondent's initial retaliatory conduct as well as those that flow from a respondent's continuing retaliatory conduct.

III

Grievances

In addition to asserting that some of the alleged acts are barred by the statute of limitations, the respondents also argue that this tribunal is without jurisdiction to adjudicate the December 2007 reassignment and the two unpaid suspensions because they were the subject of grievances filed by Dr. Saeedi's union pursuant to an applicable collective bargaining agreement.

Previous decisions of this tribunal have dismissed whistleblower retaliation complaints when the adverse personnel action had also been the subject of a

grievance. The statutory language of § 4-61dd when viewed in its entirely, its legislative history and the grievance process (at least as applied to Dr. Saeedi) reveal, however, that § 4-61dd does not require a state employee to abandon the grievance of non-whistleblower claims, even if those claims evolve from the same personnel action giving rise to his whistleblower retaliation claim.

For example, suppose an employee claimed that DMHAS' motivation in failing to promote him was in retaliation for his whistleblowing, and he also claimed that the posting and selection procedure used by DMHAS violated provisions of the collective bargaining agreement. Since human rights referees do not adjudicate collective bargaining agreements and grievances do not address whistleblower retaliation claims, under this tribunal's previous interpretation of § 4-61dd (b) the employee had one of two options. The employee could challenge the failure to promote either (1) by filing a whistleblower retaliation complaint with the chief human rights referee and abandoning his contractual claims and rights under the collective bargaining agreement or (2) by pursuing a grievance and abandoning his statutory whistleblower retaliation protection. It would be an absurd result to interpret a remedial statute such as § 4-61dd in a manner that does not provide for more protection for employees than they had prior to the statute's enactment.

Instead, the statute should and reasonably can be construed as allowing an employee to pursue both grievances alleging non-whistleblower contractual violations

and also whistleblower retaliation complaints alleging retaliatory animus arising from the same personnel action.

A

Statutory language of § 4-61dd

Previous decisions of this tribunal construed § 4-61dd (b) (4) to require an employee of a state or quasi-public agency or of a large state contractor to elect a single venue wherein to challenge the personnel action. This interpretation, however, ignored the overall context of § 4-61dd. This interpretation also ignored the specific language in § 4-61dd (b) (4) referencing subdivisions § 4-61dd (b) (2) and (b) (3). These subdivisions refer only to complaints alleging whistleblower retaliation. A more accurate interpretation of the statute is that an employee is required to make an election not as to where to challenge the specific incident but as to where to challenge the underlying retaliatory animus that motivated the employer to threaten or undertake the specific incident.

Subsection 4-61dd (a) and subdivision 4-61dd (b) (1) encourage employees of state or quasi-public agencies and of large state contractors to report wrongful acts and assure them of protection against retaliation for their whistleblowing. If after whistleblowing they experience an adverse personnel action, they may notify the attorney general, who shall conduct an investigation of whether the personnel action was retaliatory. § 4-61dd (b) (2). They may also file a complaint with the chief human rights referee for a human rights referee to determine whether the personnel action was

retaliatory. § 4-61dd (b) (3). Thus, the context of the statute is limited to whistleblowing and to whom employees can raise the retaliatory motivation underlying the personnel action. The statute does not address the venue for contractual, tort or other claims that might also arise from that personnel action.

Within this context of whistleblowing and reporting retaliation, § 4-61dd (b) (4) then states: "As an alternative to the provisions of subdivisions (2) [reporting the retaliation to the attorney general] and (3) [reporting the retaliation to the chief human rights referee] of this subsection: (A) A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than thirty days after learning of the specific incident *giving rise to such claim* with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract . . . ." (Emphasis added.) Since subdivisions (2) and (3) only discuss venues where a whistleblower retaliation claim can be brought, subdivision (4) makes sense if it, also, is read only as proposing additional alternative venues only as to where a whistleblower retaliation claim can be brought. The phrase "giving rise to such claim" further validates an interpretation that it is the retaliation claim that is at issue in § 4-61, not simply the specific incident.

The superior court case of *Benevides v Roundhouse, LLC* establishes that an employee can pursue a whistleblower retaliation claim in one venue while also pursuing in other venues other claims arising from the same personnel action.

In *Benevides*, the plaintiff commenced a whistleblower retaliation lawsuit pursuant to General Statues § 31-51m against the defendant, her former employer. In her lawsuit, she alleged that her former employer, Roundhouse, LLC (Roundhouse), had terminated her employment in retaliation for her complaint (whistleblowing) to the department of labor (DOL) that Roundhouse had illegally classified her as an independent contractor. A month after commencing her lawsuit, the plaintiff then also filed a charge with the commission on human rights and opportunities (CHRO) against Roundhouse. In her CHRO charge, she alleged that Roundhouse had terminated her both because of her complaint to DOL and also because of her internal complaints about being sexually harassed. Roundhouse moved to dismiss the § 31-51m retaliation lawsuit claiming, in part, that the CHRO complaint and the whistleblower retaliation lawsuit both stemmed from the plaintiff's whistleblowing regarding her improper classification.

The court observed that "while the evidence underlying both complaints may be related or even overlapping, the CHRO complaint and the present [whistleblower retaliation] action seek relief for distinctly different types of harm with separate statutory remedies. . . . [T]he CHRO has no jurisdiction over claims of misclassification of an employee as an independent contractor. The purview of the CHRO is limited to discriminatory employment practices including sexual harassment and retaliation in the form of termination of employment as defined by § 46a-51 (8)." *Benevides v Roundhouse, LLC.*, Superior Court, judicial district of Hartford at Hartford, Docket No.

HHD CV 09-4045477 (March 8, 2010) (2010 WL 1508288, 2). The court then denied the motion to dismiss and allowed both the § 31-51m whistleblower retaliation lawsuit and the CHRO complaint to proceed simultaneously in the two different venues.

Similarly, in this case, while the evidence related to the grievances and to Dr. Saeedi's whistleblower retaliation complaint may be related and overlapping, the grievances and the whistleblower retaliation complaint involve distinctly different types of harm with different remedies. The grievances filed by Dr. Saeedi do not allege retaliation for whistleblowing; they allege specific violations of specific provisions of the collective bargaining agreement and sought specific relief as allowed by the collective bargaining agreement. R-23, R-24. In his whistleblower retaliation complaint, on the other hand, Dr. Saeedi alleges violations of a state statute and challenges the respondents' motivation underlying the personnel actions they took against him. Dr. Saeedi also seeks relief (emotional distress damages and attorney fees) that are not available through the grievance process. In the same way that CHRO has no jurisdiction of employee misclassification, the human rights referees have no jurisdiction to resolve claims of violations of the collective bargaining agreement.

For these reasons, the statute must be read as allowing for a personnel action to be the subject of both a non-whistleblower grievance and a whistleblower retaliation complaint. A state employee can elect to pursue a whistleblower retaliation claim either with the chief human rights referee; § 4-61dd (3); or with the employees' review board; §

4-61dd (b) (4); or in accordance with an applicable collective bargaining agreement that has procedures for grieving whistleblower retaliation; § 4-61dd (b) (4).

B

Legislative history of § 4-61dd

General Statute § 1-2z provides: "The 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." To the extent that § 4-61dd (b) (3) is ambiguous, its legislative history supports the interpretation that a grievance that does not allege whistleblower retaliation is not a bar to the filing of a whistleblower retaliation complaint with the chief human rights referee.

Until 2002, § 4-61dd provided, in part, that a state employee alleging that he had been threatened with or subjected to a personnel action in retaliation for whistleblowing could appeal the personnel action either to the employees' review board or in accordance with an applicable collective bargaining agreement. It is important to note that the statute was, and still is, limited to whistleblowing and retaliation for whistleblowing.

In its 2002 session, the legislature enacted P.A. 02-91, introduced as H. B. 5487. In their discussion of the proposed bill, the legislators made clear that the "only changes we're making to the existing whistleblower statute in this bill is creating a rebuttable

presumption if the job action took place within one year of a whistleblower stepping forward. And the second thing we're doing here to the underlying law is creating a new alternative avenue for a person to bring the complaint as an alternative to the existing avenues that are in the law as we speak." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2881. The "new route that this bill before us creates is with the Attorney General and the Chief Human Rights Referee. The existing routes than at employee can take today are to file with the employee review board or they can grieve under the provisions of their state contract, if their state contract includes such a provision or three they can bring a civil action in court." 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2882. In Dr. Saeedi's case, his state collective bargaining contract does not have a provision allowing a grievance to be filed for whistleblower retaliation. FF 275.

Legislators further remarked that: "We are amending here existing law. We're not creating a new whistleblower statute. *We're only creating a new avenue for whistleblowers to bring complaints under this statute* . . . ." (Emphasis added.) 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2925-26. The only type of complaints that could have been brought, and that still can be brought, under § 4-61dd are whistleblower retaliation complaints. The legislators further remarked that the "two things this bill does, one creating the rebuttable presumption and two, creating the *alternative system* for employees to bring the [whistleblower retaliation] complaint and go through the process. Both to try to give employees that have information that may be of real concern to us, a

feeling that they can come forward with that information and be protected and that their job won't be jeopardized." (Emphasis added.) 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2871.

The legislative intent is clear that the purpose of P.A. 02-91 was limited to creating alternative venues for bringing whistleblower retaliation claims under § 4-61dd, not depriving employees of non-whistleblower contractual rights they may also have under their collective bargaining agreement.

C

Grievance process

1

An employee who files a whistleblower retaliation complaint with the chief human rights referee pursuant to § 4-61dd is afforded the due process rights available under the Uniform Administrative Procedure Act, General Statutes §§ 4-166 through 4-189 (UAPA), and sections 4-61dd-1 through 4-61dd-21 of the Regulations of Connecticut State Agencies (Regulations).

Under the UAPA and the Regulations, parties are afforded an opportunity for a hearing after reasonable notice. The complaint must include a statement of the alleged facts, events or actions upon which the complaint is based. § 4-177, §§ 4-61dd-4 and 4-61dd-6. A complaint may, upon motion, be reasonably amended, with the parties being allowed sufficient time to respond and to prepare their case in light of the amendment. § 4-61dd-7. Complainants and respondents are entitled, inter alia, to a notice that includes the time, place and nature of the hearing. The notice must be issued not less

than fourteen days prior to the initial conference and not less than sixty days prior to the hearing. § 4-61dd-6. The UAPA and the Regulations afford complainants and respondents the opportunity to inspect and copy relevant and material documents not in their respective possession and, at a hearing, to examine and cross-examine witnesses and to present evidence. § 4-177c (a), §§ 4-61dd-13 (b), 4-61dd-16. Complainants and respondents may request that the presiding officer subpoena witnesses and require the production of records at a hearing. § 4-177b, § 4-61dd-12. No ex parte communications occur between the presiding referee and any person or party regarding issues of law or fact without notice and opportunity for all persons to participate. § 4-181 (a).

The grievance process, though, at least as applied to Dr. Saeedi, operates under an entirely different procedure that illustrates why filing a non-whistleblower grievance should not be a bar to filing a whistleblower retaliation complaint with the chief human rights referee.

2

The disciplinary process generally begins with DMHAS notifying the employee of work rule violations allegedly committed by the employee. This notification is followed by DMHAS' investigation into the alleged violations. FF 121. When Mr. Mims, a DMHAS labor relations officer, conducts the investigation, as he did in three of the complaints against Dr. Saeedi, he will interview the alleged violator and other witnesses. FF 219, 220, 225, 230. He will take handwritten notes of his interview. The witness, along with the union delegate, later reviews Mr. Mims' notes and is asked to sign-off that the typed

notes accurately state the witness's responses to the investigatory questions. The witness is also given the opportunity to amend the statement. FF 244.

Mr. Mims prepares a report with his findings and his recommended disciplinary action, if any, and submits it to his supervisor for review. FF 258; Tr. 1252. If disciplinary action is recommended, the employee has a pre-decisional, or "Loudermill", conference to contest the proposed discipline. The Loudermill conference is where an employee has the right to present evidence why the recommended disciplinary action should not be taken. FF 122. The notice to the employee of the Loudermill conference should provide notice of the charges and an explanation of the evidence against the employee. FF 123. The final decision regarding discipline is not made until after the Loudermill conference because there may be mitigating factors that might change the disciplinary action. FF 124.

After the Loudermill conference, Mr. Mims presents his notes of the conference to his supervisor, John Brown, and/or to Thomas Tokarz, DMHAS' director of labor relations, and in consultation with them decides whether to impose disciplinary action. If the decision is made to impose disciplinary action, Mr. Mims drafts the notification of the proposed disciplinary action, in this case a ten-day suspension letter to Dr. Saeedi. FF 268.

If disciplinary action is imposed, the union may file a grievance, a multi-step process. If the proposed discipline is a suspension or termination of employment, the union will automatically file a grievance without consulting the employee. The union can

appeal an adverse determination to a second-step grievance hearing. An employee of the state office of labor relations presides at this subsequent second-step grievance hearing. The union may decide to arbitrate an adverse outcome. FF 125, 126.

3

On May 8, 2008, Ms. Forgit summoned Dr. Saeedi to her office and handed him correspondence accusing him of violating four work rules. FF 139, 141. She refused to provide him with any explanation as to what he had done that had violated the work rules. FF 142. The correspondence itself, while citing to the work rules, also does not contain any facts or events that would explain how Dr. Saeedi violated the rules. FF 144.

Also on May 8, 2008, Dr. Saeedi received another correspondence from Ms. Forgit dated May 8, 2007 and signed by Thomas Tokarz, DMHAS' labor relations director. In his correspondence, Mr. Tokarz accused Dr. Saeedi of violating two different work rules and informed him that he was being placing him on administrative leave. FF 146, 147. Mr. Tokarz's notification of administrative leave, though, does not mention any of the work rule violations alleged by Ms. Forgit. FF 149. It is not typical to have changes made in alleged work rule violations during the same meeting. FF 150. No one, either at the meeting or in correspondence, provided Dr. Saeedi with an explanation as to what conduct of his had violated the rules. FF 148. Dr. Saeedi was told that the nature of the charges would be explained to him at an investigative meeting on the following day. FF 151.

Troubling, the May 8, 2008 meeting, precipitated by the interaction between Ms. Melluzzo and Dr. Saeedi, was held at approximately 9:30-10:00 AM on May 8, 2008, even though Ms. Melluzzo did not prepare her complaint until 4:10 PM on May 8, 2008. FF 152.

