

**STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS**

Joseph Teal,
Complainant

OPH/WBR No.2008-096

v..

J. Robert Galvin, Commissioner
Department of Public Health,
Respondent

March 5, 2009

Ruling on Motion to Dismiss

Procedural History

On November 18, 2008, Joseph Teal (hereinafter "the complainant") filed this whistleblower retaliation complaint pursuant to General Statutes § 4-61 dd (b) (3) (A) against J. Robert Galvin, (hereinafter "the respondent") in his official capacity as commissioner of the department of public health (hereinafter "DPH") against the Department of Administrative Services (hereinafter "DAS") and against the individual DAS employees Johnette Tolliver and Stephen Caliendo. (hereinafter "former respondents"). On December 30, 2008, the complainant filed an amended complaint against the respondent alone and in said complaint eliminated any claims against DAS and the former respondents. The amended complaint is against the respondent alone.

The respondent moved that the case against him be dismissed for lack of jurisdiction under General Statutes § 4-61dd (b) (3) (A). Specifically, respondent argued (1) that the instances of warnings and threats occurring from January 2007 through October 2008 and the instance of alleged retaliation occurring April 7, 2008-April 11,

2008 are barred by the 30 day statute of limitations contained in the whistleblower retaliation statute, § 4-61dd (b) (3) (A), .and therefore those claims are untimely and (2) :that the instances occurring between April 7, 2008 and April 11, 2008 and between November 14, 2008 and December 25, 2008, must be dismissed based on filing of grievances with the State of Connecticut Employees Review Board pursuant to Connecticut General Statute § 5-202. The respondent further argued in support of its motion that General Statutes § 4-6dd (b) (4) offers complainant a choice of statutory remedies under either the whistleblower retaliation statute, §4-61dd, or under the Employee Review Board statute, § 5-202, but bars complainant from pursuing both statutory remedies simultaneously.

On February 13, 2008, complainant filed his objections to the Motion to Dismiss. In said objections, he argues that this action should not be dismissed for two principal reasons: (1) because the complainant is the subject of a continuing campaign of retaliation or continuing violation not barred by the 30 day statute of limitation set forth in §4-61dd (b) (3) (A) and is not alleging a specific incident of whistleblower retaliation and (2) because the suspensions are being contested before the Employee Review Board (hereinafter "ERB") under the provisions of Connecticut General Statute §5-202, they are separate and distinct from the alleged impermissible retaliation campaign under § 4-61dd.

Discussion

Section 4-61 dd-15 (c) of the Regulations of Connecticut State Agencies authorizes the presiding referee to dismiss a complaint, for, among other reasons, lack of jurisdiction. Section 4-61dd-12 (a) (2) of the Regulations of Connecticut State Agencies empowers the presiding officer, in a whistleblower retaliation complaint proceeding, to “rule on requests and motions, including motions to dismiss for lack of jurisdiction.”

A

A motion to dismiss admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corps.*, 44 Conn. App. 446, 451-452, cert. denied, 241 Conn. 906 (1997). In evaluating the motion, the complainant’s allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant. Every reasonable inference is to be drawn in his favor. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998). See also *Lueder v. Southern CT State University*, 2006 WL 2965504 (OPH/WBR No. 2005-011, March 16, 2006); *Bagnaschi-Maher v. Torrington Housing Authority*, 2006 WL 4754593 (OPH/WBR No. 2005-013, March 3, 2006). After a thorough review of the motion to dismiss, the objection to the motion to dismiss, along with the cases, pleadings and other supporting materials referenced therein or attached thereto, I hereby partially grant the motion to dismiss for the reasons set forth below.

B

In ruling on this Motion to Dismiss, I make the following finding of facts based on the record:

1. At all times involved herein, the complainant was an employee of DPH, functioning as its equal employment opportunity manager and therefore legally entitled to bring an action under General Statutes § 4-61dd against the respondent as his employer.
2. The complainant has filed this whistleblower retaliation complaint against the respondent, J. Robert Galvin, to whom he reports as an employee of DPH.
3. The complainant has filed grievances with the State Employees Review Board, pursuant to General Statutes § 5-202, contesting the April 7, 2008-April 11, 2008, and the November 14, 2008-December 25, 2008 disciplinary actions.
4. The respondent claims both the April 11, 2008-April 14, 2008 and the November 14, 2008-December 25, 2008 instances of alleged retaliation cannot be simultaneously pursued in two separate forums-before a referee under the provisions of General Statutes §4-61dd and before the Employees Review Board under the provisions of § 5-202.
5. The state Employees Review Board ruled on and has dismissed the grievance filed March 18, 2008. Therefore, the respondent's argument about maintaining dual actions for the April 7, 2008-April 11, 2008, disciplinary action and alleged retaliation is moot.
6. The respondent has filed this motion to dismiss alleging that complainant has made untimely claims under General Statutes § 4-61dd to the alleged various

unspecified instances of retaliation in 2007 and 2008, the specific April 7, 2008- April 11, 2008 alleged instance of whistleblower retaliation. and any other alleged act of whistleblower retaliation through October 18, 2008.

