STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Christopher J. Gorski, **Complainant**	**:**	**No. OPH/WBR 2007-061**
v.		
Department of Environmental Protection, Steve Fish, John Traynor, Evelyn Godbout and Gene VanBlaricom **Respondents**	**:**	**January 23, 2009**

MEMORANDUM OF DECISION

Preliminary Statement

The public hearing (or hearing) for the above-captioned matter was held September 9 through 11, 2008, pursuant to the conference summary and order of the undersigned presiding human rights referee issued December 12, 2007. Attorneys Kevin Smith and Norman Pattis appeared on behalf of Christopher Gorski (complainant or Gorski) who resides at 135 Reservoir Road, New Hartford, CT 06057. Assistant Attorney General Antoria Howard appeared on behalf of the department of environmental protection (DEP), Steve Fish, John Traynor, Evelyn Godbout and Gene VanBlaricom (respondents) located at 79 Elm Street, Hartford, CT 06106.

The issues addressed in this decision are: 1) whether the complainant proved by a preponderance of the evidence that the respondents violated General Statutes § 4-61dd by retaliating against him when they terminated him for disclosing information of misconduct on the part of the respondents; and 2) if so, whether the complainant is entitled to any damages or other relief.

For the reasons set forth below, it is hereby determined that the complainant has not proven that the respondents retaliated against him in violation of General Statutes § 4-61dd. Judgment is entered in favor of the respondents and the complaint is dismissed.

Procedural History

On November 15, 2007, the complainant filed a whistleblower retaliation complaint (complaint) with the chief human rights referee alleging that the respondents retaliated against him when they dismissed (terminated) him because he disclosed information that the respondents had committed unethical practices, violated state laws/regulations, mismanaged and abused authority in violation of General Statutes §§ 4-61dd et seq. On November 15, 2007, the office of public hearings issued to all parties of record the notice of initial conference and hearing along with a copy of the complaint. The respondents filed an answer to the complaint on November 30, 2007. On December 7, 2007, the complainant filed a motion to amend his complaint that was granted. The respondents filed an amended answer on December 26, 2007. The hearing was held on September 9 through 11, 2008. The complainant filed a brief with a prayer for relief and attachments with calculations for damages on October 30, 2008. The respondents also filed their brief on October 30, 2008 and the record closed on November 13, 2008. All statutory and procedural prerequisites to the public hearing

[1] References made to the transcript pages are designated as "Tr." followed by the accompanying page numbers. References made to the exhibits are designated as "Ex. C-" for the complainant and "Ex. R-" for the respondents followed by the accompanying exhibit numbers. References made to the findings of fact are designated as "FF" followed by the accompanying numbers and references made to the briefs are designated as "R. Brief" for the respondents and "C. Brief" for the complainant followed by the accompanying page numbers.

were satisfied and this complaint is properly before the undersigned presiding referee for decision[1].

Findings of Fact

1. The complainant, Christopher Gorski, began his employment as a data processing technical specialist 2 with the respondent DEP (a state agency) on April 13, 2007. Ex. R-1. In July 2007, his job title changed to information technology (IT) analyst 1. Tr. 162-63; Complaint ¶ 6; Answer ¶ 6.
2. Steve Fish, director of office of information management, John Traynor, the complainant's supervisor of the help desk, and Gene VanBlaricom, technology analyst 4 and supervisor in IT, were all employees of the DEP. Answer, ¶ 6; Tr. 66-91, 214-15, 369-70. Evelyn Godbout, IT manager 2 was employed by the department of information and technology (DOIT) (a state agency)[2] and assigned to DEP for her employment. Tr. 512.
3. The duties of the IT analysts included working at a level one help desk conducting basic IT tasks such as removing software when computers were operating slowly, updating Microsoft Windows and resolving computer issues so that end users were able to utilize their computers. Tr. 36, 410, 654-55, 660-63. Authorization is necessary for an IT analyst to perform certain software updates. Tr. 660-63, 669-70.
4. When the complainant interviewed for his position with the DEP in December 2006, the DEP IT network was undergoing an upgrade and changes, which involved converting from a "Novel-Based environment" to a "Windows Active Directory environment" and involved new computers. Tr. 37, 166-67.
5. Web filtering is a process of preventing an end user access to certain unauthorized websites. The DOIT filter assists to block access to these websites. The DEP was working on subscribing or "getting on" to the DOIT filter to monitor computer traffic. Tr. 118, 211, 429-30, 488-89, 537.

