STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Katherine Cassidy, Complainant	:	No. OPH/WBR-2008-072
v.	:	
University of Connecticut Health Center, Respondent	:	June 5, 2008

RULING ON MOTION TO DISMISS

Background

The complainant, a registered nurse, began working for the respondent in September 2006. She was assigned to work in the Garner Correctional Institution (Garner). In March 2007 she received an unnerving letter from an inmate and, at her request, was placed on "keep separate" status; that is, she was to have no assignments in that inmate's cellblock. Thereafter, coworkers informed her that the inmate made numerous threatening statements about her.

In December 2007, after a supervisor nonetheless assigned her to that inmate's cellblock, the complainant filed an internal complaint with several of the respondent's administrators, alleging that the respondent violated its policy of separating an "at risk" employee from that part of the prison environment from which the risk arose. Such violation, she claims, constituted an abuse of authority and posed a danger to her and others' safety. Within a week, the respondent allegedly told her she would not be returning to Garner. In the complainant's words, she was "effectively terminated" in violation of § 4-61dd (b).

On April 29, 2008, the complainant filed this whistleblower retaliation complaint alleging that the respondent threatened or took adverse actions against her

because she had engaged in the protected activity of filing an internal complaint pursuant to General Statutes § 4-61dd (a).[1]

The respondent filed a motion to dismiss the complaint (the motion) on May 13, 2008, alleging (1) that the complaint was time-barred because it was filed more than thirty days after the occurrence of the adverse action; and (2) that, in light of the discrimination case filed four weeks earlier with the commission on human rights and opportunities, this complaint should be dismissed under the "prior pending action doctrine." On June 2, 2008, the complainant filed a timely answer (the objection) to the motion.

Did the complainant file her complaint in a timely manner?

The respondent claims that this matter should be dismissed because it was not filed within the statutorily mandated timeframe. According to General Statutes § 4-61dd (b) (3), the complainant must file her complaint "[n]ot later than thirty days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of [§ 4-61dd (b) (1)] . . ."

In her complaint, the complainant alleges that on December 28, 2007, approximately one week after making certain disclosures protected by § 4-61dd (a) (that is, she "blew the whistle"), the respondent informed her that she could not return to her position at Garner. (For reasons not clear from the pleadings, the complainant refers to her status as "effectively banned.") Whether this was an actual termination, an intimation that she might be moved to another one of

[1] The primary purpose of General Statutes § 4-61dd is to enable employees of the state, quasi-public agencies, or large state contractors to disclose, with impunity, information about corruption, unethical practices, violation of laws, mismanagement, gross waste of funds, abuse of authority, or danger to the public safety occurring in any state department or agency, any quasi-public agency, or any large state contract. A person disclosing such information is known in lay terms as a "whistleblower." A whistleblower should feel free to report such information without fear of retaliation. *Bagnaschi-Maher v. Torrington Housing Authority*, No. OPH/WBR-2005-013 (Ruling on Motion to Dismiss, March 3, 2006)

the respondent's sites, or a threat of one or the other, the triggering date for the filing period is December 28, 2007. She filed this § 4-61dd (b) (3) complaint on April 29, 2008, well beyond the thirty-day filing window.

The filing requirement is comparable to a statute of limitations, with which one must comply absent factors such as consent, waiver or equitable tolling. *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (discussing EEOC filing deadlines); *Williams v. Commission on Human Rights & Opportunities*, 257 Conn. 258, 284 (2001) (discussing filing deadlines for complainants filed under the Connecticut Fair Employment Practices Act [CFEPA]).[2] In certain circumstances, an employer's behavior in delaying the filing of a complaint may toll the statute of limitations. *Williams v. Commission on Human Rights & Opportunities*, 67 Conn. App. 316, 329 (2001); *Rodriguez v. Connecticut Board of Education,* No. OPH/WBR-2007-065 (Ruling on motion to dismiss, February 6, 2008)