Further, although the excessive attention that Dr. Saeedi displayed toward Ms. Melluzzo was widely discussed in the unit and although employees discussed having someone speak to Dr. Saeedi, neither Ms. Melluzzo nor anyone else ever told Dr. Saeedi that his interactions with Ms. Melluzzo made her uncomfortable. FF 133, 134, 135.

On May 9, 2008, Dr. Saeedi returned to Ms. Forgit's office for the investigative meeting. FF 161. With no explanation as to why, DMHAS investigator Paula DeBarros informed him that the first set of work rule violations he had received on May 8, 2008 were "false" and would not be pursued by DMHAS, but that the violations in the second correspondence were being investigated. FF 162, 163. Still with no explanation to Dr. Saeedi as to the underlying facts or events constituting how he had violated the rules, Ms. DeBarros questioned him. FF 164. From her line of questioning, Dr. Saeedi inferred that he was being accused of conduct that had made a nurse in the unit, Ms. Melluzzo, uncomfortable. FF 165. The interview statement attributable to Dr. Saeedi is in Ms. DeBarros' handwriting, is undated and is not signed by Dr. Saeedi. FF 166.

On July 9, 2010, Dr. Saeedi attended a meeting with Ms. DeBarros. Also attending were Mike Piscopiello and Dr. Timmerman, union delegates. At that meeting,

Ms. DeBarros handed him correspondence signed by her and dated July 3, 2008. FF 175. In that correspondence, she advised Dr. Saeedi that as the result of her investigation and pursuant to the requirements of Loudermill she had scheduled a Loudermill conference for him on July 9, 2008, the very day that she handed him the correspondence notifying him of the meeting. FF 176. The correspondence informed Dr. Saeedi that he was found to have violated two work rules and that a five-day suspension without pay was under consideration. FF 177.

Prior to the receipt of the correspondence at the meeting, neither Dr. Saeedi nor his union delegates were aware that the July 9, 2008 meeting would be a Loudermill conference regarding a proposed suspension. Dr. Saeedi and his union delegates asked for time to prepare a defense. Ms. DeBarros refused to provide them with any time and proceeded with the conference. Dr. Saeedi and his union delegates asked Ms. DeBarros to explain what specific conduct of Dr. Saeedi had violated the work rules. She refused and told them that the Loudermill conference was Dr. Saeedi's opportunity to explain why he should not be suspended. Dr. Saeedi responded that he could not defend himself since he did not know what conduct had led to the charges. FF 178-180.

Subsequent to the Loudermill conference, Luis B. Perez, CVH's chief executive officer, suspended Dr. Saeedi without pay for five days for violating two work rules. The suspension was for July 31; August 1, 5, 6 and 7, 2008. FF 182, 183.

On July 29, 2008, three work rule violation reports were completed against Dr. Saeedi. Mr. Forgit completed two of the reports and Jeanine Larouchelle, the division

director of general psychiatry, completed one of the reports. FF 205. Ms. Forgit alleged that Dr. Saeedi had improperly entered Dutcher Hall on July 25, 2008. According to Ms. Forgit, she had told Dr. Saeedi on June 12, 2008 that he was not to enter Dutcher Hall. FF 207. Ms. Forgit also alleged that Dr. Saeedi could not be located for two hours on July 22, 2008. Ms Forgit reported that Dr. Saeedi had been told that his grievance hearing previously scheduled for July 22, 2008 had been cancelled, but he left the worksite anyway. FF 206. Ms. Larouchelle claimed that on some unknown date Dr. Saeedi had improper contact with a nurse, Ms. Peabody. FF 208. These three violation reports were received by DMHAS' labor relations division on July 30, 2008. FF 210.

On August 4, 2008, Ms. Forgit called Dr. Saeedi to meet her at her office. Dr. Saeedi attended with his union delegate, Mr. Piscopiello. Also at the meeting was Ms. Larouchelle. At the meeting, Ms. Larouchelle handed Dr. Saeedi correspondence signed by her and dated July 31, 2008, in which he was alleged to have violated two work rules. Neither Ms. Larouchelle nor Ms. Forgit would explain what the conduct was that allegedly violated the work rules. Ms. Forgit then handed Dr. Saeedi two correspondences signed by her and dated August 4 2008 alleging that Dr. Saeedi had violated two other work rules. Again, no explanation was provided as to what conduct of his had allegedly violated these work rules. The correspondences themselves also provide no facts or events explaining what conduct of Dr. Saeedi allegedly violated these rules. FF 211-214.

At that meeting, Ms. Forgit and Ms. Larouchelle also gave Dr. Saeedi a memorandum from Mr. Mims, a DMHAS labor relations officer, scheduling an investigatory interview for August 8, 2008 to discuss three separate incidents that had occurred on July 22, 25 and 29, 2008. Mr. Mims' memorandum does not describe or identify what occurred on July 22, 25 or 29, 2008 and does not identify the work rules allegedly violated. FF 215.

As a result of a medical emergency involving a patient, the investigatory interview was postponed from August 8, 2008 to August 11, 2008. FF 218. When questioned by Mr. Mims on August 11, 2008, Dr. Saeedi did not have an exact idea of the actual accusations. FF 223. During the meeting on August 11, 2008, Dr. Saeedi suffered a cardiac event and was transported to the emergency room of a local hospital. The meeting was recessed until August 26, 2008. FF 246, 252. Attending the August 26, 2008 interview were Dr. Saeedi; the union delegate, Dr. Timmerman; Ms. Jerilynn Lamb-Pagone, the director of nursing; and Mr. Mims. FF 239.

Following his investigation, Mr. Mims prepared a report dated September 9, 2008. FF 254. In his report, he recommended no disciplinary action against Dr. Saeedi regarding two of the three work rule violation complaints filed on July 29, 2008. As to the third complaint, involving interaction between Dr. Saeedi and Ms. Peabody, Mr. Mims recommended a ten-day suspension. FF 255, 256. Mr. Mims reviewed this report with John Brown, his immediate supervisor, and with Tom Tokarz DMHAS' human resource director. FF 258.

By correspondence dated September 11, 2008, Mr. Mims notified Dr. Saeedi that a Loudermill conference would be held on September 16, 2008 as a result of allegations filed against him on July 29, 2008. The penalty under consideration was a ten-day suspension without pay. FF 261. Although the Loudermill notice is dated September 11, 2008, Dr. Saeedi and union delegate William Hill did not receive the notice until they arrived at the meeting on September 16, 2008. FF 265; C-26.

On September 18, 2008, Luis Perez, CVH's chief executive officer, notified Dr. Saeedi that he was suspended without pay for ten days, to be served on various days between September 25, 2008 and October 9, 2008, for an incident dated July 29, 2008. FF 269. Dr. Saeedi's union grieved Mr. Perez's ten-day suspension of Dr. Saeedi. FF 274. At the step-one grievance hearing, Mr. Mims presented the case in support of the discipline and his supervisor, Mr. Brown, conducted the hearing. Mr. Brown upheld the suspension. The step-two grievances hearings for both the five-day and the ten-day suspensions were held on February 6, 2009. An employee of the office of labor relations conducted the step-two grievances hearings. Mr. Brown and Ms. DeBarros presented the case in support of the five-day suspension. Mr. Brown then presented the case in support of the ten-day suspension. The hearing officer upheld the suspension. FF 276, 278-282.

4

The process used in Dr. Saeedi's grievances amply demonstrates why a non-whistleblower grievance should not bar filing a whistleblower retaliation complaint with the chief human rights referee. First, Dr. Saeedi's grievances do not allege that the adverse actions were in retaliation for whistleblowing and, in fact, there is no provision in the applicable collective bargaining agreement that allows a grievance to be brought alleging retaliation for whistleblowing. FF 275. Second, the grievance procedure DMHAS provided to Dr. Saeedi was a process with a disturbing lack of explanation about what his conduct was that had violated the work rules, lack of notice of the Loudermill conferences and lack of adequate time for him to prepare a defense. FF 141, 142, 144, 148, 149, 164, 178-181, 212-216, 265. Third, Ms. Forgit, who herself had filed several work place violation complaints against Dr. Saeedi, was present when Dr. Saeedi and other employees were interviewed. FF 141, 205-207, 241 Dr. Saeedi, though, not only was not present during those interviews but also was not given the opportunity to question the witnesses or even the opportunity to review Mr. Mims' reports of their statements to contest their accuracy and truthfulness. FF 242.

The accuracy of Mr. Mims' witness statements is also of concern. Mr. Mims' interviews were not audio-taped. He handwrote the interviewee's responses to his questions, had his written notes typed up, and later presented his typed accounts to the

interviewees for their review and signature, if they chose. Mr. Mims' accounts, though, are his notes of the interviewees' answers to questions; his accounts do not include the questions themselves. FF 244, 245.

The context of the answers matters because of the opportunity for the interviewer through the use of leading questions to direct the witness to a desired answer. For example, according to Ms. Peabody, her "cop a feel" remark in Mr. Mims' account was in response to a question she was asked at the interview. She had not included that remark in her own July 27, 2008 handwritten statement of the incident nor made that remark to her supervisor on the date of the incident. FF 235. Also, Mr. Mims' account of Mr. Growczwicz's testimony is a one line summary of the Mr. Growczwicz's responses to several questions, not a verbatim transcription. Tr. 1395; R-36.

In addition, according to Ms. Peabody, she returned, unsigned, two of Mr. Mims' typed accounts of her responses for further revision because the typed versions were "really incorrect". Tr. 1531. She finally signed the third version because, even though "[t]here were things I didn't say in there" and "[t]here was a lot left out," she was told "that was okay, as long as what was written was true . . . ." Tr. 1532; FF 236. Interestingly, and unlike other witnesses, when Mr. Mims interviewed Dr. Buss, she brought pre-typed statements with her to her interview. FF 226.

Also, according to the testimony of Mr. Piscopiello, the statement attributed to him (R-32) does not accurately reflect what he said, was not signed by him and, in fact, was never seen by him prior to his being shown the statement at this hearing. FF 232.

The accuracy and truthfulness of these accounts are critical because the accounts are exhibits at the step-one and step-two grievance hearings; the interviewees themselves are not present and do not testify. FF 277, 281. Since Dr. Saeedi did not know what the witnesses had said and cannot cross-examine them, he could not challenge the veracity of these accounts.

In his suspension notice to Dr. Saeedi, Mr. Perez cited Dr. Saeedi's conduct toward Ms. Peabody as violating work rule number 19. FF 269, 270. Work rule number 19 states: "Physical violence, verbal abuse, inappropriate or indecent conduct and behavior <u>*that endangers the safety and welfare of persons*</u> or property is prohibited." (Emphasis added.) FF 270; R-11, R-19. However, from the testimony of Ms. Peabody herself, from Mr. Piscopiello's recounting of his conversation with her on the date of the incident, and from Ms. Girard's testimony of her conversation with Ms. Peabody subsequent to the incident, it is evident that while Dr. Saeedi's nudge offended Ms. Peabody, his conduct and behavior did not endanger her safety or welfare and she never felt that his conduct endangered her safety or welfare. FF 271.

Section 4-61dd (b) (3) (A) provides, in part, that when conducting hearings of a whistleblower retaliation complaint, the "human rights referee shall act as an independent hearing officer." The processing of Dr. Saeedi's grievances lacks this critical independent review of the allegations and evidence.

Mr. Mims, the DMHAS employee who interviewed the witnesses and recommended the proposed disciplinary action, conducted the Loudermill conference.

FF 266. Following the conference, Mr. Mims discussed the meeting with his supervisors, Mr. Brown and Mr. Tokarz, DMHAS employees, and in consultation with them decided to proceed with his recommended suspension of Dr. Saeedi. Mr. Mims then drafted the ten-day suspension letter to Dr. Saeedi. FF 268.

Dr. Saeedi's union grieved the suspension. FF 274. Mr. Mims presented the case in support of the suspension and Mr. Brown, who was involved in the decision to suspend Dr. Saeedi, conducted the step-one grievance hearing and sustained the ten-day suspension. FF 276, 278. The grievance continued to a step-two hearing. Although an employee of the office of labor relations conducted the hearing, Mr. Brown presented the case in support of the suspension. FF 279, 281. No witnesses were examined at either the first- or second-step grievance. The evidence consisted of Mr. Mims' accounts of the witnesses' answers to his questions. FF 277, 281.

5

The grievance process is concerned about whether there is "just cause" to impose discipline; it is not concerned with the employer's motivation in seeking to impose discipline. FF 127. Determining motivation, though, is critical in a retaliation claim. For example, when two employees have violated the same work rule, the employer's motivation in pursuing disciplinary against one employee but not the other is relevant and material to determining whether retaliatory animus improperly motivated the disciplinary action.

One of Dr. Saeedi's union delegates described the grievance process that Dr. Saeedi underwent as having been observed "in about the most ragged way I've seen." Tr. 1156. Given the strong public policy and state interest in having employees report wrongdoing without fear of retaliation, the filing of a whistleblower retaliation complaint with the chief human rights referee should not be barred by a "ragged" grievance process in which the employee has not grieved a whistleblower retaliation claim, does not have specific information as to how his conduct violated the work rules, does not have timely notice of the Loudermill conferences, does not have the opportunity to question the witnesses against him, and does not even have the opportunity to review the witnesses' statements.

D

Summary

Provided that a grievance does not specifically allege that a personnel action was in retaliation for whistleblowing, a complainant may contest the same personnel action through both a grievance and a whistleblower retaliation complaint.

IV

Retaliatory acts/personnel actions

A

1

Whistleblower retaliation cases brought under § 4-61dd are analyzed 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, 53-54 (1990). Therefore, it is useful to begin the analysis with a review of the U. S. Supreme Court's discussion in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U.S. 53 (2006) of Title VII's anti-retaliation provisions to determine both (1) the scope of § 4-61dd's anti-retaliatory provision and (2) the degree of harm a complainant must incur for a retaliatory act to fall within the scope of § 4-61dd.

In *Burlington Northern*, the Court noted that words such as "'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee' – explicitly limit the scope of [Title VII's substantive anti-discrimination] provision to actions that affect employment or alter the conditions of the workplace. No such limiting words appear in the antiretaliation provision." *Burlington Northern & Santa Fe Railway Co. v. White,* supra, 548 U.S. 62. Similarly, there are no such limiting words in § 4-61dd that would restrict its application only to adverse decisions affecting employment or altering the conditions of the workplace.

The Supreme Court observed that the anti-retaliation provision seeks to prevent "an employer from interfering (through retaliation) with an employee's efforts to secure or advance enforcement of the Act's basic guarantees. The substantive provision seeks to prevent injury to individuals based on who they are, i.e., their status. The antiretaliation provision seeks to prevent harm to individuals based on what they do, i.e., their conduct." Id., 63.