[2] See The Official State of Connecticut Website (last modified October 21, 2008) < http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246450>.

6. The various emails sent during June 2007 involving Gorski contained information and discussions regarding routine tasks performed by the employees of the IT department. Gorski did not initiate these emails. Complaint and Ex. R-11.
7. On August 21, 2007, Traynor discussed with the complainant various performance issues, directives and expectations. Tr. 434, 623-24; Ex. R-21. The complainant did not comply with directives given to him by Traynor, which included: 1) obtaining approval before removing software; 2) performing certain computer tasks; and 3) consulting staff regarding tasks. Tr. 204, 215-17, 226.
8. On September 14, 2007, the complainant complained to Fish regarding what the complainant believed to be unethical practices, violations of the state laws and regulations, mismanagement and abuse of authority. Complaint; Tr. 66-91, 241, 278, 280, 291, 303.
9. The complainant's interpretation of the State's policies and regulations led him to believe he did not have to follow his supervisor's directives as long as he followed the State's directives. Tr. 196-98, 226.
10. Kim Czapla, an end user and employee in the water bureau of the DEP, requested that the complainant no longer be allowed to attempt to resolve problems on her computer because he was never successful. Tr. 451-52, 644-48; Ex. R- 27.
11. Traynor implemented a policy that the help desk personnel return to the help desk after each end user call. Tr. 214-15, 436-37; Exs. R-21 and 22.
12. Kristin Wolf, a data processing operations support assistant, could not locate the complainant on many occasions during the work day to inform him of end user requests, but Wolf was always able to locate Alex Vargas, another technology analyst/specialist hired with Gorski. Tr. 410, 420-22, 702-07. The complainant spent much time away from his workstation (the help desk area). Tr. 216, 437.
13. The complainant did not consult his team of IT colleagues before performing certain tasks. Tr. 695-98. Specifically, he did not consult Francisco Gonzalez, technical analyst 2, for assistance with a printer installation job. Tr. 680, 685. The complainant initiated the printer installation job on more printers than he

was authorized, which caused “fatal” errors on two computers among other problems. Tr. 184-85, 195-96, 204-05, 423-28, 682-83.

14. VanBlaricom assigned the complainant the task of deploying air cards (devices that attach to a computer). Tr. 181-84, 370-72, 384, 394-95. The complainant deployed air cards to more computers than he was directed to do, which resulted in air cards having to be returned and an inconvenience to the users who were to receive air cards on their computers. Tr. 370, 377-78, 394-95, 399-400; Exs. R-11 and R-21.
15. The complainant also tested the filtering of an employee’s computer by accessing the website “playboy.com” on that employee’s computer. Tr. 206-07, 372-73, 429. The complainant performed the testing without VanBlaricom’s permission and did not inform the employee or VanBlaricom. VanBlaricom brought this issue to the complainant’s attention first. Tr. 207-210, 373-76, 390-91, 399, 429-430, 516-17; Ex. R-12.
16. Certain employees are granted administrative rights on their computers, which allow end users to run certain programs necessary to perform their job duties. Tr. 200-01, 431-32, 517-18, 602. The complainant removed the administrative rights from an employee’s computer, which resulted in her not being able to perform her job duties. Tr. 199-202, 431-32.
17. The complainant accessed non-work related websites during fifty percent of his work hours and was one of the highest internet users. He violated the State’s policy on interent usage (Acceptable Use Policy). Tr. 62-63, 185-86, 196, 516; Exs. R-5 and R-31, p.3.
18. Traynor did not generate the report used by the auditors regarding the problem with the complainant’s unauthorized high internet usage and did not have the authority to eliminate the report. Tr. 440-42. Traynor did not state to the complainant that he could eliminate this internet problem. Tr. 441.
19. The DEP terminated the complainant’s employment on October 11, 2007 via correspondence from William Evans, chief of fiscal/administrative services 2. Tr. 35-40, 44; Ex. R-30. The complainant was still serving a six-month working test period (probation) when he was terminated. Tr. 43-44; Ex. R-1.