Although the complainant never identified any legal precedent or even alluded to concepts such as consent, waiver or equitable tolling, she does mention in her complaint, in the accompanying cover letter, and in her objection to the motion that her filing was inhibited by the parties' attempts to resolve the matter informally. Certainly the pressure of this situation might cause an employee to eschew legal action for fear of thwarting any potential resolution or of facing retribution; on the other hand, a prudent employee should take all appropriate steps to preserve her rights lest no resolution be forthcoming. Although this tribunal must draw every reasonable inference in a complainant's favor when evaluating a motion to dismiss; *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); here the complainant has failed to describe

[2] Interpretation and application of § 4-61dd are guided by employment retaliation cases under Title VII and its Connecticut counterpart, CFEPA. See *Asante v. University of Connecticut*, No. OPH/WBR-2006-031 (Ruling re: Motion to Dismiss, June 4, 2007).

any particular behavior by the respondent or any other specific facts that would buttress her otherwise general and self-serving argument for tolling the statutory deadline. I conclude that she did not file her complaint in a timely fashion and it is, therefore, time-barred.

But even if the complainant were to successfully argue that the time for filing should be extended for equitable reasons, her complaint must be dismissed for another reason. In her objection to the motion, the complainant admits that the threat was "completely redacted." (Objection, p. 2) I assume that she means that the threat was "retracted," for she then states that she was "welcomed back to work." (Id.) The exact date of her return is not clear from the pleading, but it appears to be some time after she filed her discrimination complaint (approximately April 1, 2008) and around or just after the time she filed this retaliation complaint four weeks later. Accordingly, she now rephrases her objection and, at the same time, modifies and contradicts her retaliation complaint: "[T]he Complainant's basis for her complaint is **not** based upon the initial threat of December 28, 2008, but rather the [respondent's] **continuing** disregard of a policy and/or practice" regarding employees deemed 'at risk' or accorded a 'keep separate' status. (Emphasis in original.) (Objection, p. 3) "This disregard of placing employees identified at risk into environments into which they are to be kept separate is an abuse of authority and more importantly a danger to the public safety of nursing personnel at Garner Correctional (Conn. Gen. State § 4-61dd (a)) and creates a fluent (sic) time to which the Complainant or any employee can file a Whistleblower Complaint." (Id.)

In short, the complainant no longer considers the purported termination on December 28 to be the adverse action triggering the thirty-day filing period. Instead, she identifies the adverse action as the respondent's ongoing disregard of its own "keep separate" policy. If such indifference, as she suggests, is an abuse of authority and a safety threat, then it might well be the appropriate subject of a whistleblower disclosure pursuant to § 4-61dd (a). Indeed, her supervisor's disregard of the policy was precisely the subject of the complainant's

original § 4-61dd (a) disclosure. Abrogating the policy, however, was not the retaliatory action that harmed or threatened to harm her—in the sense contemplated by the statute—and thus provides no legal or logical basis for a retaliation complaint. The potential for future disregard of the policy might leave the respondent vulnerable to further whistleblower disclosure, but it plays no role in the matter before me. In essence, the complainant has removed the sole retaliatory adverse action from the equation, leaving her whistleblower retaliation claim without the necessary predicate. Accordingly, the complaint should be dismissed.

Does the "prior pending action doctrine" bar this complaint?

The prior pending action doctrine is "a rule of justice and equity, generally applicable, and always where the two suits are virtually alike, and in the same jurisdiction." (Internal quotation marks omitted.) *Larobina v. McDonald*, 274 Conn. 394, 409 (2005). When different theories of liability are advanced in two suits, yet both actions arise out of the same course of conduct involving the same allegations, and the asserted rights and liabilities are predicated on the same underlying facts, the prior pending action bars the subsequent one. *Saracino v. The Hartford Financial Services Group, Inc*., 50 Conn. Sup. 503, 506 (2007).

The respondent argues that the factual allegations in the whistleblower retaliation complaint are "identical" to those in the complaint filed with the commission approximately four weeks earlier. The respondent also notes that the same parties appear in both cases and the discrimination complaint allows the same relief as this retaliation complaint. Because I am dismissing this case for either or both of the reasons articulated above, I need not address these claims.

This matter is hereby dismissed.

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Date David S. Knishkowy
Human Rights Referee