As the Supreme Court noted, one cannot secure the objective of the anti-retaliation provision "by focusing only upon employer actions and harm that concern employment and the workplace. . . . An employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace . . . . A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision's primary purpose, namely, [m]aintaining unfettered access to statutory remedial mechanisms." (Citations omitted; internal quotation marks omitted.) Id., 63-64. The purpose and the language of the anti-retaliation provision indicate "that the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id., 64. "Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishments of the Act's primary objective depends." Id., 67.

To prevail, the complainant "must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Internal quotation marks omitted.) Id., 68. "We refer to reactions of a *reasonable* employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determine a

plaintiff's unusual subjective feelings." Id., 68-69. "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." Id., 69.

In other words, the anti-retaliation provisions of Title VII, the Connecticut Fair Employment Practices Act and § 4-61dd are broader in scope and provide protection from a greater degree of harms than the substantive anti-discrimination provisions of Title VII and the Connecticut Fair Employment Practices Act.

2

Employment discrimination and retaliation cases "fall into two basic categories: 'single issue motivation' and 'dual issue motivation' cases. In single issue motivation cases, the single issue [is] whether an impermissible reason motivated the adverse action, which courts analyze under the framework first set forth in *McDonnell Douglas* . . . . In dual issue motivation cases, the determination involves both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason, which is analyzed under the framework set forth in *Price Waterhouse* . . . ." (Citations omitted; internal quotation marks omitted.) *Wood v. Sempra Energy Trading Corp.,* United States District Court, Docket No. 3:03 CV 986 JHC (D. Conn. December 12, 2005), (2005 WL 3416126, 5 n. 6 (D. Conn.), aff'd, 225 Fed. Appx. 38 (2nd Cir. 2007) (2007 WL 1600001).

> "A prima facie case of discrimination can be established either by utilizing the test formulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 . . . or the test set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 . . . . The *McDonnell* test is the test said to be used in a situation where circumstantial evidence is presented to show discrimination, while the *Price Waterhouse* test somewhat confusingly is called the "direct evidence" test . . . .
>
> Simply put, in a pretext case [*McDonnell*], the plaintiff seeks to show discrimination indirectly, and the defendant claims a non-discriminatory reason for its action. In mixed motive cases, [*Price Waterhouse*], the plaintiff demonstrates the presence of discrimination directly and the defendant must then prove that it harbored other motives [whence the term "mixed motive"] which would have led it to the same decision, without regard to the impermissible [i.e., discriminatory] factor. . . .
>
> Or, to put it in plainer English, the *McDonnell* test does involve the use and analysis of "circumstantial evidence" as generally understood while, under the *Price Waterhouse* test, direct evidence of bias can be shown by circumstantial evidence in some circumstances."

Denault v. Conn. Gen. Life Ins. Co., Superior Court, Docket No. CV-95-0050418s (June 29, 1999) (1999 WL 549454, 4).

The "Second Circuit has held [t]hat the ultimate issue in an employment discrimination case is whether the plaintiff has met her burden of proving that the adverse employment decision was motivated at least in part by an impermissible reason, i.e., a discriminatory reason, regardless of whether the case is presented as one of single or dual motive." (Internal quotation marks omitted.) *Wood v. Sempra Energy Trading Corp.,* supra, 2005 WL 3416126, 5 n. 6.

B

1

Since both the complainant and the respondents utilized the single motive *McDonnell Douglas* analysis in their briefs, that paradigm will be applied in this decision.

The *McDonnell Douglas* analysis uses a three-step burden shifting analytical framework. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995). The three shifting evidentiary burdens are: (1) the complainant's de minimis burden in the presentation of his prima facie case; (2) the respondents' burden of articulation in the presentation of their non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving by a preponderance of the evidence that the respondents retaliated against him because of his whistleblowing. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to whistleblower retaliation cases. *LaFond v. General Physics Corp.*, 50 F.3d 165, 172-73 (2d Cir. 1995).

a

With respect to the first evidentiary burden, 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. Id.

As to the first prima facie element, the four statutory components of a protected activity as defined by § 4-61dd are, first, the respondents 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), General Statutes §§ 1-120, 4-141. Second, the complainant must have been an employee of the regulated entity. § 4-61dd (b).

Third, the complainant must either have knowledge of (1) "corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency" or have knowledge 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 any large state contract" (protected information). § 4-61dd (a). As to this statutory component, the complainant need not show that the conduct he reported actually violated § 4-61dd (a), but only that he 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.

To satisfy the fourth statutory component, 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 the complainant is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) in the case of a large state contractor, the contracting state agency concerning a large state

contract (whistleblowing). § 4-61dd (b) (1). The complainant need only show that the respondents had general knowledge that he had engaged in a protected activity. *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 116 (2d Cir. 2000).

To satisfy the second element of his prima facie case, the complainant must show that he suffered or was threatened with personnel action by a regulated entity subsequent to his whistleblowing. §4-61dd (b) (1). The respondents incorrectly argue that the scope of § 4-61dd is narrower than the anti-discrimination provisions of Title VII and the Connecticut Fair Employment Practices Act. Respondents' trial brief, pp. 9-12. However, "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 his 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); *Burlington Northern & Santa Fe Railway Co. v. White,* supra, 548 U.S. 62-68; *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket No. FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6).

In addition, unlike other statutes, § 4-61dd does not narrowly define "personnel action". For example, General Statutes § 31-51u provides, in relevant part: "(a) No employer may determine an employee's eligibility for promotion, additional compensation, transfer, termination, disciplinary or other adverse personnel action

solely on the basis of a positive urinalysis drug test result . . . ." Similarly, General Statutes § 31-275 (16) (B) (iii) refers to: "A mental or emotional impairment that results from a personnel action, including but not limited to, a transfer, promotion, demotion or termination . . . " Unlike § 4-61dd, these statutes tie "personnel action" to acts that significantly impact the terms and conditions of employment.

Likewise, had the legislature wanted to narrow the scope of "personnel action" in § 4-61dd, the legislature could have incorporated §§ 31-51u or 31-275 by reference in § 4-61dd or the legislature could have included in § 4-61dd restrictive employment terms such as "promotion", "compensation", or "demotion". The legislature, however, did not impose such a narrow definition in § 4-61dd, and there is no basis to narrowly read the statute. In a retaliation claim, context matters.

The third element of a prima facie case requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and his whistleblowing. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The complainant can establish the inference of causation either (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 or (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.

“A causal connection can be established indirectly by showing that the protected activity was followed close in time by adverse action . . . but the inquiry into whether temporal proximity establishes causation is factual in nature. There is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between [protected activity] and an allegedly retaliatory action. The trier of fact, using the evidence at his disposal and considering the unique circumstances of each case, is in the best position to make an individualized determination of whether the temporal relationship between the employee’s protected activity and an adverse action is causally related.” (Internal quotation marks omitted.) *Taylor v. Dept. of Correction*, Superior Court, judicial district of New Haven at New Haven, Docket No. NNH-CV-09-5030106s (July 12, 2010) (2010 WL 3171317, 11).

“Absent a more precise definition of what constitutes ‘very close’ for retaliation purposes, the question - as to whether a given period of time permits an inference of causation as required by the fourth prong of a prima facie case - is determined in the context of a particular case, on a case-by case-basis.” (Internal quotation marks omitted.) *Young v Spectrum Associates, Inc.*, United Stated District Court, Civil Action No. 3:10cv-223 (JCH) (D. Conn. July 30, 2010) (2010 WL 3025232, 5).

If the complainant establishes a prima facie case, the analysis proceeds to the second burden-shifting step in which the respondents must produce a legitimate, non-retaliatory reason for their actions; *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 53-54; which, if taken as true, would permit the conclusion that

there was a non-retaliatory reason for their actions; *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174. If the respondents do not produce a legitimate, non-retaliatory reason, the complainant prevails. If the respondents produce a reason, the analysis proceeds to its third burden-shifting step.

c

If the respondents produce a legitimate, non-discriminatory reason for their actions, the burden shifts back to the complainant "to establish, through either direct or circumstantial evidence, that the employer's action was, in fact, motivated by discriminatory retaliation." *Raniola v Bratto*n, 243 F.3d 610, 625 (2d Cir. 2001). In this third burden-shifting step, the complainant bears the burden of persuasion to establish by a preponderance of the evidence that retaliation was a motive in the employer's decision.[3] *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174.

Retaliation may be established even "when a retaliatory motive is not the sole cause of the adverse employment action . . . or when there were other objectively valid grounds for the [adverse action]. . . . A retaliatory motive must be, however, at least a substantial or motivating factor behind the adverse action. . . . A plaintiff may prove that retaliation was a substantial or motivating factor behind an adverse employment action either (1) indirectly, by showing that the protected activity was followed closely by discriminatory treatment, or through other circumstantial evidence such as disparate treatment of fellow employees who engaged in similar conduct; or (2) directly, through evidence of retaliatory animus directed against the plaintiff by [the] defendant."

(Citations omitted; internal quotation marks omitted.) *Raniola v Bratto*n, supra, 243 F. 3d 625; *Henry v. Wyeth Pharmaceuticals, Inc.*, 616 F.3d 134, 156 (2d Cir. 2010).

2

In this case, Dr. Saeedi established the three elements of a prima facie case.[4] First, he proved the four statutory components of the first element to his case. The respondents are, or were at times relevant to this case, a state agency and/or employees of a state agency. FF 2. Dr. Saeedi is employed by a state agency, DMHAS. FF 12. Dr. Saeedi had knowledge of and concerns about the medical treatment of patients in the care of DMHAS and CVH that constituted, or that he reasonably believed constituted, corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority and/or danger to the public safety occurring in DMHAS and CVH. FF 26, 30, 37, 39, 40, 42, 43, 44, 46. That other medical and nursing staff at CVH shared Dr. Saeedi's concerns supports the reasonableness of his belief. FF 50, 51, 55. Finally, Dr. Saeedi disclosed this information to employees of DMHAS, specifically to Ms. Forgit, Dr. Lev, Dr. Forman and Mr. Perez. FF 27, 29, 34, 38, 40, 42, 43, 44, 45, 47.

Dr. Saeedi established the second prima facie element by showing that he suffered or was threatened with personnel action by a regulated entity subsequent to his whistleblowing. In August 2007, Ms. Forgit and Ms. Distiso directed a nurse to file a work rule violation complaint against Dr. Saeedi. FF 57-62. In September 2007, Ms. Forgit, Dr. Forman, and Ms. Vartelas approved Dr. Saeedi's 2006-07 performance

appraisal that had ratings lower than his 2005-06 performance appraisal. FF 65-67. Also in September 2007, Ms. Forgit, Ms. Vartelas and Dr. Forman attempted to use policy statement 48 to reassign Dr. Saeedi. FF 80-83. In November 2007, Dr. Lev told the director of nursing to instruct the nursing staff to report to him anything that Dr. Saeedi did wrong. FF 40, 41. In December 2007, Dr. Saeedi was involuntarily reassigned from Merritt Hall to Dutcher Hall. FF 101. Also in December 2007, Dr. Saeedi was required to travel between buildings to cover patients for all absent physicians. FF 109.

In January 2008, Ms. Forgit solicited other physicians to file work rule violations against Dr. Saeedi. FF 113-115. In March and April 2008, an issue arose at Dutcher Hall regarding a patient that Dr. Saeedi and Dr. Peterson had in common. Dr. Saeedi was concerned about the patient's condition. The patient had been prescribed a medication which had a serious, detrimental effect on the patient's liver. Dr. Saeedi discovered this and sought to correct the problem by changing the patient's medication. The respondents attempted to blame Dr. Saeedi for the situation. FF 117.

In May 2008, Ms. Forgit filed a work rule violation complaint against Dr. Saeedi and Mr. Tokarz placed him on administrative leave for an incident involving Ms. Melluzzo. Subsequently, Mr. Perez imposed a five-day unpaid suspension. FF 141, 146, 147, 182, 183. On July 29, 2008, Mr. Forgit and Ms. Larouchelle filed work rule violations against Dr. Saeedi, and Dr. Carre removed Dr. Saeedi as chair of the continuing medical education committee. FF 204, 206. In September 2008, Mr. Perez placed Dr. Saeedi on a ten-day unpaid suspension, and Ms. Forgit, Ms. Vartelas and

Dr. Forman gave Dr. Saeedi a performance appraisal with an over-all rating of unsatisfactory. FF 269, 283, 285.

Based on these personnel actions, Dr. Saeedi established the second prima facie element.

With respect to the third prima facie element, Dr. Saeedi successfully established an inference of a causal connection between the adverse personnel action and the whistleblowing based on the number of adverse personnel actions taken, the temporal proximity of the personnel actions to the whistleblowing, and the disparate treatment of Dr. Saeedi and other employees.

Dr. Saeedi was not the victim of a single adverse personnel action or isolated personnel actions occurring over a long time span. Rather, as discussed infra, the respondents undertook, attempted or threatened to undertake fifteen adverse personnel actions against Dr. Saeedi within a thirteen-month period.

The temporal proximity of the adverse actions to the whistleblowing further supports a causal connection between the adverse personnel actions and the whistleblowing. Dr. Saeedi expressed his concerns about Dr. Sonido's treatment of patients to Ms. Forgit and Dr. Buss in August and September 2007. FF 31-34, 38. In November 2007, he documented and reported a high risk medical error that placed a patient at risk. FF 39. In November 2007, he also reported Dr. Sonido to Dr. Lev. FF 40. By correspondence dated December 4, 2007, Dr. Saeedi notified Dr. Forman of Dr. Sonido's patient care, and informed Dr. Forman that he had expressed these concerns

to Dr. Buss and Ms. Forgit in August and September 2007. FF 42, 43, 44. He sent copies of his correspondence to Mr. Perez, Dr. Carre, Ms. Forgit and Dr. Lev. FF 45. Later that month, he again reported Dr. Sonido's mismanagement of patient care to Dr. Lev. FF 47.

During this August to December 2007 period when Dr. Saeedi was whistleblowing, six of the fifteen previously discussed adverse personnel actions occurred. The remaining nine adverse personnel actions occurred within nine months thereafter, through September 2008, as situations arose in which the respondents could take or threaten to take the retaliatory personnel actions previously discussed.