20. The complainant was terminated because: 1) the respondents received complaints from customers/end users; 2) the respondents were unable to find the complainant during work hours; 3) the complainant failed to consult staff regarding computer issues, resulting in many complaints and doubts about complainant's technical ability; and 4) the complainant was one of the highest internet users violating the State's internet policy by accessing non-work related internet sites. Tr. 44-47, 441-44, 446; Exs. R-5 and R-30.
21. The respondent DEP terminated Ron Tapanes' employment on September 20, 2007 because he was also an employee with high internet usage accessing non-work related sites. Tr. 446-47, 525, 625 and 679.

I

DISCUSSION

In analyzing whistleblower retaliation cases brought under General Statutes § 4-61dd,[3] this tribunal looks to cases interpreting other anti-retaliation statutes, namely

[3] General Statutes § 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

General Statutes §§ 31-51m, 46a-60 and 31-290a, and to federal law for guidance. See *Stacy v. Department of Correction*, OPH/WBR No. 2003-002 (Final decision, March 1, 2004) (2004 WL 5000797), citing *Arnone v. Town of Enfield*, 79 Conn. App. 501, 507, cert. denied, 266 Conn. 932 (2003); *Delgado v. Achieve Global*, 2000 WL 1861835 (Conn. Super. November 15, 2000) (No. CV990362720S); and *Ford v. Blue Cross Blue Shield of Connecticut, Inc*., 216 Conn. 40, 53-54 (1990); see also *Irwin v. Lantz, Callahan and Department of Correction*, OPH/WBR Nos. 2007-40, 41, 42, 44, 45, 46, 51, 52, 53, 54, 55 and 56, 11 (Final decision, May 9, 2008) (2008 WL 2311544).

The three-step burden shifting analysis of *McDonnell Douglas Corporation v. Green,* 411 U. S. 792, 802-803 (1973) is applied to whistleblower retaliation cases involving an alleged violation of General Statutes § 4-61dd (b). See *Stacy v. Department of Correction*, supra, OPH/WBR No. 2003-02, 4. The necessary elements of proof under *McDonnell Douglas* are tailored to suit the fact scenario of § 4-61dd whistleblower retaliation cases. Id. The three burdens are: (1) the complainant's burden of proving a prima facie case of retaliation; (2) the respondents' burden of producing a non-retaliatory reason for the adverse personnel action; and (3) the complainant's

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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

ultimate burden of proving by a preponderance of the evidence that the respondents retaliated against him because of his disclosure of regulated information (whistleblowing). See *Irwin v. Lantz, Callahan and Department of Correction*, supra, OPH/WBR No. 2007-40 et seq., 12.

A.

Prima Facie Case

Although the complainant's burden of proof at the first step of the analysis, the prima facie stage, is de minimis, the complainant still must satisfy the three elements that comprise the prima facie evidentiary burden. See *LaFond v. General Physics Service Corporation*, 50 F.3d 165, 173 (2d Cir. 1995). The three elements are: "(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." *Mary K. O'Sullivan v. Helene Vartelas*, et al., OPH/WBR No. 2008-086, (Ruling on Respondent's Motion to Dismiss and Order re: Amending the Complaint, November 20, 2008)(2008 WL 5122194). See *LaFond v. General Physics Services Corp*., 50 F.3d 165, 173 (2d Cir. 1995); see also *Irwin v. Lantz*, *Callahan and Department of Correction,* supra, OPH/WBR No. 2007-40 et seq., 12-14.