C

I begin my analysis by examining § 4-61dd (b) (3) (A) which states in pertinent part that “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... employee may file a complaint concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57.” Applying the 30 day time limitation to the specific facts of this case results in the legal conclusion that: (1) that the unspecified dates of the warnings and threats he alleges he was subjected to in 2007-2008 and the alleged retaliation that resulted in the April 2008 suspension do not meet the statutory time limits so that those claims must be dismissed. Under the plain language of the statute, §4,-61dd (b)((3) (A), the thirty days expired on April 12, 2008. This complaint was filed by the complainant on November 18, 2008- approximately 219 days after complainant learned of the personnel action threatened or taken. “Where ...a specific time limitation is contained within a statute that creates a right of action that did not exist at common law, then the remedy exists only during the prescribed period and not thereafter....In such cases, the time limitation is not to be treated as an ordinary statute of limitation, but rather is a limitation on the liability itself, and not of the remedy alone..” *Ambroise v William Raveis Real Estate, Inc.*, 226 Conn. 757, 766 (1993). To the same effect is the Referee’s ruling in the

dismissal of the whistleblower complaint as untimely by only one day in *Pamela Banks v. Civil Service Commission*, OPH/WBR-2006-017 (2006). Likewise, the complainant's recitation of a continuing violation theory as a means of defeating the timeliness restriction for filing a complaint under § 4-61 dd (b) (3) (A) is also unavailing.

As pointed out by Human Rights Referee David Knishkowy in his ruling in *Stephen J. Samson v. State of Connecticut Department of Safety*, OPH/WBR-2007-064 (2008) that the six alleged specific retaliatory acts did not constitute a continuing violation adequate to defeat the time reporting restrictions of the whistleblower retaliation statute, "In 2002, however, the United States Supreme Court constrained the use of the continuing violation theory. According to *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) (along with the myriad federal and Connecticut cases following *Morgan*), under Title VII, each discrete act of discrimination or retaliation constitutes a separate, actionable incident and an employee cannot proceed on claims based on discrete acts occurring beyond the appropriate time period, even if they are related to acts alleged in a timely manner. *Id.*, 113-14Discrete acts "that fall within the statutory time period do not make timely acts that fall outside the time period." *National Railroad v. Morgan*, *supra*, 112." *Samson v. State*, *supra* 5. The failure to act upon them within the statutory thirty day period is fatal to the viability of the 2007-2008 alleged retaliatory acts.

Conclusion

. The concept of equitable tolling advanced as an argument by complainant is unavailing as it only applies to unusual circumstances, not entirely within the claimant's control; *Christopher Gorski v. Department of Environmental Protection, et al*, OPH/WBR

2007-061 (2008); a situation that does not exist here. I, therefore conclude that this action should be dismissed as to all matters complained of, except the November 5, 2008 matter, based on a lack of jurisdiction by this tribunal under § 4-61dd (b) (3) (A).

II

The third argument advanced by the respondent is that this action must be dismissed because the complainant has filed grievances with the Employees Review Board. He asserts that § 4-61dd (b) (4) requires the claimant to make an election to proceed before that board or before the Human Rights Referees. This argument now applies to only the November 5, 2008 incident as the March 13, 2008 incident is untimely. There are presently two controlling, but slightly differing decisions. In *Andrew N. Matthews v Commissioner John Danaher, III et al*, (2008), Chief Human Rights Referee Jon P. FitzGerald, held that §4-61dd (b) (4) provides an alternative to proceeding with a whistleblower complaint and that is to proceed under the provisions of §5-202 with the complainant's grievances before the Employees Review Board, but that "The statute is clear that an employee has an election of mutually exclusive alternative forums in which to challenge the consequences of a specific incident, regardless of the myriad of legal claims that may arise from the incident." *Id.* at 4. Referee FitzGerald denied the respondent's motion to dismiss, but ordered the complainant to make an election of remedies by either withdrawing his grievances filed with the ERB or in the alternative withdrawing his allegation in the whistleblower retaliation case that the personnel action transferring his employment was retaliatory.

Referee David Knishkowsky, when confronted with a similar situation in *Jennifer Jones v. Connecticut Judicial Department*, OPH/WBR # 2006-032 (2006), also held the statutory remedies to be in the alternative, to be mutually exclusive, but granted respondent's motion to dismiss. This matter is procedurally similar to the *Matthews* matter in that there is presently pending both this complaint and the unresolved November 5, 2008, grievance before the ERB. I also hold these statutory remedies to be in the alternative and mutually exclusive.

Conclusion

With respect to the November 18, 2008 grievance, on or before March 19, 2009, the complainant shall file and serve a withdrawal either of the November 18, 2008 grievance designated as ERB #3188 or his allegation that the November 14--December 25, 2008 suspension was retaliatory. Failure to file a withdrawal of his grievance may result in a dismissal of the allegation that the November 14—December 25, 2008 suspension was retaliatory.

Ruling and Order

1. The respondent's motion to dismiss is granted as to all alleged instances of whistleblower retaliation except the alleged incident of November 5, 2008.
2. On or before March 17, 2009, the complainant shall file and serve a withdrawal either of the November 10, 2008 grievance designated as ERB # 3188 or his allegation that the November 14--December 25, 2008 suspension was retaliatory. Failure to file a

withdrawal of his grievance may result in a dismissal of the allegation that the November 14—December 25, 2008 suspension was retaliatory.

Dated at Hartford, Connecticut this 5th day of March, 2009.

Jerome D. Levine
Human Rights Referee

cc.

Joseph Teal, via first class mail
Commissioner J. Robert Galvin/ DPH
Antoria Howard, Esq., AAG- via fax only
Barbara Collins, Esq.-via fax only