The respondents' disparate treatment of Dr. Saeedi and other employees also supports a causal connection between the adverse personnel actions and the whistleblowing. The respondents treated Dr. Saeedi different from Dr. Sonido with regard to alleged mismanagement of patients. When Ms. Sievert reported to Ms. Distiso her observations of Dr. Sonido's mismanagement of patients, Ms. Distiso did not tell Ms. Sievert to write up Dr. Sonido. FF 51, 52. Although several other employees were also expressing concerns about Dr. Sonido's care of patients, the respondents never took any action against Dr. Sonido. FF 48, 50, 52, 54, 55. However, in August 2007, Ms. Distiso and Ms. Forgit told another nurse to write up Dr. Saeedi for his treatment of a patient. FF 61, 62.

The respondents also applied policy statement 48 disparately. The respondents charged Dr. Saeedi with violating policy statement 48. FF 80, 81. Yet, although Ms.

Forgit, Ms. DeBarros and Mr. Smith knew that the relationship between Dr. Sonido and Ms. Distiso violated policy statement 48, no action was taken against either Dr. Sonido or Ms. Distiso. FF 85, 86, 93-95. Ms. Forgit also knew of other employees whose relationship violated policy statement 48, but she did nothing about those employees. FF 85. Had Dr. Saeedi been reassigned because of policy statement 48, his office would have been relocated to a trailer. He would have been the only physician with an office in a trailer. FF 87. In addition, the respondents treated physicians disparately in their assignments to buildings. As a result of the December 2007 reassignments, Dr Saeedi was the only physician who did not get the assignment location that he requested. FF 101.

In summary, Dr. Saeedi established the three elements of his prima facie case. He produced evidence satisfying the four statutory components of the first element. He satisfied the second element by producing evidence of repeated personnel actions. His evidence of the number of personnel actions taken or threatened, the temporal proximity of the personnel actions to the whistleblowing and the respondents' disparate treatment of employees establish a causal connection sufficient to satisfy the third prima facie element.

b

Because Dr. Saeedi established a prima facie case, the burden of articulation shifts to the respondents to proffer a non-retaliatory reason for their actions which, if taken as true, would permit the conclusion that there were non-retaliatory reasons for

their actions. Once the respondents articulate non-retaliatory reasons for their actions, the burden of persuasion remains with the Dr. Saeedi to establish by a preponderance of the evidence that retaliation was a substantial or motivating factor for the respondents' decisions.

In this case, the respondents articulated non-retaliatory explanations for many of their actions. Dr. Saeedi, in turn, proffered persuasive evidence which, in addition to the persuasive evidence of his prima facie case, establishes that retaliation was a substantial factor in the respondents' actions.

Following his whistleblowing, Ms. Forgit removed Dr. Saeedi as Dr. Sonido's supervisor. FF 49. There is no explanation as to why this action was taken. Following Dr. Saeedi's removal, no one apparently supervised Dr. Sonido. FF 31, 50.

In August 2007, Ms. Forgit and Ms. Distiso directed a nurse to file a work rule violation against Dr. Saeedi. FF 61, 62. The explanation for this action related to Dr. Saeedi's patient care. FF 61. There is, though, no factual basis to support the claim that Dr. Saeedi had violated the work rule. FF 57-62. There is no also evidence of disciplinary action imposed on Dr. Saeedi for patient care. Dr. Saeedi, however, proffered persuasive evidence that he provides excellent patient care. FF 22.

In September 2007, Ms. Forgit, Ms. Vartelas and Dr. Forman gave Dr. Saeedi a performance appraisal in September 2007 that did not reflect the quality of his work. FF 65-67, 71. Also in September 2007, Ms. Forgit, Ms. Vartelas and Dr. Forman threatened to reassign Dr. Saeedi from Merritt Hall to Whiting Hall. The explanation for the

reassignment was that having both Dr. Saeedi and his sister in the same building violated policy statement 48. FF 80, 81. Policy statement 48 provides, in part, that an employee cannot work in a position that would place the employee under the supervision of a relative where the relative might influence the salary, benefits, working conditions or disciplinary actions of the employee. FF 84; R-3. Dr. Saeedi persuasively established that this explanation is not credible.

Three years prior to this attempted reassignment and after speaking with the human resource department who said it would not be a problem, it was Ms. Forgit who had assigned Dr. Saeedi to Merritt Hall knowing that his sister already worked there. FF 75-77. Also, on its face, the policy statement does not apply to Dr. Saeedi and his sister. They did not work the same shift and Dr. Saeedi's sister does not work in ambulatory care services. They did not supervise each other and they could not influence the working conditions of the other. FF 75, 78, 79, 96. In addition, policy statement 48 was not applied to other employees whose relationships were known to violate the policy. FF 85, 86, 95.

Further suggestive of retaliatory animus, the respondents provided no explanation as to why, despite their knowledge of Dr. Saeedi's defibrillator, the building to which they proposed to transfer him into the only building that would have required him to go through a metal detector. FF 17, 89.

In December 2007, Dr. Saeedi was reassigned from Merritt Hall to Dutcher Hall. The explanation for this assignment appears to be that it was part of the usual rotation

of physicians. Tr. 810-11; R-4. Dr. Saeedi, though, established that he was treated different from other physicians. All the other physicians were either reassigned to the building of their choice or, again at their choice, not reassigned to a different building. Dr. Saeedi, despite having seniority, was the only physician who did not get his choice of assignment, which was to remain at Merritt Hall. FF 101. Ms. Forgit and Dr. Forman gave him conflicting explanations as to the reasons for his relocation. FF 104-108.

Also in December 2007, Dr. Saeedi was also required to cover the patients for every physician who was absent. FF 109. Despite Dr. Forman having told Dr. Saeedi in September that Mr. Perez wanted reassignments that would minimize the time physicians spent traveling between buildings, this assignment required Dr. Saeedi to travel between buildings. FF 70, 109. The constant travel between buildings significantly impacted Dr. Saeedi's workload and the amount of time he had available for each patient. FF 110. Travelling between buildings also required Dr. Saeedi to go outside and clear his car of snow several times a day. Because of his cardiac condition, he was concerned about suffering another heart attack from breathing in the cold air. FF 10, 109. Ms. Forgit was aware of Dr. Saeedi's medical condition. FF 17.

In January 2008, Ms. Forgit solicited other physicians to file work rule violations against Dr. Saeedi. The explanation for this is a conversation he had with Dr. Buss during an informal "venting" session that typically followed formal staff meetings. Dr. Saeedi, though, established by persuasive evidence that this explanation is not credible as it was clear that this conversation violated no work rules. FF 113-115.

In March and April 2008, an issue arose at Dutcher Hall regarding a patient that Dr. Saeedi and Dr. Peterson had in common. Dr. Saeedi was concerned about the patient's condition. The patient had been prescribed a medication which had a serious, detrimental effect on the patient's liver. Dr. Saeedi discovered this and sought to correct the problem by changing the patient's medication. The respondents attempted to blame Dr. Saeedi for the situation. FF 117.

On July 29, 2008, Ms. Forgit and Ms. Larouchelle filed three work rule violation complaints against Dr. Saeedi. The explanation for these complaints is that Dr. Saeedi entered Dutcher Hall after having been told not to do so, that he left the worksite to attend a meeting at the office of labor relations that he had known was cancelled, and that he had improper interaction with Ms. Peabody. FF 205-208.

Dr. Saeedi established that the respondents' explanations regarding Dutcher Hall and leaving the worksite without authorization were clearly false. He had never been told that he could not enter Dutcher Hall, only that he could not enter the Dutcher 2 North unit. He also had never been told that his meeting at the office of labor relations had been cancelled. In addition, even though the purported reason for the cancellation was that Ms. Forgit was unable to attend the meeting, she did not attend the rescheduled meeting. FF 174, 197, 199, 224. Cancelling a meeting purportedly to accommodate the schedule of someone whose attendance was obviously unnecessary in order to inconvenience Dr. Saeedi is further indication of retaliatory animus. Further, Ms. Forgit pressured Ms. Peabody into filing a work rule violation complaint despite the

fact that the situation had already been resolved to her satisfaction and the fact that Dr. Saeedi's conduct toward her did not violate the work rule. FF 185-193, 270-271.

In August 2008, Dr. Carre, president of the medical staff, removed Dr. Saeedi as chair of the continuing medical education committee. The explanation given for this action was that Dr. Saeedi's term had expired. Dr. Saeedi had not sought to step down as chair and had served for only four years; his predecessor had served for ten years as chair. FF 204. Dr. Saeedi had also been commended in his 2005-06 performance appraisal for raising the committee's level of excellence. FF 25. Dr. Saeedi had previously forwarded to Dr. Carre copies of his correspondence complaining about the quality of Dr. Sonido's patient care. FF 45.

In September 2008, Ms. Forgit, Ms. Vartelas and Dr. Forman issued Dr. Saeedi an over-all unsatisfactory rating on his September 2007 – September 2008 performance appraisal. The explanation for this is the five- and ten-day suspensions he had received. FF 288. As Dr. Saeedi persuasively established, this explanation is not credible for several reasons. The decision-makers should not have known of the ten-day suspension at the time they signed the performance appraisal. FF 259, 260, 293. Ms. Mims did not release his recommendation for the ten-day suspension until sometime between September 9 and September 11, 2008. FF 260; C-26. Yet, Ms. Forgit, Ms. Vartelas and Dr. Forman referenced this suspension on September 1 and 2, 2008 when they signed the performance appraisal. FF 293. Their knowledge of the suspension

prior to its release strongly suggests their retaliatory involvement in the determination to impose the ten-day suspension.

Also, Ms. Forgit, Ms. Vartelas and Dr. Forman, after consulting with DMHAS' human resource department, improperly used Dr. Saeedi's interaction with two co-workers as criteria for determining the rating for judgment. FF 283, 285, 286-289. As further indicia of a retaliatory motive, they improperly calculated his over-all performance rating. FF 284, 285.

In addition, Ms. Forgit, Ms. Vartelas and Dr. Forman had found Dr. Saeedi's performance unsatisfactory even though Dr. Buss, Dr. Saeedi's direct supervisor for medical affairs, said she believed that Dr. Saeedi did his job as a doctor very well and, in her evaluation of him in August 2008, had given him the highest possible ratings in all the categories. FF 4, 201-03, 292.

Finally, the disciplinary and grievance processes utilized in the investigations of the Melluzzo and Peabody incidents provide further persuasive evidence that a retaliatory animus played a motivating or substantial factor in the respondents' actions.

Dr. Saeedi received a five-day unpaid suspension. The explanation for this disciplinary action is that it was the result of an investigation that DMHAS was legally obligated to conduct in response to a work rule violation complaint regarding Dr. Saeedi's interaction with Ms. Melluzzo. Respondents' trial brief, pp. 22-24. The evidence of retaliatory animus, however, begins with Dr. Saeedi not being given the benefit of DMHAS' progressive discipline policy. Despite DMHAS' policy of progressive

discipline, Dr. Saeedi's contributions to CVH, the quality of his patient care and his unblemished disciplinary history, Mr. Perez suspended Dr. Saeedi for five days for the Melluzzo incident. Dr. Saeedi did not first receive any counseling, verbal warnings or written warnings. He was not required to attend any training or referred to an employee assistance program. The respondents did not apply DMHAS' progressive discipline policy to Dr. Saeedi. FF 19, 20, 56, 118-120, 134-135, 184.

The evidence of retaliatory animus continues with the glaring inconsistencies between the work rule violations alleged by Ms. Forgit and those alleged by Mr. Tokarz in their May 8, 2008 allegations against Dr. Saeedi. Ms. Forgit asserted that Dr. Saeedi was conducting personal business during work hours, engaging in improper relationships with patients, and engaging in violence or indecent conduct that endangered the safety and welfare of others. FF 141; R-5. Mr. Tokarz asserted two entirely different work rules as his basis for putting Dr. Saeedi on administrative leave: harassment of a person and interfering with the productivity of other employees. FF 146, 149; R-7. It is very untypical to have changes made in alleged work rule violations during the same meeting, and even a representative from DMHAS' human resource department conceded that Ms. Forgit's allegations were false. FF 150, 162.

Also, at the time Ms. Forgit and Mr. Tokarz issued their charges against Dr. Saeedi, the only information available about the incident, which was offered into evidence, was Ms. Hutchins' May 7, 2008 statement. In her statement, Ms. Hutchins writes three times that her conversation with Ms. Melluzzo occurred on May 1, <u>2007</u>. FF

136, 137, 138; R-41. No evidence was proffered that any attempt was made to discover whether the conversation occurred in 2007 or whether "2007" was a scrivener's error. Also, at least two of four work rule violations Ms. Forgit asserted against Dr. Saeedi were not supported by the information provided by Ms. Hutchins. FF 145; R-5, R-41.

Further, Mr. Tokarz placed Dr. Saeedi on administrative leave prior to Ms. Melluzzo preparing her statement of the incident. FF 147,152. Atypically, the work rule violations were based not on the victim's statement, but on the statement of Ms. Hutchins. FF 182. The respondents rushed to impose disciplinary action on Dr. Saeedi prior to clarifying when Ms. Hutchins had her conversation with Ms. Melluzzo, prior to receiving Ms. Melluzzo's statement of the incident, prior to reconciling the discrepancies between Ms. Forgit's and Mr. Tokarz's allegations and prior to reconciling the discrepancies between Ms. Hutchins' statement and Ms. Forgit's allegations. This precipitous action based on incomplete and conflicting information is strong evidence that the respondents were looking for any and every opportunity to impose an adverse personnel action on Dr. Saeedi for his whistleblowing.

Additionally, while DMHAS may have been legally obligated to conduct an investigation, the manner in which the investigation was conducted is persuasively suggestive of retaliatory animus. As previously discussed at length, there were notable inconsistencies in the allegations; FF 137, 138, 141, 145, 147, 149, 162; and Dr. Saeedi was repeatedly not informed as to the exact nature of the charges against him or as to what conduct violated the work rules. He repeatedly was not provided with timely notice

of meetings, and was not provided with the opportunity to prepare a defense to the charges. FF 142, 144, 147-149, 164, 175-181.

In September 2008, Dr. Saeedi received an unpaid ten-day suspension. The explanation for this is that it was the result of an investigation that DMHAS was legally obligated to conduct in response to a work rule violation complaint regarding Dr. Saeedi's interaction with Ms. Peabody. Respondents' trial brief, pp. 22-24. Dr. Saeedi established that the five-day suspension had been improperly considered in the recommendation and decision to impose the ten-day suspension. FF 257, 264. Further, while DMHAS may have been legally obligated to conduct an investigation, as in the case of the Melluzzo investigation, the manner in which the investigation was conducted is persuasively suggestive of retaliatory animus. Dr. Saeedi was again repeatedly not informed as to the exact nature of the charges against him or as to how his contact violated the work rules. The witnesses' statements do not reflect the questions they were asked, do not accurately reflect what they said, and do not support the charge made against Dr. Saeedi. In addition, Dr. Saeedi was not provided with the opportunity to question witnesses or even to review their statements. He also was not provided with timely notice of meetings and not provided with the opportunity to prepare a defense to the charges; FF 212, 215, 216, 231, 232, 235, 236, 238, 242-245, 265.