To fulfill the first element, the complainant must show that he engaged in a protected activity by satisfying the four statutory prerequisites of § 4-61dd. See *LaFond*

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

v. General Physics Services Corp., 50 F.3d 165, 173 (2d Cir. 1995); see also *Irwin v. Lantz, Callahan and Department of Correction*, supra, OPH/WBR No. 2007-40 et seq., 12. "The four statutory prerequisites of § 4-61dd are, first, the respondent 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), 1-120. Second, the complainant must be an employee of a regulated entity. § 4-61dd (b). Third, the complainant must have knowledge either of (1) 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 a state department or agency or a quasi-public agency or 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 a large state contract. . . . § 4-61dd (a). Fourth, the complainant must have disclosed the [above-regulated] information to an employee of (1) the auditors of public accounts . . .; (2) the attorney general; (3) the state agency or quasi-public agency where he is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) the contracting state agency concerning a large state contractor . . .. § 4-61dd (b) (1).

"With respect to the third and fourth statutory prerequisites, the complainant need only establish general corporate knowledge that the [complainant] has engaged in a protected activity. . . . Further, 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; *Pappas v. Watson Wyatt & Co.*, [United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008)] (2008 WL

793597, 4-6)." (Internal quotation marks omitted; citation omitted.) *Irwin v. Lantz, Callahan and Dept. of Correction*, supra, OPH/WBR No. 2007-40 et seq., 12-13.

The complainant has proven the first element of his prima facie case. It is undisputed that the DEP is a state agency and that Fish, Traynor and VanBlaricom are employees thereof. FF 2. Godbout was an employee of the state agency DOIT assigned to work at the DEP. FF 2. The complainant was employed by the DEP beginning on April 13, 2007. FF 1. He transmitted information to Fish, director of office of information management, about what he believed to have been unethical practices, violations of state laws or regulations, mismanagement and abuse of authority. FF 8. Specifically, on September 14, 2007, he discussed with Fish issues regarding internet filtering, integrity and security, air cards, unauthorized software and administrative rights. Tr. 97-127, 725-26; Ex. R-32. Although the respondents argued that the type of information disclosed was not regulated by § 4-61dd (See R. Brief pp. 18-21), the complainant had a good faith belief that the respondents were not conducting themselves properly. The respondents did not present evidence that the complainant knowingly and maliciously made false disclosures. See § 4-61dd. Therefore, under §§ 4-61dd (c) and (g), the complainant engaged in protected activity by making a good faith disclosure.

The complainant argued that he initially disclosed information in June 2007 prior to his meeting with Fish. Complaint; C. Brief, p.3. He testified that he verbally complained on June 5, 2007 to VanBlaricom and on June 6, 2007 to Traynor and Godbout about security issues (specifically, air cards issue). Tr. 130-132, 722-24. This disclosure was not substantiated. The complainant stated that he also complained via

emails sent on June 12, 2007 about security in the network, but there is no mention of such in the emails. Tr. 723; Ex. R-11. Instead, all of the emails on June 12, 2007, with the exception of the 8:27 a.m. email, possessed the subject line that read "Jeff Chander." Also, all of these emails concerned regular IT business, involving the assignment, deployment and return of air cards. FF 6. For example, in the 8:27 a.m. email from Gorski to Peter Zack and Rich Scalora (copies to VanBlaricom, Varanelli and Traynor), with a subject line that read "Mistake on my part", Gorski stated that he mistakenly provided an air card for Scalora that belonged to another department and that it had a "static IP address" attached. He needed the card returned and wanted to know when he could get the card. Ex. R-11. These June 12, 2007 emails did not appear to contain language involving a disclosure of regulated information. Even Gorski testified that the string of emails between him and VanBlaricom dealt with "one specific air card for one specific person." Tr. 182-83. Thus, I do not find that the content of the emails constituted disclosure of information regulated by § 4-61dd (a). Ex. R-11.

