

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

Michael Asante,
Complainant

: OPH/WBR No. 2006-031

v.

University of Connecticut,
Respondent

: March 2, 2007

Ruling re: the respondent's motion to dismiss

and

Order re: amending the complaint and dates for the prehearing and the public hearing

Preliminary statement

On August 8, 2006, the complainant filed a complaint (complaint) with the chief human rights referee pursuant to General Statutes § 4-61dd alleging that the respondent retaliated against him on May 1, 2006. By motion (motion) and memorandum (memorandum) filed on January 12, 2007, the respondent moved to dismiss the complaint. A status conference with the complainant and counsel for the respondent was held on February 8, 2007. At that hearing, the respondent requested the opportunity to file a supplemental memorandum to the motion to dismiss (supplement). The respondent's request was granted and the supplement was to be

filed on or before February 20, 2007. The respondent's subsequent motion to extend the filing date to February 27, 2007 was also granted. The respondent's supplement was untimely filed and, on March 1, 1007, the complainant filed an objection to the consideration of the supplement and his response to the motion.

For the reasons stated herein, the respondent's motion is denied, the complainant is ordered to amend his complaint as directed herein and dates are ordered for the filing of an answer, and the scheduling of the prehearing conference and the public hearing.

Analysis

In its memorandum, the respondent asserted that the complainant was not a state employee as required under § 4-61dd and defined under General Statutes § 4-141. (Section 4-61dd refers to § 4-141 for the definition of state employee.) As noted by the respondent, the complainant identified himself in his complaint as a student, not as an employee. Memorandum, p. 4; Complaint, ¶ 2. The respondent also argued that the complaint should be dismissed because the complainant had not transmitted facts and information to the Auditors of Public Accounts or to the Attorney General prior to filing his complaint with the chief human rights referee. Memorandum, p. 5.

In its supplement, the respondent reiterated that the complainant was not a state employee. According to the respondent, the complainant was a student worker who was

paid under the student labor payroll and the work-study payroll. The student labor payroll is funded through the respondent's own funds while the work-study payroll is a federally funded financial program for students with financial need. Supplement, pp. 1 – 3. The respondent further argued that while § 4-61dd protects state employees who disclose the information described in § 4-61dd (a), the complainant did not allege that he disclosed information. Rather, he alleged that he told various people that he was not making any statements. Supplement, p. 4; Complaint, ¶ 8. For these additional reasons, the respondent argued that the complaint should be dismissed.

Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies provides that: "The presiding referee may, on his own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant: (1) Fails to establish jurisdiction; (2) Fails to state a claim for which relief can be granted; (3) Fails to appear at a lawfully noticed conference or hearing without good cause; or (4) Fails to sustain his or her burden after presentation of the evidence." In this case, the respondent's arguments are not that the human rights referees lack subject matter jurisdiction over § 4-61dd "whistleblower" retaliation complaints or lack personal jurisdiction over the parties, but rather that the complaint as written fails to state a cause of action. Memorandum, p. 1; Supplement, p. 1. In that regard, this subsection is analogous to a motion to strike utilized in Connecticut courts. Practice Book §§ 10-39 through 10-45. Unlike the result in court, where the granting of a motion to strike still provides the plaintiff with the

opportunity to file a new pleading; Practice Book § 10-44; here, the draconian consequence to a complainant would be the dismissal of the complaint.

While the undersigned agrees with the respondent that the complaint, inartfully drafted by a pro se complainant, is defective, the undersigned is unwilling at this stage to assume that the defects result from the lack of information rather than from the failure to provide the information, particularly in light of Section 4-61dd-4 (b) of the Regulations of Connecticut State Agencies. Section 4-61dd-4 (b) provides that: "A complaint shall not be deemed defective solely because of the absence of one or more of the items contained in subsection (a) of this section, provided that the complaint may be amended in accordance with section 4-61dd-7 as directed by the presiding officer." Thus, the regulatory scheme appears to favor providing the complainant with the opportunity to correct defects in the complaint prior to its dismissal.

The undersigned is further reluctant to grant the motion because of the apparent weaknesses in the respondent's arguments. The respondent argued that the complaint should be dismissed because the complainant was not an employee of the respondent at the time of the alleged retaliatory act. At the status conference, however, the complainant produced a pay stub issued by the respondent that identified him as an employee. The respondent provided no statute or case law for its proposition that student workers cannot be state employees. Its reference to § 4-141 is hardly dispositive to its argument given the broad statutory language that "state officers and employees' includes every person elected or appointed to or employed in any office,

position or post in the state government whatever such person's title, classification or function and whether such person serves with or without remuneration or compensation" (Emphasis added.) Construing the evidence most favorably for the complainant, he has established that he was a state employee for purposes of § 4-61dd, at least for purposes of the motion.

The respondent further argued that the complaint should be dismissed because the complainant did not contact the Auditors of Public Accounts and the Attorney General prior to filing his complaint with the chief human rights referee. Public Act 05-287, however, eliminated the requirement that a complainant contact the Auditors or the Attorney General as a precondition to filing a complaint. The respondent did correctly observe that the complainant failed to allege to whom he reported information but, as discussed earlier, the complainant will be given the opportunity to amend his complaint to address this defect.

Orders

1. The motion to dismiss is denied.
2. On or before March 16, 2007, the complainant shall file and serve an amendment to his complaint. The amendment shall include:
 - (a) a statement by the complainant as to whether he was an employee of the respondent;

- (b) a description of the corruption, unethical practice, violations of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety that he observed occurring at the University of Connecticut;
 - (c) the persons at the University of Connecticut to whom he disclosed this information; and
 - (d) the date(s) he disclosed this information.
3. The respondent shall file and serve an answer to the amendment on or before March 30, 2007.
 4. The prehearing conference is scheduled for April 17, 2007 at 10:00 AM in the Small Hearing Room, 21 Grand Street, 4th floor, Hartford, CT. The purposes of the conference include simplifying and clarifying the issues, reviewing the witness and exhibit lists, and establishing the procedure for the public hearing.
 5. The public hearing is scheduled for May 15 – 17, 2007 at 9:30 AM in the Large Hearing Room, 21 Grand Street, 4th floor, Hartford. CT.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Michael Asante
Michael Sullivan, Esq.