The notice for the Loudermill conference should contain information of the charges and an explanation of the evidence. FF 123. In both the Melluzzo and Peabody investigations, however, the Loudermill notices contain no explanation of the evidence.

C-26; R-8. With both investigations, Dr. Saeedi was given inadequate notice of the date and time of the Loudermill conference and an inadequate time to prepare his defenses to the charges. FF 175-179, 265. In both investigations, there was also a disturbing lack of information describing how Dr. Saeedi's conduct purportedly violated the work rules. He was left to infer what the allegations were from the questions that he was asked during the investigative interviews. FF 142, 144, 147, 148, 151, 164, 181, 212-216.

Finally, it should be noted that Dr. Saeedi first reported Dr. Sonido in 2005 or 2006 to Dr. Freedman, Dr. Buss' predecessor as medical director for ambulatory care services. FF 4, 27. Dr. Saeedi never believed that Dr. Freedman took any retaliatory action against him. FF 28. There is no evidence that Dr. Freedman relayed Dr. Saeedi's concerns to any other CVH administrator. That the adverse personnel actions then began in August 2007 with Dr. Saeedi's complaints to Ms. Forgit and subsequently to Dr. Lev, Dr. Forman and Mr. Perez reinforces the conclusion that their actions were retaliatory.

As evidence of a non-retaliatory motive, the respondents cite to the investigation by Mr. Mims, who testified that he was unaware of Dr. Saeedi's concerns regarding Dr. Sonido, and the step-two grievance decisions by an employee of the office of labor relations upholding the five- and ten-day suspensions. Respondent's trial brief, pp. 25, 31-33. Dr. Saeedi persuasively established that these explanations are not credible.

First, neither Mr. Mims nor the hearing officer from the office of labor relations was the final decision-maker. Mr. Mims merely recommended the ten-day suspension to

Mr. Perez and the hearing officer merely affirmed that Mr. Perez had just cause under the collective bargaining agreement to impose the five- and ten-day suspensions. Again, determining motivation in a retaliation case is essential, and Mr. Perez did not testify and was not subjected to cross-examination as to his motivation in imposing the suspensions rather than lesser penalties in accordance with DMHAS' progressive disciplinary policy and in consideration of Dr. Saeedi's contribution to CVH. FF 19, 22, 118-120, 127, 134, 135, 184, 256, 269, 282. Similarly, with respect to the Melluzzo investigation, Ms. DeBarros was not the final decision-maker. She made a recommendation to Mr. Perez, and the hearing officer merely affirmed that Mr. Perez had just cause under the collective bargaining agreement to impose the suspensions. FF 127, 177, 182, 282.

Second, causation can be found even when the agent who decides to impose the adverse action is ignorant of the employee's protected activity. "The lack of knowledge on the part of particular *individual agents* is admissible as some evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment. . . . A jury, however, can find retaliation even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge. . . . This is so, moreover, regardless of whether the issue of causation arises in the context of plaintiff's satisfaction of her *prima facie* case or as part

of her ultimate burden of proving that retaliation “played a motivating role in, or contributed to, the employer's decision.” *Gordon v. New York City Bd. of Educ.*, supra, 232 F.3d 117.

In this case, the disciplinary and grievance processes were clearly influenced by Ms. Forgit, who actively sought out employees to file work rule violation complaints against Dr. Saeedi, who filed her own work rule violation complaints against him (some clearly without any basis in fact) and who was present when witnesses were interviewed during the investigation of the work rule complaints. FF 61-62, 141, 145, 162, 174, 191, 205-207, 224, 228, 233, 241. Further undue influence is also evident in the awareness by Ms. Vartelas and Dr. Forman of the ten-day suspension before it was issued by Mr. Mims. FF 259, 260, 293.

Third, neither Mr. Mims nor the hearing officer was concerned about motivation; their inquiry was whether there was just cause supporting the disciplinary action. FF 127, 282. In addition, the decision of the hearing officer was not based upon substantial evidence after a fair hearing that would warrant the decision being given probative weight. The hearing officer did not hear testimony from any of the witnesses interviewed during the investigations; FF 281; and Dr. Saeedi was not present when any of the witnesses were interviewed and did not have the opportunity to cross-examine any witnesses; FF 242.

Also, the hearing officer’s findings are factually wrong. With regard to the Melluzzo matter, the hearing officer found that Ms. Melluzzo “made it clear that she was

not interested in any socializing with Dr. Saeedi." R-28. In fact, until Dr. Saeedi was served with the work rule violation notices on May 8, 2008, no one, including Ms. Melluzzo, had made it clear to him that his interactions with her were unwelcome. FF 132-135.

In summary, applying the *McDonnell Douglas* analysis, Dr. Saeedi established a prima facie case of retaliation. The respondents, in turn, met their burden of production by articulating non-retaliatory reasons for their actions. Through evidence of the number of adverse personnel actions, of the temporal proximity, of the disparate treatment of employees, of the context in which the adverse personnel actions occurred and of discrepancies in the disciplinary process, Dr. Saeedi met his burden of persuasion by establishing by a preponderance of the evidence that a retaliatory animus substantially motivated the respondents. Further, clearly the barrage of work rule violation complaints (some of them obviously baseless at the time they were made), unpaid suspensions, involuntary reassignments, proposed reassignments that could have adversely impacted his health, disparate application of policy statements, disciplinary action initiated for retaliatory reasons, failure to utilize progressive discipline, and an unsatisfactory performance appraisal – would dissuade a reasonable employee from whistleblowing.

C

In their trial brief, the respondents raised several claims that have not been previously addressed.

1

The respondents argued that a "hostile work environment" claim is not an adverse personnel action. They further argued that even if a hostile work environment is an adverse personnel action, Dr. Saeedi failed to establish that he suffered retaliation that amounted to a hostile work environment on the basis of his whistleblowing. Respondents' trial brief, pp. 16-21. Regardless of whether a hostile work environment is an adverse personnel action, this case is not a hostile work environment case. This case is about the respondents engaging in a repeated course of retaliatory conduct against Dr. Saeedi in retaliation for his whistleblowing about patient care. Further, the respondents used retaliatory acts as an excuse to justify subsequent retaliatory acts, such as using the five-day suspension to justify the ten-day suspension, and then using the five- and ten-day suspensions to justify the unsatisfactory performance appraisal.

2

The respondents assert that Dr. Saeedi's belief that the respondents also discriminated against him on the basis of his non-European ethnicity precludes him from bringing a whistleblower retaliation complaint. Respondents' trial brief, pp. 19-21. First, that the respondents may have discriminated against all of its non-ethnic European physicians, including Dr. Saeedi, is not a bar to Dr. Saeedi filing a whistleblower retaliation claim. Second, that the respondents discriminated against Dr. Saeedi for his ethnicity does not mean they did not also retaliate against him for his whistleblowing.

Retaliation need not be the sole cause for the adverse personnel action; retaliation need only be a substantial or motivating factor.

Further, Dr. Saeedi very clearly and persuasively explained the difference between the respondents' discrimination against its non-ethnic Europeans as a group and its retaliatory conduct against him specifically. The general ethnic discrimination Dr. Saeedi observed was preferential treatment given to physicians of European ancestry at the expense of physicians of non-European ancestry. He noticed differences in terms of patient coverage for absent physicians, the allocation of physician assistants and advanced practical registered nurses, and inequitable work assignments. R-25, R-26. The retaliatory personnel actions he complains of in this whistleblower retaliation complaint, however, are a "concerted effort by administration targeting me which started almost immediately or very soon after Ms. Forgit became aware that I am making [a] complaint, reporting a life-threatening matter . . . ." Tr. 592. He was persistent in seeking to have serious life-threatening patient issues addressed. Tr. 593. Thereafter, complaint after complaint after complaint alleging work rule violations was filed specifically against him, "more than half a dozen such complaints within less than a year, all occurred right after my reporting and insisting on Dr. Sonido, and I was targeted. . . . I was being disciplined. . . . That was [a] concerted effort against me by administration just because I had reported Dr. Sonido . . . ." Tr. 593.

3

The respondents further observed that "Ms. Forgit retired from DMHAS before the hearings were scheduled and was residing in Florida, thus unavailable to testify and beyond the subpoena power." Respondents' trial brief, p. 24 n. 7. This statement is not quite accurate. Ms. Forgit retired from state service on July 1, 2009. Tr. 1478. At the hearing conference on November 6, 2008, when Ms. Forgit was still a state employee, this case was scheduled for a hearing to commence on July 7, 2009. The hearing was postponed because <u>Ms. Forgit and the other respondents</u> obtained a judicial stay of the administrative hearing while they unsuccessfully pursued an interlocutory appeal of an order to produce documents. Further, Ms. Forgit, a named respondent, was unavailable by her own choice. There is also no claim of insufficiency of service on her. In addition, there was no explanation for the absence of the other decision-making respondents.

4

According to the respondents, as "described in detail in other sections of this brief, the reason for the Complainant being placed on paid administrative leave was the numerous complaints about his offensive behavior and the number of incidents that occurred between April and July 2008." Respondents' trial brief, p. 28. This statement is factually inaccurate for several reasons. First, there were not "numerous complaints about" Dr. Saeedi's behavior prior to his being placed on paid administrative leave by Mr. Tokarz on May 8, 2008. There was only one complaint – that of Ms. Hutchins (R-41), filed less that twenty-four hours prior to Dr. Saeedi being placed on paid

administrative leave. Second, incidents occurring between April and July 2008 could not have formed the basis for Dr. Saeedi being placed on paid administrative leave in May 2008.

5

The respondents contend that § 4-61dd does not permit the imposition of individual personal liability against the individually named respondents. Respondents' objection to complainant's petition for attorney's fees, pp. 2-10; Tr. 1637. The complainant, in turn, is vague as to whether he is suing the named individuals in their official or individual capacities. Tr. 1635-36. The undersigned declines the respondents' invitation to establish a blanket construal of § 4-61dd that whistleblower retaliation complaints can never be brought against individual state employees or officials in their individual capacity. Instead, the undersigned adopts the approach the analysis used by the courts in their interpretation of General Statute § 4-165.

Section 4-165 provides in relevant part that: "(a) No state officer or employee shall be personally liable for damage or injury, not wanton, reckless or malicious, caused in the discharge of his or her duties or within the scope of his or her employment." In determining whether a claim has been brought against a state employee in an individual capacity:

> "Our Supreme Court has set forth criteria to determine whether an action is against the state or against a defendant in an individual capacity. The four criteria for an action against the state are: (1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and

> (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." (Internal quotation marks omitted.) *Hultman v. Blumenthal,* 67 Conn. App. 613, 621, 787 A.2d 666, cert. denied, 259 Conn. 929, 793 A .2d 253 (2002). If all four of the criteria are met, then the action is brought against the state employee in his or her official capacity. "Because an action against state employees in their official capacities is, in effect, an action against the state ... the only immunity that can apply is the immunity claimed by the state itself-sovereign immunity." (Citation omitted.) *Mercer v. Strange, supra,* 96 Conn. App. at 128; see also *Hultman v. Blumenthal, supra,* at 620 ("[T]he immunity provided by § **4-165** does not apply if the doctrine of sovereign immunity does apply.").
>
> If any one of the four criteria is not met, however, then the action is brought against the state employee in his or her individual capacity.

Jeffries v. Mondell, Superior Court, judicial district of New Haven at Meriden Docket No. NNI-CV -08-5002900s (October 21, 2010) (2010 WL 4516680, 2).

Applying the criteria to the facts of this case, the undersigned concludes that the whistleblower retaliation complaint is brought against the named individuals in their official capacity.

General Statute § 5-141d then provides in relevant part that: "(a) The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person's civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act

or omission is found not to have been wanton, reckless or malicious." The decision whether to save harmless and indemnify the individually named respondents in this case, or any state officer or employee in any case, is not a decision to be made by the presiding human rights referee. Rather, that decision is a post-trial determination to be made by the state in accordance with § 5-141d and any other applicable statute or regulation.

V

Damages

A

Section 4-61dd (b) (3) (A) provides in relevant part: "If the human rights referee finds such a violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred, reasonable attorneys' fees, and any other damages." The plain language of the statute thus makes clear that damages are not limited to those specifically listed, but include other damages suffered by the complainant. Emotional distress is an element of damages suffered by Dr. Saeedi.

B

Emotional distress damages

1

The assistant attorney general argues that the Workers' Compensation Act bars Dr. Saeedi from recovering emotional distress damages incurred as from the cardiac event he suffered during the August 11, 2008 investigatory meeting with Mr. Mims. Respondent's Brief, pp. 5-6. According to the assistant attorney general, in *Almada v. Wausau Business Ins. Co.*, 274 Conn. 449 (2005): The "Connecticut Supreme Court unequivocally declared, 'As a matter of law, the plaintiff's *claim for emotional distress*, which arose out of and in the course of the *workers' compensation claim*, is barred by the Act, and, therefore, the Complainant's remedies are limited to those afforded under the Act.' *Supra*, 274 Conn. 449, 457 (2005)." (Emphasis added.) Respondent's Brief, p. 6. Unfortunately for the respondents, this is not what our Supreme Court said.

What our Supreme Court actually said in *Almada* was: "We also agree with Wausau, pursuant to our reasoning in *DeOliveira*, that, as a matter of law, the plaintiff's *claim for negligent infliction of emotional distress,* which arose out of and in the course of the *workers' compensation claim process*, is barred by the act, and, therefore, that the plaintiff's remedies are limited to those afforded under the act." (Emphasis added.) Id., 457.

The assistant attorney general's claim is rejected for the following reasons. First, section 4-61dd-18 of the Regulations of Connecticut State Agencies provides, in

relevant part that: “The presiding officer may deem the failure to brief any claim to be a waiver of such claim.” The assistant attorney general’s material misrepresentation of the holding in *Almada* is found to constitute a failure to brief the claim and is deemed a waiver of the respondents’ claim that emotional distress damages for the investigatory incidents are barred.