Gorski also testified that he specifically cited to regulations regarding the air card issues and in the June 19, 2007 emails, he suggested security updates. Tr. 724, 731. Attached to his complaint, there are a series of what appear to be emails all dated June 19, 2007 with the subject line reading "Problem starting Outlook." In an email from Gorski to Traynor, VanBlaricom and several other individuals, Gorski stated that in addition to fixing Microsoft Outlook he found "a plethora of security updates that need applying . . . After everything is updated properly, . . . the end user's PC's run much faster . . ." See complaint. The emails seem to have been initiated by Kristin Wolf who sent an email to Daniel White (with a copy to Gorski) informing him of a request by

White regarding a problem with starting Outlook. Complaint. I find that rather than whistleblowing, Gorski was responding to the problem, explaining how to fix it and stating his other findings regarding security updates. FF 3. In addition, there was an email of June 19, 2007 at 12:25 p.m. from Gorski to nine employees, including VanBlaricom and other supervisors, addressing them as "Fellow Mighty OIM Gods" and informing them that a "network push" would be the more efficient solution to the problem. Complaint. VanBlaricom responded stating that he would speak to Rich Soj (DEP technical analyst 4, Tr. 680-81) and Traynor regarding the "network push" as a solution to the problem and told Gorski to refrain from such greetings. VanBlaricom subsequently told Gorski to discuss issues with his supervisor first, not to discuss with all employees in the email. Complaint. The emails then were exchanged back and forth between Gorski and VanBlaricom. Complaint. Again, I do not find that these June 19, 2007 emails constituted disclosure of regulated information but merely involved routine IT tasks and duties. FF 3.

Overall, Gorski did not initiate the many emails, and their subject lines and their contents did not state, for example, "security concerns" or any other concerns regarding a violation or wrongdoing. Instead, they dealt with routine computer tasks, for example, updates. The June 19, 2007 emails' subject line read "Problem starting Outlook" and the June 12, 2007 emails' subject lines read "Jeff Chandler," "Mistake on my part" and "Info Follow up." Complaint; Ex. R-11 and R-12. While the emails may have suggested security problems, I find that the IT department discussed such issues while conducting routine tasks. FF 3. Gorski did not disclose any wrongdoing on the part of the respondents but instead discussed problems within his department that employees

were attempting to resolve. Thus, Gorski's initial disclosure of alleged wrongdoing occurred at the September 14, 2007 meeting with Steve Fish. FF 8. Even if I were to find that the complainant disclosed information in June 2007 via emails or verbally, he has not satisfied his burden of proving that the respondents' proffered business reason is pretext for retaliation, as discussed below in section I C.

To satisfy the second element of his prima facie case, the complainant must establish that he suffered an adverse personnel action or was threatened by his employer or its employees with an adverse personnel action subsequent to his disclosure of information covered by § 4-61dd (b) (1). See *Stacy v. Department of Correction*, supra, OPH/WBR No. 2003-002. On October 11, 2007, William Evans sent a letter to Gorski informing him of his termination from the DEP. FF 19. Termination constitutes an adverse personnel action and therefore, the complainant satisfied the second element of his prima facie case. See *Galabya v. New York City Bd. of Educ*., 202 F.3d 636, 640 (2d Cir. 2000); *Farrar v. Stratford*, 537 F. Sup.2d 332, 355 (D. Conn. 2008).

