STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

James D. Dax, Complainant	:	No. OPH/WBR-2008-068
v.	:	
Baran Institute of Technology, Respondent	:	March 4, 2008

RULING ON MOTION TO DISMISS

On February 4, 2008, James Dax (the complainant) filed this complaint pursuant to General Statutes § 4-61dd (b) (3) (A), alleging that his former employer, Baran Institute of Technology (the respondent), retaliated against him for engaging in protected “whistleblowing" activities.

On February 27, 2008, the respondent filed a motion to dismiss this action, claiming that the complainant has not satisfied the jurisdictional prerequisites to bring this action. In particular, the respondent asserts that it is not an entity covered by the statute; that the complainant failed to make whistleblower disclosures to any of the persons or entities to whom such disclosures must be made in order to invoke the statute’s protection; and the disclosures could not be retaliatory, as they occurred after the complainant’s termination. On March 3, 2008, the complainant filed a timely objection to the motion to dismiss.

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). The motion admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products*

Corp., 44 Conn. App. 446, 451-52, 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 *Proietto v. Whitney Manor Convalescent Center, Inc*, No. OPH/WBR-2005-009 (Ruling on Motion to Dismiss, March 1, 2006). Even after reviewing the pleadings, the motion and the response—along with the supporting materials referenced therein or attached thereto—in a light most favorable to the complainant, I conclude that the complainant failed to satisfy several jurisdictional prerequisites to this action.

According to § 4-61dd (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.

Here, the complainant originally conceded that the respondent is neither a state or quasi-public agency nor an appointing authority. In his complaint—a boilerplate, “fill-in-the-blanks” document—he checked off the box identifying his employer as a large state contractor. At the initial scheduling conference on February 28, 2008, the complainant admitted that he chose the “large state contractor” option only because he did not know what other box to check.

Accompanying the motion to dismiss is an affidavit from the respondent’s president, averring that the respondent “does not have a contract with any state agency or quasi public agency having a value of five million dollars or more.” In

his response to the motion, the complainant merely reiterates that the "respondent is a state contractor and has received more than . . . five million dollars or is likely to receive same during its course of business." The complainant's bald assertion is not under oath and is unaccompanied by any corroborative evidence to support his claim that the respondent received the requisite contractual sums from a state agency; his suggestion that the respondent may attain this status in the future is unsubstantiated and, in any event, has no bearing on the respondent's present status. In fact, other than intimating that the respondent's "services" are governed by the state Department of Higher Education, the complainant does not even identify the alleged contracting state agency. He has failed to demonstrate that the respondent is a large state contractor regulated by § 4-61dd and, accordingly, this tribunal lacks jurisdiction over his complaint. See, e.g., *Fields v. Dattco, Inc*., No. OPH/WBR-2006-036 (Ruling on Motion to Dismiss, February 15, 2007).

Moreover, even assuming the respondent were a large state contractor, the statute protects the complainant from retaliation only if he has made the requisite disclosures either to the auditors or attorney general under the provisions of § 4-61dd (a), or, "in the case of a large state contractor, to an employee of the contracting state agency . . ." (Emphasis added.) Sec. 4-61dd (b) (1)

The sparse record before me indicates only that the complainant made certain disclosures to his own supervisors and to the Accrediting Commission of Career Schools and Colleges of Technology, located in Arlington, Virginia. He did not, however, make any disclosures to the auditors of public accounts or the attorney general; nor did he make any disclosures to the agency with which the respondent allegedly has contracted. See, e.g., *Jackson v. Antonetz*, No. OPH/WBR-2006-030 (Ruling on Motion to Dismiss, October 5, 2006); *Bagnaschi-Maher v. Torrington Housing Authority,* No. OPH/WBR-2005-013 (Ruling on Motion to Dismiss, March 3, 2006).

In conclusion, the respondent is not a large state contractor and the complainant did not disclose information (i.e., "blow the whistle") to any of the persons or entities identified in § 4-61dd (b) (1). Accordingly, for either or both of these reasons, the complaint must be dismissed. I need not address the respondent's final allegation that the adverse personnel actions preceded any of the whistleblowing disclosures.

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Date

David S. Knishkowy
Human Rights Referee

Copies mailed to all parties of
record on this date.