Second, notwithstanding the waiver, the plain language of the Workers’ Compensation Act itself does not bar Dr. Saeedi’s claim for emotional distress damages. General Statutes § 31-275 (16) provides in relevant part that: “(B) ‘Personal injury’ or ‘injury’ shall *not* be construed to include . . . (iii) A mental or emotional impairment that results from a personnel action, including, but not limited to, a transfer, promotion, demotion or termination; . . . .” (Emphasis added.) As Dr. Saeedi’s claim for emotional distress damages arise from personnel actions taken against him in retaliation for his whistleblowing, his emotional distress claim is not within the statutory definition of ‘personal injury’ and is not prohibited by the Workers’ Compensation Act.

Third, Dr. Saeedi’s emotional distress arises from numerous acts of retaliation in addition to the cardiac event.

The respondents also claim emotional distress damages should not be awarded for the investigations into the Melluzzo and Peabody matters because DMHAS was required to investigate the complaints. To the extent that these investigations factor into the emotional distress award, damages are being awarded not for the investigations themselves but for the retaliatory processes and behavior exhibited during the

investigations. As set forth, supra, the investigations were initiated for retaliatory purposes, the choices of disciplinary action were retaliatory (suspensions rather than counseling or warning), there were notable inconsistencies in the allegations, Dr. Saeedi was repeatedly not informed of the exact charges against him or how his conduct violated the work rules, and he was not provided with timely notice of meetings or time to prepare defenses to the charges.

2

The award for emotional distress damages must be limited to compensatory rather than punitive amounts. *Chestnut Realty, Inc. v. Commission on Human Rights & Opportunities*, 201 Conn. 350, 366 (1986). “That such compensatory damages may be incapable of precise mathematical computation and necessarily uncertain does not, however, prevent them from being awarded. ‘That damages may be difficult to assess is, in itself, insufficient reason for refusing them once the right to damages has been established.’ *Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 420 (1982).” *Commission on Human Rights & Opportunities ex rel. Cohen v. Menillo*, CHRO Case No. 9420047, Memorandum of Decision, 12-13 (June 21, 1995).

The criteria to be considered for awarding an emotional distress award are: (1) most importantly, the subjective internal emotional reaction of the complainant to the retaliatory experience which he has undergone; (2) whether the retaliatory personnel actions occurred in front of other people; (3) the degree of offensiveness of the retaliatory acts and (4) the impact on the complainant. *Commission on Human Rights &*

Opportunities ex rel. Harrison vs. Greco, CHRO Case No. 7930433, Memorandum of decision, 15, (June 3, 1985) cited with approval in *Commission on Human Rights & Opportunities ex rel. Peoples v. Belinski*, Superior Court, judicial district of Stamford-Norwalk at Norwalk, Docket No. CVN-08806-1209 (November 8, 1988) (1988 WL 492460, 6 – 7).

3

In this case, Dr. Saeedi experienced a serious internal emotional reaction to the retaliatory actions; the retaliatory actions occurred in front of other people; the retaliatory acts were highly offensive; and the retaliatory acts had a severe impact on him.

a

Dr. Saeedi's subjective internal emotional reaction can best be summed up by his comment to his wife from his hospital bed in August 2008: "Sue, they're trying to kill me." Tr. 1053; FF 247. Based on the conduct of the respondents, it was not an unreasonable observation.

The respondents actively sought out people to file work rule violation complaints against Dr. Saeedi. FF 61, 62, 191. They prosecuted him for alleged conduct that they knew other employees engaged in without punishment. FF 85. Despite knowing he had a defibrillator and the consequences to his health, they sought to reassign him to a building that would require him to walk through a metal detector. FF 89. Despite knowledge of his cardiac condition, they gave him a winter coverage schedule that forced him to go outside several times each day. FF 17, 109, 110. During the

disciplinary process, they refused to provide him with any description of how his conduct violated work rules and did not provide him with adequate time or information to prepare a defense. Despite having left the investigative interview by ambulance and having provided a doctor's note, Dr. Saeedi was harassed to provide a family medical leave form before the interview could be rescheduled. FF 137, 138, 141, 152, 144, 145, 147-149, 162, 164, 175-181, 212, 215, 231, 232, 235, 236, 238, 242-245, 249-251, 265.

Dr. Saeedi was very disturbed and bothered when, in August 2007, a nurse was instructed by Ms. Distiso, at Ms. Forgit's direction, to file a complaint against Dr. Saeedi. FF 61-63. As a result of Ms. Forgit insisting, in September 2007, that Dr. Saeedi give Dr. Sonido a higher performance rating that Dr. Sonido deserved, Dr. Saeedi believed he was being exploited. He came home less calm and peaceful than he had been and became more preoccupied and distant. FF 34-37. He was very disappointed that he received a performance rating for 2006-2007 that did not reflect the quality of his work and was lower than the performance rating he had received in his 2005-2008 appraisal. FF 65, 68. He was very fearful about his health and the impact on his defibrillator when, in September 2007, Ms. Forgit attempted to reassign him to Whiting Hall. FF 89-91.

Dr. Saeedi's had further concerns about his health in December 2007. As a result of being assigned to cover for all the clinicians in December 2007, Dr. Saeedi was travelling between buildings several times a day. To do this, he had to clear snow from his car. Because of his cardiac condition, he was concerned about another heart attack from breathing in the cold air. FF 109.

During the May 8, 2008 meetings, Dr. Saeedi was visibly unnerved and upset. FF 154. When he arrived home that night, his face was pale and blank. He was despondent, crushed, confused, dismayed, very distraught and visibly shaken by the accusations. FF 158. As a result of the false accusations alleged in the work rule violations, he felt he was being treated like a criminal. FF 159.

During his family vacation in May 2008, he was distant, anxious and quiet. FF 168. He returned home still nervous, perplexed and distraught over the allegations. FF 169. He was concerned upon his return to work in June 2008 when Ms. Forgit, who a month earlier had accused him of sexual harassment, wanted to reassign him to an all-female unit. FF 172.

Dr. Saeedi was stunned and beside himself when, on August 4, 2008, Ms. Forgit and Ms. Larouchelle served him with notifications of alleged work rule violations. FF 217. He was upset at the disrespectful treatment shown to him by Mr. Mims when he sought a brief delay in the resumption of his investigative interview following his August 11, 2008 cardiac event. FF 250-253.

When, on September 19, 2008, Dr. Saeedi saw the unsatisfactory personnel appraisal he felt awful and very hurt. He believed that he had received a slap in the face from his supervisors not because of legitimate concerns about his medical care of patients but rather because he had reported a doctor who was doing negligent work. FF 295. Because two successive unsatisfactory performance ratings constitute just cause for termination, he was very disturbed and fearful about losing his job. FF 296.

b

The respondents' retaliatory conduct was public. They co-opted other employees to monitor Dr. Saeedi in hopes he would make a mistake; FF 41; and actively solicited, if not compelled, other employees to file work rule violations against him; FF 61, 62, 114, 190, 191. Employees other than the respondents were brought into meetings to discuss Dr. Saeedi. FF 93, 140. Dr. Saeedi's reassignments to other buildings were evident to other staff. FF 173, R-4.

c

The respondents' conduct was highly offensive. It is important to remember that Dr. Saeedi's whistleblowing was not about some actuarial dispute, but involved legitimate and documented concerns about poor medical treatment being given to a vulnerable population of society in DMHAS' care. FF 26, 29-32, 37-40, 42-48, 50, 51, 53, 55. Further, Dr. Saeedi was a respected member of the medical community who had given a considerable amount of his time and energy to CVH. FF 19-22. Prior to his whistleblowing, Dr. Saeedi had never been disciplined or accused of misconduct. FF 56. Also, Ms. Forgit was aware of Dr. Saeedi's medical condition. FF 17.

After Dr. Saeedi's whistleblowing, the respondents, other than asking Dr. Saeedi to increase Dr. Sonido's performance rating, did nothing about Dr. Sonido. FF 31, 34, 35, 48, 52, 54. Rather, they removed Dr. Saeedi from supervising Dr. Sonido; FF 49; and engaged in a year-long course of unremitting retaliatory personnel actions against Dr. Saeedi. Staff were instructed to monitor Dr. Saeedi and were recruited to file work

rule violations against him. FF 41, 62, 114-15, 190-191. His 2006-2007 performance appraisal was downgraded from ratings he had received in his 2005-2006 appraisal and did not accurately reflect the work he had done. FF 64, 65.

The respondents misused state policy against Dr. Saeedi and refused to apply it against other employees. Three years after Ms. Forgit assigned Dr. Saeedi to Merritt Hall, she charged him with violating policy statement 48 because he and his sister worked in the same unit. At the time of Dr. Saeedi's assignment, Ms. Forgit and DMHAS' human resource department had been aware that Dr. Saeedi's sister worked in the same unit. This did not become an issue until after Dr. Saeedi had expressed his concerns about Dr. Sonido. FF 75-77, 81, 94. The respondent not only attempted to mis-apply policy statement 48 to Dr. Saeedi's situation but refused to apply it to other employees whose relationships were known to violate the policy. FF 79, 84-86, 95, 96.

The respondents made numerous attempts to exacerbate Dr. Saeedi's health issues. Despite knowing of Dr. Saeedi's defibrillator, the respondents inexplicably proposed to assign Dr. Saeedi to Whiting Hall, where he would have had to walk through a metal detector on a daily basis that might cause the defibrillator to shock prematurely or to reprogram the defibrillator in a way that it would not operate properly when needed. FF 17, 89-91. Dr. Saeedi was assigned to cover for every clinician in ambulatory care services when they were absent. This required him to move between buildings, and to clear his car of snow several times a day. He was concerned about another heart attack from breathing in the cold air. FF 10, 109. Despite having seen Dr.

Saeedi leave the August 11, 2008 investigative interview by ambulance, Mr. Mims harassed Dr. Saeedi over rescheduling the interview. FF 250-252.

Although Dr. Saeedi had no prior disciplinary action or charges of misconduct against him, he was not afforded the benefit of DMHAS' progressive disciplinary policy. FF 56, 118-120, 184. Despite having never been told or counseled that his interaction with Ms. Melluzzo made her uncomfortable, he received a five-day suspension. FF 133-135, 182. Despite having resolved his misunderstanding with Ms. Peabody to her satisfaction, he received a ten-day suspension. FF 186-189, 269. Although the five-day suspension was still in the grievance process, it was improperly considered and used as a basis for imposing a ten-day suspension. FF 257, 264.

The respondents filed complaints against Dr. Saeedi containing false accusations. The first set of work rule violations that Dr. Saeedi received on May 8, 2008 contained allegations that were false and unsupported by the underlying complaint on which they were based. FF 145, 162. Dr. Saeedi was falsely accused of improperly leaving his work-site to attend a meeting at the office of labor relations. FF 197, 206. He was falsely accused of entering Dutcher Hall after having been told not to enter that building. FF 174, 207, 224.

The disciplinary processes themselves were offensive procedures in which Dr. Saeedi and the union delegates were denied basic information on the charges against Dr. Saeedi, a clear description of his conduct and the opportunity to prepare a defense. FF 141-144, 178-181, 212-216, 223, 242. Although the ostensible reason for the

cancellation of the July 22, 2008 meeting at the office of labor relations was because of Ms. Forgit's unavailability, she also failed to attend the rescheduled meeting. FF 196, 199.

d

The retaliatory actions had a severe impact on Dr. Saeedi. Prior to the summer of 2007, Dr. Saeedi and his wife had led a very joyful and busy life. They did not miss any family events. FF 309. From the summer of 2007 through September 2008, however, Dr. Saeedi was physically and emotionally exhausted. Because of the respondents' adverse personnel actions, Dr. Saeedi paced the house with high anxiety, talking to himself, acting very different from the happy-go-lucky person he had been. The joy in his family life had diminished, nothing was pleasurable anymore. He was very preoccupied, fatigued, and no longer reviewing his medical journals for pleasure as he had previously. He was more solemn. He showed no interest in his wife's activities. He would discuss the problems arising at work. Pleasant discussion at dinnertime ceased. FF 310.

From the summer of 2007 through September 2008, Dr. Saeedi's social schedule also changed because of the respondents' adverse personnel actions. He and his wife did not celebrate the Iranian New Year. They did not attend Iranian New Year celebrations at the University of Connecticut. They did not get together with family or friends despite social obligations. They did not attend parties. They did not prepare special meals. Dr. Saeedi was emotionally drained, exhausted and frustrated. FF 311.

After Ms. Forgit directed Dr. Saeedi to increase Dr. Sonido's performance rating in September 2007, he came home less calm and peaceful and became more preoccupied and distant. FF 36. Also in September 2007, during the period when the respondents were attempting to reassign Dr. Saeedi to Whiting Hall, he was expressing a lot of frustration at home. He and his wife discussed every night what was going on at work. FF 99.

After Dr. Saeedi received notice of the work rule violations and his placement on administrative leave on May 8, 2008, he experienced chest pains, his heart was racing and he used the nitroglycerin spray that he carries with him. FF 156. He was unable to eat supper that evening. That night, he did not sleep; he just lay in bed. FF 160.

The allegations of May 8, 2008, significantly impacted Dr. Saeedi while he was on his family vacation celebrating his brother's seventieth birthday. He had sleepless nights and he was preoccupied. He again experienced chest pains and a racing heart and used his nitroglycerin spray. FF 167. He was not his usual jovial, talkative self. He was very distant, anxious and quiet. Despite having been looking forward to going to St. Peter's Basilica, he excused himself and sat in the rotunda, forlorn, in despair, by himself. He would pace. FF 168.

On return from vacation, Dr. Saeedi thought that he had to be available in case he was called, so he did not leave the house. He withdrew from friends and family. Although he had rarely used the living room, he went off by himself into that room. He would tell his wife to turn the radio off and he would not talk to anybody. He would not

go for a walk around the neighborhood for fear he might miss a telephone call from work. He was visibly nervous and burdened by what was occurring. He was perplexed, distraught and anxiety-filled. FF 169.

During the August 11, 2008 questioning by Mr. Mims, Dr. Saeedi was very distraught and upset. The interview was recessed when Dr. Saeedi suffered a cardiac event. He began experiencing chest pain, neck tightness, shoulder pain and shortness of breath. He twice used his nitroglycerin spray, but the symptoms did not go away. Dr. Timmerman announced a medical emergency and an ambulance was called to take Dr. Saeedi to a hospital. By the time the ambulance arrived, Dr. Saeedi had used his nitroglycerin spray four times, the symptoms had not gone away, and he was concerned that he was having a heart attack or congestive heart failure. FF 246. At the hospital, Dr. Saeedi was given a blood thinner and underwent blood tests, an electrocardiogram and other tests. FF 248. There is a reasonable medical probability that the cardiac event that led to Dr. Saeedi's admission to the hospital on August 11, 2008 was caused by an emotional stimuli due to a stressful meeting at work that led to an episode of chest discomfort. FF 304-308.