"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 by three methods: (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; *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2000), *Farrar v. Stratford*,

supra, 537 F. Sup.2d 354; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent[s]; *Gordon v. New York City Bd. of Educ.*, supra, 117; *Farrar v. Stratford*, supra, 537 F. Sup.2d 354; or (3) by operation of statute as a rebuttable presumption; § 4-61dd (b) (5). *Stacy v. Dept. of Correction*, supra, OPH/WBR No. 2003-002, 6 – 7." *Irwin v. Lantz, Callahan and Dept. of Correction*, supra, OPH/WBR No. 2007-40 et seq., 14. The complainant has satisfied the third element of his prima facie case. The complainant established that an inference of causation exists because he disclosed information on September 14, 2007 and was terminated less than a month later on October 11, 2007. FF 8, 19. In addition, under General Statutes § 4-61dd (b) (5), a rebuttable presumption exists because the complainant's termination occurred within one year after he transmitted information to Fish. FF 8, 19. Thus, Gorski has established a prima facie case of retaliation.

B.

Proffered Legitimate Non-Retaliatory Reason

Once the complainant establishes a prima facie case of retaliation, the analysis moves to the second step of the burden shifting in which the respondents have the burden to produce a legitimate, non-retaliatory reason for their action. See *Ford v. Blue Cross Blue Shield of Connecticut, Inc*., supra, 216 Conn. 53-54. Since the termination occurred within one year of the complainant's transmittal of information to Fish creating a statutory rebuttable presumption, the respondents' burden at this second step is more than just production. See *Irwin v. Lantz, Callahan and Dept. of Correction*, supra, OPH/WBR No. 2007-40 et seq., 17. The respondents must present evidence that

produces a legitimate, non-retaliatory reason *and persuades* the trier of fact that the reason is the actual reason for the adverse personnel action. Id.

"The presumptions created by those statutes may be rebutted by sufficient and persuasive evidence to the contrary. These rebuttable presumptions apply only to the question of causation … . *Malchik v. Division of Criminal Justice*, 266 Conn. 728, 738 (2003). A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact. That burden is met when it is more probable than not that the fact presumed is not true. *Salmeri v. Department of Public Safety*, 70 Conn. App. 321, 339, cert. denied, 261 Conn. 919 (2002). The evidence presented by the respondents must be sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function." (Internal quotation marks omitted.) *Irwin v. Lantz, Callahan and Dept. of Correction*, supra, OPH/WBR No. 2007-40 et seq., 17-18.

Here, the respondents produced persuasive, legitimate non-retaliatory reasons for the termination. The respondents stated that the complainant was terminated because of the reasons set forth in the October 11, 2007 termination letter: 1) customers complained that the complainant could not resolve computer issues; 2) the complainant was told on August 21, 2007 to make his whereabouts known at all times, but he remained difficult to locate; 3) the complainant was told on August 21, 2007 to consult staff members prior to attempting to resolve computer issues, but he failed to do

so, resulting in customer complaints and respondents questioning the complainant's technical ability; and 4) the complainant was one of the employees with the highest internet usage viewing non-work related sites. FF 7, 20.

The evidence presented substantiated the respondents' proffered, legitimate, non-retaliatory reasons. Alex Vargas testified that he told Traynor about problems with Gorski and that the employees spoke as a group regarding the problems. Tr. 657-58. Vargas testified that if it would take up to an hour to fix a computer, the analyst must seek help at the "next level," from Francisco Gonzalez, a technical analyst 2. Tr. 655-56. Gonzalez also testified that if an analyst is at a computer for more than one hour, it is considered a major problem and an analyst must request additional help from him or Dominic Carlone, a technology analyst 2. Tr. 484, 687. The respondents' witness Kim Czapla testified to the complainant's poor performance when he would attempt to fix her computer and was unsuccessful. FF 10. Czapla testified that the complainant spent hours at her computer and never fixed it. Tr. 646-47. In an email dated October 2, 2007, Czapla informed Traynor and Carlone that she no longer wanted Gorski to work on her computer. FF 10. Most important, Gorski did not rebut Czapla's testimony.