Dr. Saeedi next experienced chest pain in February 2009 when he went to a hearing at the office of labor relations. Prior to the commencement of the hearing, Dr. Saeedi was served with another set of alleged work rule violations. The date assigned for the hearing was a date that Ms. Forgit knew would be a date that Dr. Saeedi's union delegate would be out of town. Dr. Saeedi was very upset, began experiencing anxiety

and emotional distress and began experiencing chest pain. FF 297, 298. This is not a claim in this proceeding; Tr. 523-531; and damages are not being awarded for this incident. Rather, this incident is further indication that there is a reasonable medical probability that Dr. Saeedi's cardiac event on August 11, 2008 was caused by emotional stimuli resulting from the stressful investigative interview. FF 304.

Dr. Saeedi is not seeking damages subsequent to the September 19, 2008 discussion of the September 2007 – September 2008 personnel appraisal. Tr. 233-34.

e

Applying the criteria for determining emotional distress damages to the facts of this case, Dr. Saeedi is awarded $40,000.

C

Attorney fees and costs

1

Dr. Saeedi seeks attorneys' fees in the amount of $132,927.73. The respondents argue, incorrectly, that General Statutes § 4-184a limits an award of attorney fees to $7,500. Respondents' objection to complainant's petition for attorneys' fees, pp. 10-11. Section 4-184a provides that:

> (a) For the purposes of *this section*:
> (1) "Person" means a person as defined in section 4-166, but excludes (A) an individual with a net worth in excess of five hundred thousand dollars, (B) a business whose gross revenues for the most recently completed fiscal year exceeded one million five hundred thousand dollars, (C) a business with more than

twenty-five employees and (D) an agency as defined in section 4-166

(2) "Reasonable fees and expenses" means any expenses not in excess of seven thousand five hundred dollars which the court finds were reasonably incurred in opposing the agency action, including court costs, expenses incurred in administrative proceedings, attorney's fees, witness fees of all necessary witnesses, and such other expenses as were reasonably incurred.

(b) *In any appeal by an aggrieved person of an agency decision taken in accordance with section 4-183 and in any appeal of the final judgment of the Superior Court under said section taken in accordance with section 51-197b*, the *court* may, in its discretion, award to the prevailing party, other than the agency, reasonable fees and expenses in addition to other costs if such prevailing party files a request for an award of reasonable fees and expenses within thirty days of the issuance of the court's decision and the court determines that the action of the agency was undertaken without any substantial justification.

Emphasis added.

Section 4-184a is inapplicable to the bulk of Dr. Saeedi's petition for attorney fees for at least two reasons. First, by the clear and unambiguous terms of the statute itself, § 4-184a applies only to awards by the Superior Court for attorney fees when an appeal is taken in accordance with § 4-183 or § 51-197b. Most of the attorneys' fees being sought here were not the result of an appeal to the superior court under § 4-183 or § 51-197b. Rather, most of the attorneys' fees being sought here result from an administrative proceeding in the Executive Department taken in accordance with § 4-61dd, and the award of attorney fees is not being made by a superior court but by a human rights referee in accordance with § 4-61dd (b) (3) (A).

Second, if the legislature had intended § 4-184a to apply to § 4-61dd proceedings, the legislature would have expressly referenced that section. For example, in § 4-61dd (a), the legislature expressly references General Statute § 1-120 in defining "quasi-public agency". Similarly, in § 4-61dd (b) (1), the legislature expressly references General Statutes § 4-141 in defining state officer and employee. As the legislature did not specifically reference § 4-184a in § 4-61dd, and did not specifically reference § 4-61dd in § 4-184a, there is no basis for imputing the limits on attorney fees in § 4-184a to § 4-61dd.

2

When determining reasonable attorney fees,

> the initial estimate of a reasonable attorney's fee is properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate. . . . The courts may then adjust this lodestar calculation by other factors. . . . For guidance in adjusting attorney's fees, Connecticut courts have adopted the twelve factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714, 717-19 (5th Cir. 1974). The *Johnson* factors are (1) the time and labor required, (2) the novelty and difficulty of the questions, (3) the skill requisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee for similar work in the community, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional relationship with the client, and (12) awards in similar cases . . . .[FN3]
>
> > FN3. We note, however, that the "list of factors is not . . . exclusive. The court may assess the reasonableness of the fees requested using any number of factors . . . .

(Citations and internal quotation marks omitted.) *Ernst v. Deere and Co., 92* Conn. App. 572, 576 (2005).

3

The written fixed fee agreement between Dr. Saeedi and the law firm of Beck & Eldergill provides that Dr. Saeedi would be charged an hourly rate of $350, or at the rate of the attorney actually providing the services, whichever was less. Attorney Eldergill expended 386.8 hours and charged an hourly fee of $350. Attorney Angliss expended 5.6 hours and charged an hourly fee of $175. After the application of courtesy discounts and services at no charge, Dr. Saeedi was billed $131,720. For the reasons set forth, the fees are reduced in the amounts of $7,420 for fees attributable to Dr. Saeedi's defense against the respondents' interlocutory appeal and $945 for fees attributable to Dr. Buss in her previous status as a named respondent. Dr. Saeedi is awarded attorneys' fees of $123,355.

In support of the petition for attorneys' fees and costs, Dr. Saeedi's counsel submitted affidavits of their experience and qualifications, a copy of the fixed hourly fee agreement, a detailed electronically generated bill record showing contemporaneous time entries, an itemized bill of costs, an affidavit attesting to the customary fee for similar work in the community and a memorandum of law in support of the petition. Complainant's petition for attorneys' fees and costs. The respondents are not challenging Attorney Eldergill's expertise as an employment lawyer and are not challenging her hourly rate. Tr. 1606-07.

The description of services rendered and time spent, as reflected in the billing record, are reasonable and appropriate given this case's procedural history, the motions filed and the legal issues raised. Dr. Saeedi's counsel successfully presented persuasive evidence as to the respondents' motivation, a difficult hurdle for a complainant, as well as successfully argued both for the application of the continuing course of conduct doctrine and a reconsideration of the referees' interpretation of the impact of grievances on whistleblower retaliation complaints. Dr. Saeedi was also successful in obtaining the results he sought.

4

While the majority of the requested attorneys' fees is for work in connection with Dr. Saeedi's § 4-61dd complaint before this tribunal, in his attorney's affidavit is 18.5 hours of work incurred in the respondents' interlocutory appeal brought pursuant to § 4-183.[5] Pursuant to statute, § 4-184a (b), Dr. Saeedi should have sought an award of reasonable fees and expenses from the superior court within thirty days of the court's decision dismissing the respondents' interlocutory appeal. At the hourly rate of $350 for 18.5 hours, the reduction is $7,420.

In his complaint, Dr. Saeedi had named Dr. Buss as a respondent. He subsequently withdrew his complaint as to her. Therefore, the requested fees are reduced in the amount of $945 for work (2.7 hours at $350 per hour) attributed to Dr. Buss in her status as a named respondent.[6] Given Dr. Buss' role as Dr. Saeedi's supervisor for medical affairs, her participation in his personnel appraisals and her

involvement in work rule violation complaints against him, there is no reduction for fees incurred, if any, for work arising from Dr. Buss' involvement in the incidents in this complaint.

5

Dr. Saeedi also seeks $1,207.73 in costs of suit for fees charged by a private investigator and by Dr. Gallo, for copies of documents, for service of subpoenas and for witness fees. Tr. 1613-17, 1639-32; Complainant's petition for attorneys' fees, exhibit 4. Dr. Saeedi is awarded $410.25 for reimbursement of the service of the subpoenas ($310.25) and witness fees ($100). No award is made for the private investigator as the investigator was not called in Dr. Saeedi's case in chief and the objection to calling him on rebuttal was sustained. The investigator's report, though proffered, was not admitted as an exhibit. The expense for copies was withdrawn. The request for subpoenas is reduced for the witnesses who were subpoenaed but not called. The claim for Dr. Gallo's bill is discounted as there was no evidence as to how Dr. Gallo calculated his fee.

D

Lost benefits

Article 23, section 8, of the collective bargaining agreement provides, in part, that an employee placed on leave without pay in excess of five working days in a calendar month shall not be credited for length of service and shall not earn vacation or sick leave for that month. C-27, p. 67. In this case, Dr. Saeedi was placed on two unpaid

suspensions, one for five days and one for ten days. As these suspensions were retaliatory, DMHAS shall credit the complainant for any credited length of service, vacation or sick leave he lost as a result of the suspensions.

E

September 2008 performance appraisal

The respondents shall issue Dr. Saeedi a revised performance appraisal for the September 2007 to September 2008 period as follows. The revised appraisal shall omit references to the five-day and ten-day suspensions. The service ratings in the revised appraisal shall be the same as in R-20 except for the category of "Judgment" which shall be revised to a score of "4" for each of the three competencies. The determination that "4" reflects a score commensurate with Dr. Saeedi's actual performance is based upon his receiving a "5" in this category and these competencies in his September 2005 – September 2006 performance appraisal; C-20; a "4" in this category and these competencies in his September 2006 – September 2007 performance appraisal; C-16; and the ratings of "satisfactory" (the highest rating available) in Dr. Buss' August 4, 2008 evaluation; R-22.

In addition, the revised performance appraisal shall give Dr. Saeedi an overall performance rating of 4.375 (excellent). This overall performance rating is based on averaging the ratings Dr. Saeedi received in his job elements, as revised by the increase in the "Judgment" rating.

F

Dr. Saeedi is awarded $12,000 in salary and wages lost as a result of the five- and ten-day unpaid suspensions. FF 299.

G

Pre- and post-judgment interest

"Generally, in civil cases, the award of interest, and the method of its calculation, are within the discretion of the factfinder. . . . This is particularly true in cases of employment discrimination. Prejudgment interest . . . is an element of complete compensation. . . . Interest rate calculations are not specified by federal employment laws but are set by the court, and courts have the discretion to choose a prejudgment interest calculation date best suited to make a victim whole." *Silhouette Optical Ltd. v. Commission on Human Rights & Opportunities*, 10 Conn. L. Rptr. No. 19, 599604 (February 28, 1994).

The respondents shall pay Dr. Saeedi prejudgment interest on the award of $12,000 at the compounded rate of 10% per annum from November 1, 2008 to December 1, 2010 in the amount of $2,641 calculated as follows:

<u>Prejudgment interest on November 1, 2008 – October 31, 2008 salary loss - $12,000</u>

a/o 11/01/09 $12,000 x 10% = $1,200

a/o 11/01/10 $12,000 + $1,200 = $13,200

$13,200 x 10% = $1,320

a/o 12/01/10 $13,200 + $1,320 = $14,520.

$14,520 x 10% x 1/12 = $ 121

Prejudgment interest total: $2,641

The respondents shall pay the complainant post-judgment interest at the compounded rate of 10% per annum on the monetary award of $177,917.98 ($12,000 in lost salary resulting from two unpaid suspensions; $40,000 in emotional distress damages; $123,355 in attorneys' fees and $410.25 in costs).

H

The respondents shall restore to Dr. Saeedi any vacation or personal leave time he may have used to attend any proceeding before a human rights referee or a judge arising from his whistleblower complaint, and from the respondents' interlocutory appeal and their petition for declaratory judgment.

Conclusion of law

1. A complainant is not precluded from pursuing both his whistleblower retaliation complaint and his grievance, provided that the grievance does not also allege that the personnel action was in retaliation for whistleblowing. The human rights referees retain subject matter jurisdiction of a whistleblower retaliation complaint even if a grievance filed pursuant to a collective bargaining agreement alleges that the personnel action which is the subject of the whistleblower retaliation complaint also violated the terms of the collective bargaining agreement,

provided that the grievance does not also allege that the personnel action was in retaliation for whistleblowing.

2. The doctrine of "continuing course of conduct" applies to a complaint filed with the chief human rights referee pursuant to § 4-61dd (b) (3) (A) to toll the thirty-day statute of limitations. The statute does not begin to run until the course of conduct is completed. Nevertheless, the complaint must be filed with the chief human rights referee within thirty days after a complainant learns of a specific incident giving rise to a claim that a retaliatory personnel action has been threatened or has occurred. As provided by the continuing course of conduct doctrine, the complainant may collect damages that flow from a respondent's initial retaliatory conduct as well as those that flow from a respondent's continuing retaliatory conduct.
3. The anti-retaliatory provision of § 4-61dd is not limited to actions that affect the terms and conditions of employment. The anti-retaliatory provisions of § 4-61dd are broader in scope and provide protection from a greater degree of harms than the substantive anti-discrimination provisions of Title VII and the Connecticut Fair Employment Practices Act.
4. Dr. Saeedi established by a preponderance of evidence that the respondents violated General Statute § 4-61dd.

Order

1. The respondents shall pay to Dr. Saeedi $12,000 in reimbursement due to salary and wages lost as a result of the unpaid suspensions.
2. The respondents shall pay to Dr. Saeedi $40,000 in emotional distress damages.
3. The respondents shall pay to Dr. Saeedi $123,355 in attorneys' fees and $410.25 in costs.
4. The respondents shall issue Dr. Saeedi a revised performance appraisal for the September 2007 to September 2008 period omitting references to the five-day and ten-day suspensions, retaining the same scores as in R-20 except for the category of "Judgment", increasing the scores in the "Judgment" competencies and the "Judgment" category to a score of "4"; and giving Dr. Saeedi an overall performance rating of 4.375 (excellent).
5. The respondents shall not consider the suspensions or the administrative leave when considering future personnel action involving Dr. Saeedi, including, but not limited to, demotion, dismissal, disciplinary action, promotion, performance appraisals, building assignments or annual salary increase.