Additionally, Traynor informed Gorski not to remove software from computers without informing Traynor first, and to return to the help desk after each job request. FF 7, 11. The complainant admitted to disregarding the help desk policy to return to the help desk after each end user call. Tr. 216-17. Consistent with this, Kristin Wolf would not see Gorski for an entire day and she was not able to contact him on various occasions, but she had no problem finding Vargas, the other technology analyst 1. FF 12. Traynor testified that Gorski was given the task to install printers for the water

bureau of the DEP. Tr. 423-26. Instead of installing printers for ten employees as directed, Gorski distributed software (a rapid install or push) to more than ten employees, which caused problems and many complaints from the water bureau. FF 13. Gonzalez corroborated that Gorski had problems following directions and testified that Gorski was supposed to consult Gonzalez to work with him before conducting the "push with printers," instead Gorski acted alone, which caused many problems. Tr. 682-83, 695-98. Gonzalez testified that Gorski conducted the push by installing "rips" to forty computers. Tr. 696-98. Also, Vargas corroborated this further explaining the "rip" process by stating that Gorski was given the task to install printers by doing a push but instead of doing it per end user, Gorski did a rip by installing printers to a few people at a time, which caused problems because the end users were using different operating systems. Tr. 657. Gonzalez testified that approximately twenty to thirty computers were non-operational after Gorski performed the push with the printers. Tr. 682-83. Gorski admitted to installing printers to a larger group of people without permission, which caused "fatal" errors. Tr. 195-196. The complainant admitted not consulting his superiors and causing a problem with the printer jobs. Tr. 184-85 and Ex. R-21. He admitted that he "rolled out' to other computers without Traynor's permission and that caused problems. Tr. 184, 205.

In addition, certain employees have administrative rights to run certain software on their computers. FF 16. Traynor testified that Gorski removed administrative rights from an employee's computer without permission. Tr. 431-32. This employee needed the administrative rights on her computer in order to perform her job duties. FF 16.

Gonzalez also corroborated the problems that Gorski caused with the employee's administrative rights. Tr. 689.

Another problem arose when VanBlaricom assigned Gorski the task of deploying twenty air cards. FF 14. VanBlaricom testified that Gorski deployed certain air cards without permission, which caused problems. Tr. 377-79; Ex. R-11. When asked whether he deployed air cards without VanBlaricom's permission, Gorski was not able to respond, stating that he could not answer the question with a "yes or no." Tr. 181-84. VanBlaricom testified that Gorski also used an improper site (playboy.com) to test filtering on an end user's computer, a task not given to him by VanBlaricom. Tr. 207, 375-76. VanBlaricom stated that the end user found the site on his computer and brought this to VanBlaricom's attention. Tr. 374-76. Gorski testified that he had told VanBlaricom about using playboy.com for testing the filter, but this proved to be untrue because VanBlaricom sent emails to Gorski first raising the issue with him. Tr. 207-210, 375-76; Ex. R-12; FF 15. Gorski never informed VanBlaricom that Gorski would test the filtering and that he would use playboy.com for the testing. FF 15. The complainant disobeyed instructions from both VanBlaricom and Traynor. Gorski admitted that he was told to consult Traynor prior to doing particular jobs and he disobeyed directives given to him. Tr. 204-05, 216-17; FF 9. Although Gorski was directed by his supervisors to obtain permission first, he believed he was guided by the state regulations when he performed tasks without permission. FF 9. Traynor counseled Gorski regarding the problems that had been occurring. FF 7.

Evelyn Godbout, an information technology manager 2 assigned to DEP, testified that the complainant was terminated because of, among other reasons, his high internet

usage on non-work related sites. Tr. 512, 524-32; Ex. R-5. The complainant admitted to violating the internet usage policy by using the internet 50% of his time for non-work related information. FF 17. In addition, the respondents presented credible evidence that it had terminated another employee, Ron Tappanes, on September 20, 2007, just before complainant's termination, for violating the same internet policy. FF 21. This evidence showed that the respondents treated the complainant the same as another employee.

The complainant did not rebut the respondents' evidence supporting their reasons for his termination other than to state that there were end users who praised him for his work on their computers. Tr. 71, 149-53. However, he presented no corroborating evidence to that effect. In fact, most of the complainant's evidence supported the respondents' reasons for the termination. No witnesses testified that Gorski was effective in his position as a technology analyst 1. I find that the respondents provided persuasive legitimate, non-retaliatory reasons for terminating the complainant and, therefore, have rebutted the statutory presumption.

C.

Proof of Retaliation

In the third step of the burden shifting analysis, the complainant must prove by a preponderance of the evidence that he was retaliated against because of his disclosure of information to an employee of the state agency, Fish. The complainant can show that he was a victim of retaliation through direct evidence that a retaliatory reason motivated the employer's action. See *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra,

216 Conn. 54; see also *Irwin v. Lantz, Callahan and Dept. of Correction*, supra, OPH/WBR No. 2007-40 et seq., 15.

"Alternatively, the complainant can persuade the factfinder that he was the victim of retaliation through indirect evidence showing that the employer's proffered explanation is unworthy of credence [(*Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 54)] or is a pretext for retaliatory personnel action. The complainant must offer some significantly probative evidence showing that the [respondents'] proffered reason is pretextual and that a retaliatory intention resulted in the adverse personnel action. [*Arnone v. Town of Enfield*, supra, 79 Conn. App. 507]. Pretext may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence comprising the prima facie case, without more …. [*LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174]. Ultimately, 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. *Miko* v*. Commission on Human Rights & Opportunities*, supra, 220 Conn. 205; (Internal quotation marks omitted; citations omitted.) *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173." *Stacy v. Dept. of Correction*, supra, OPH/WBR No. 2003-002.

In an attempt to establish *direct* evidence of retaliation, the complainant testified that John Traynor told him that "[Traynor] could make this whole thing go away." Tr. 62, 137-38, 729-31. Gorski further testified that Traynor stated he controls what the auditors view and could make make the internet problem go away if the complainant would "tone it down." Tr. 725. Traynor testified that he did not make that statement. Tr.

441. Gorski's notes prepared prior to the September 14, 2007 meeting with Fish included many of the concerns that he would address at the meeting but as the respondents pointed out, the notes made no mention of Traynor's alleged statement to make things "go away." Ex. R-32. In fact, Traynor testified that he did not have the power or authority to get rid of the high internet usage issue or make anything go away because as he explained, the internet information is created by a proxy that is a daily log of all web activities. Tr. 440-42. He explained that a product called Web Spy reviews the daily log and computes the internet usage for each individual by date. Tr. 440-42. Traynor testified that he provides the computer product with the requested dates for the report and the web spy generates the report. Tr. 441-43. He testified that he would not tamper with this information or the logs because someone could run the same report and get a different result. Tr. 442-43.

There was no corroborating evidence for the alleged statement by Traynor and I do not find that it was made. FF 18. The complainant has not established direct evidence of retaliation. As previously stated above, the complainant also has not proven by indirect evidence that the respondents' proffered business reason is not worthy of credence or pretext for retaliation. The complainant provided no additional credible evidence to rebut the respondents' persuasive evidence supporting their legitimate business reasons for the termination.

II

CONCLUSION and ORDER

After fully considering the evidence in the record, I find that the complainant did not establish by a preponderance of the evidence that his termination was based on retaliation for his disclosing regulated information. The complainant has failed under the pretext/*McDonnell Douglas* analysis to establish retaliation based on his whistleblowing activity. Pursuant to General Statutes § 4-61dd (b) (3) (A), the case is hereby DISMISSED.

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Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

c. Christopher J. Gorski
State of Connecticut, Department of Environmental Protection
Attorney Kevin Smith, Law Offices of Norman Pattis
Attorney Antoria Howard, Office of the Attorney General