6. The respondents shall purge all references to the suspensions and the administrative leave from Dr. Saeedi's official personnel file and any unofficial personnel files.
7. The respondents shall not consider the September 2008 overall rating of "unsatisfactory" when considering future personnel action involving Dr. Saeedi, including, but not limited to, demotion, dismissal, disciplinary action, promotion, performance appraisals, building assignments or annual salary increase.
8. DMHAS shall credit the complainant for any credited length of service, vacation or sick leave lost as a result of the suspensions.
9. The respondents still employed by DMHAS shall within nine months of this decision receive training at DMHAS' expense in professional ethics.
10. The respondents shall not threaten or undertake any adverse action against any person who participated as a witness in the hearing.
11. The respondents shall restore to Dr. Saeedi any vacation or personal leave time he may have used to attend any proceeding before a human rights referee or a judge arising from his whistleblower complaint, and from the respondents' interlocutory appeal and the petition for declaratory judgment.
12. The respondents shall pay Dr. Saeedi prejudgment interest on the award of $12,000 at the compounded rate of 10% per annum from November 1, 2008 to December 1, 2010 in the amount of $2,641.

13. The respondents shall pay the complainant post-judgment interest at the compounded rate of 10% per annum on the monetary award of $177,917.98.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mehdi Saeedi, M.D., certified mail, return receipt requested
Kathleen Eldergill, Esq.
Ann Smith, Esq., certified mail, return receipt requested
Nancy Brouillet, Esq., certified mail, return receipt requested

[1] General Statute § 4-61dd provides:

> (a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation. The Attorney General shall have power to summon witnesses, require the production of any necessary books, papers or

other documents and administer oaths to witnesses, where necessary, for the purpose of an investigation pursuant to this section. Upon the conclusion of the investigation, the Attorney General shall where necessary, report any findings to the Governor, or in matters involving criminal activity, to the Chief State's Attorney. In addition to the exempt records provision of section 1-210, the Auditors of Public Accounts and the Attorney General shall not, after receipt of any information from a person under the provisions of this section, disclose the identity of such person without such person's consent unless the Auditors of Public Accounts or the Attorney General determines that such disclosure is unavoidable, and may withhold records of such investigation, during the pendency of the investigation.

(b) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for such employee's or contractor's disclosure of information to (A) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (B) an employee of the state agency or quasi-public agency where such state officer or employee is employed; (C) an employee of a state agency pursuant to a mandated reporter statute; or (D) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract.

(2) If a state or quasi-public agency employee or an employee of a large state contractor alleges that a personnel action has been threatened or taken in violation of subdivision (1) of this subsection, the employee may notify the Attorney General, who shall investigate pursuant to subsection (a) of this section.

(3) (A) 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 in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section. If the human rights referee finds such a

violation, the referee may award the aggrieved employee reinstatement to the employee's former position, back pay and reestablishment of any employee benefits for which the employee would otherwise have been eligible if such violation had not occurred, reasonable attorneys' fees, and any other damages. For the purposes of this subsection, such human rights referee shall act as an independent hearing officer. The decision of a human rights referee under this subsection may be appealed by any person who was a party at such hearing, in accordance with the provisions of section 4-183.

(B) The Chief Human Rights Referee shall adopt regulations, in accordance with the provisions of chapter 54, establishing the procedure for filing complaints and noticing and conducting hearings under subparagraph (A) of this subdivision.

(4) As an alternative to the provisions of subdivisions (2) and (3) of this subsection: (A) A state or quasi-public agency employee who alleges that a personnel action has been threatened or taken may file an appeal not later than thirty days after learning of the specific incident giving rise to such claim with the Employees' Review Board under section 5-202, or, in the case of a state or quasi-public agency employee covered by a collective bargaining contract, in accordance with the procedure provided by such contract; or (B) an employee of a large state contractor alleging that such action has been threatened or taken may, after exhausting all available administrative remedies, bring a civil action in accordance with the provisions of subsection (c) of section 31-51m.

(5) In any proceeding under subdivision (2), (3) or (4) of this subsection concerning a personnel action taken or threatened against any state or quasi-public agency employee or any employee of a large state contractor, which personnel action occurs not later than one year after the employee first transmits facts and information concerning a matter under subsection (a) of this section to the Auditors of Public Accounts or the Attorney General, there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section.

(6) If a state officer or employee, as defined in section 4-141, a quasi-public agency officer or employee, an officer or employee of a large state contractor or an appointing authority takes or threatens to take any action to impede, fail to renew or cancel a contract between a state agency and a large state contractor, or between a large state contractor and its subcontractor, in retaliation for the disclosure of information pursuant to subsection (a) of this section to any agency listed in subdivision (1) of this subsection, such affected agency, contractor or

subcontractor may, not later than ninety days after learning of such action, threat or failure to renew, bring a civil action in the superior court for the judicial district of Hartford to recover damages, attorney's fees and costs.

(c) Any employee of a state or quasi-public agency or large state contractor, who is found to have knowingly and maliciously made false charges under subsection (a) of this section, shall be subject to disciplinary action by such employee's appointing authority up to and including dismissal. In the case of a state or quasi-public agency employee, such action shall be subject to appeal to the Employees' Review Board in accordance with section 5-202, or in the case of state or quasi-public agency employees included in collective bargaining contracts, the procedure provided by such contracts.

(d) On or before September first, annually, the Auditors of Public Accounts shall submit to the clerk of each house of the General Assembly a report indicating the number of matters for which facts and information were transmitted to the auditors pursuant to this section during the preceding state fiscal year and the disposition of each such matter.

(e) Each contract between a state or quasi-public agency and a large state contractor shall provide that, if an officer, employee or appointing authority of a large state contractor takes or threatens to take any personnel action against any employee of the contractor in retaliation for such employee's disclosure of information to any employee of the contracting state or quasi-public agency or the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section, the contractor shall be liable for a civil penalty of not more than five thousand dollars for each offense, up to a maximum of twenty per cent of the value of the contract. Each violation shall be a separate and distinct offense and in the case of a continuing violation each calendar day's continuance of the violation shall be deemed to be a separate and distinct offense. The executive head of the state or quasi-public agency may request the Attorney General to bring a civil action in the superior court for the judicial district of Hartford to seek imposition and recovery of such civil penalty.

(f) Each large state contractor shall post a notice of the provisions of this section relating to large state contractors in a conspicuous place which is readily available for viewing by the employees of the contractor.

(g) No person who, in good faith, discloses information to the Auditors of

Public Accounts or the Attorney General in accordance with this section shall be liable for any civil damages resulting from such good faith disclosure.

(h) As used in this section:

(1) "Large state contract" means a contract between an entity and a state or quasi-public agency, having a value of five million dollars or more; and

(2) "Large state contractor" means an entity that has entered into a large state contract with a state or quasi-public agency.

[2] References to an exhibit are by party designation and number. The complainant's exhibits are denoted as "C" followed by the exhibit number, and the respondents' exhibits are denoted as "R" followed by the exhibit number. Those exhibits that were proffered by both the complainant and the respondents may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number.

[3] A complainant's burden in the *McDonnell Douglas* third burden-shifting step has often been described as requiring the complainant to establish that the respondents' explanation is a pretext for discrimination or retaliation. As the Second Circuit recently made clear, because a complainant is not required to prove that the respondents' explanation for its decision is false, the use of the word "pretext" is a confusing and inaccurate description of a complainant's burden:

> [W]e think it is unwise for a court to charge the jury that a plaintiff must prove that the employer's explanation of an adverse action was a "pretext." Such an instruction has a likelihood of confusing the jury and adding inappropriately to the plaintiff's burden. At least some of the most prominent dictionary definitions of "pretext" and of "pretend," from which it derives, include the intent to deceive. [FN4]
>
> > FN4. For example, Webster's Third New International Dictionary (1976 ed.) offers the following definitions: "Pretext: a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs." "Pretend: ... 2a: to make believe; feign, sham. b: to hold out, represent or assert falsely: ... show hypocritically or deceitfully."

A jury instructed that the plaintiff must prove that the employer's explanation is a “pretext” is likely to understand that the plaintiff must prove that the employee offered the explanation with a conscious intention of deceiving by concealing its discrimination. This is especially so when, as in the present case, the court associates the word “pretext” with “coverup.”

In proving a case under Title VII, following the defendant's proffer of a justification, a plaintiff need only show that the defendant was in fact motivated at least in part by the prohibited discriminatory animus. *Gordon,* 232 F.3d at 117 (holding that defendant can prevail “by proving that a discriminatory motive, more likely than not, motivated the defendants” (internal quotation marks omitted)). *See also* *Aulicino v. New York City Dep't of Homeless Servs.,* 580 F.3d 73, 80 (2d Cir. 2009) (explaining that to prevail, plaintiff must prove “that the defendant's employment decision was more likely than not based in whole or in part on discrimination” (internal quotation marks omitted)); *James v. New York Racing Ass'n,* 233 F.3d 149, 154 (2d Cir. 2000) (explaining that defendant entitled to prevail “unless the plaintiff can point to evidence that reasonably supports a finding of prohibited discrimination”). A plaintiff has no obligation to prove that the employer's innocent explanation is dishonest, in the sense of intentionally furnishing a justification known to be false.[FN5]

FN5. We previously addressed this point in *Fields v. New York State Office of Mental Retardation & Developmental Disabilities,* 115 F.3d 116 (2d Cir. 1997), where we wrote:
Though there are sentences in some opinions to the effect that a Title VII plaintiff must prove “ *both* that the [defendant's proffered] reason was false, and that discrimination was the real reason,” these decisions do not require a finding of pretext in addition to a finding of discrimination; they make the quite different point that a Title VII plaintiff may not prevail by establishing only pretext, but must prove, in addition, that a motivating reason was discrimination. But though a plaintiff may not prevail only by showing that a proffered explanation is a pretext, it is not required to make such a showing. Since a plaintiff prevails by showing that discrimination was a motivating factor, it can invite the jury to ignore the defendant's proffered legitimate explanation and conclude that discrimination was a motivating factor, whether or not the employer's proffered explanation was also in the employer's mind.

Id. at 121 (quoting *St. Mary's,* 509 U.S. at 515) (citations omitted).

> Notwithstanding our admonition in *Fields,* district courts in the intervening years have continued to instruct juries that pretext is, in effect, a required element of plaintiff's claim which must be proved by a preponderance of the evidence. Plaintiff has *no such burden;* in all cases, plaintiff sustains his burden if he proves that an adverse employment decision was motivated by discrimination, regardless of whether he is able to additionally show that the employer's asserted justification for the decision was "pretextual."

The crucial element of a claim under Title VII is discrimination, not dishonesty.

We recognize that courts often speak of the obligation on the plaintiff to prove that the employer's explanation is a "pretext for discrimination." We believe this is either a shorthand for the more complex concept that, regardless of whether the employer's explanation also furnished part of the reason for the adverse action, the adverse action was motivated in part by discrimination, or a misunderstanding of dicta in Supreme Court opinions. In *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), the Court stated in dicta that, "should the defendant carry [its] burden [of furnishing a non-discriminatory reason for its adverse action], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* at 253. The Court revisited this statement in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). The Court held in *St. Mary's* that a factfinder's rejection of an employer's asserted justification for an action did not, standing alone, entitle the plaintiff to judgment as a matter of law. The majority and the dissenting justices disagreed over the proper significance under the *Burdine* dictum of jury rejection of the employer's asserted justification for its actions. The dissenting justices construed *Burdine* to mean that a plaintiff who disproved the employer's asserted justification was entitled to judgment as a matter of law on his discrimination claim. Justice Scalia, writing for the majority, responded that "a reason cannot be proved to be a 'pretext *for discrimination* ' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason.'' *Id.* at 515.

Putting aside the fact that in both cases the reference to “pretext” was dictum, we think it clear that in neither case did the Supreme Court intend to impose on the plaintiff a requirement of proving intent to deceive. It seems clear from the discussion that what the Court meant by its reference to the falsity of the employer's asserted justification was not intent to deceive, but inaccuracy or incompleteness resulting from the failure to include the fact of the discriminatory motivation. In context, it is amply clear that the import of the statements in both *Burdine* and *St. Mary's* was *not* that plaintiff was required to prove the employer's stated justification was asserted with intent to deceive or in bad faith. It was rather that no plaintiff could prevail without establishing, by a preponderance of the evidence, that discrimination played a role in an adverse employment decision.

To require a plaintiff to prove that the employer acted with conscious intent to deceive as to its reasons imposes a burden not envisioned by the statute. There are many circumstances in which a jury may justifiably find a prohibited discriminatory motivation notwithstanding a different explanation given by the employer in good faith without intent to deceive. One such circumstance exists where the adverse decision is made by two or more persons, some of whom are motivated by discrimination, while others are motivated by other reasons, and the employer's innocent explanation emanates from those who had no discriminatory motivation and were unaware of their colleagues' discriminatory motivation. In such cases, the explanation given by the employer will be based on incomplete information, but not an intent to deceive.[FN6]

FN6. Another such circumstance may arise where the decisionmaker is unaware of his own discriminatory motivation and may believe in good faith that his different explanation honestly accounts for the decision, without awareness of the extent to which his judgments are influenced by ingrained discriminatory attitudes which have been proved to the jury.

In short, what the statute prohibits is discrimination in employment. It does not require proof in addition of deceitful misrepresentation.

Plaintiff in this case cannot be heard to complain of the court's charge on “pretext” because he requested it. Accordingly, our observations

on the inappropriate nature of such a charge have no effect on this appeal.[FN7] Nonetheless, for the future we caution district courts to avoid charging juries to the effect that a plaintiff must show that the employer's stated reason for an adverse action was a “pretext.” It is sufficient for a plaintiff to prove that discrimination played a role in motivating the adverse action taken against the plaintiff.

Henry v. Wyeth Pharmaceuticals, Inc., 616 F3d 134, 155-57 (2d Cir. 2010).

[4] In their objection to the complainant’s motion to compel, the respondents acknowledge that: “In this matter, most elements are not disputed. There is no dispute that the Complainant was an employee of a state agency, DMHAS. There is no dispute that the Complainant ‘engaged in a protected activity’ when he made reports by email (although whether that conduct was a violation is disputed, but he need not establish that to make a *prima facie* case.) There is also no dispute that the Complainant faced an adverse employment action of suspension without pay. The dispute between the parties arises from the causal connection (including temporal connection) between the Complainant’s activity and the adverse employment action. The Respondents contend that the Complainant did not suffer any retaliation as he alleges in September 2008 from his transmittal of information in 2007.” Respondents’ objection to complainant’s motion to compel, p. 5, February 20, 2009.

[5] The 18.3 hours were incurred on May 5; June 2, 3, 8, 9, 11, 12, 15, 16, 17; and September 21 and 22, 2009. Tr. 1621-23; Complainant’s petition for attorneys’ fees, exhibit 3.

[6] The 2.7 hours were incurred on November 12, 13, 18, 20, December 1, and 11, 2008; and February 9 and 12, 2009. Tr. 1609; Complainant’s petition for attorneys’ fees, exhibit 3.