Shawn Irwin	: Office of Public Hearings
	:
v.	:
	:
Theresa Lantz and Dan Callahan	: OPH/WBR 2007-40, 41, 42, 44,
	: 45 and 46
	:
Shawn Irwin	: OPH/WBR 2007-51, 52, 53, 54,
	: 55 and 56
v	:
	:
Theresa Lantz, Dan Callahan and	:
Department of Correction	: May 9, 2008

Final decision

Preliminary statement

Shawn Irwin (the complainant) filed seven whistleblower retaliation complaints (Docket numbers 2007-40 through 2007-46[1]) with the chief human rights referee on March 16, 2007 alleging that Theresa Lantz, commissioner of the department of correction, and Dan Callahan, director of human resources for the department of correction, violated General Statutes § 4-61dd[2] when they failed to promote him to the position of lieutenant in retaliation for his whistleblowing activities. On April 2, 2007, Lantz and Callahan filed their answer denying the allegations. On September 18, 2007, the complainant filed seven additional whistleblower retaliation complaints (Docket numbers 2007-50 through 56[3]), alleging that Lantz, Callahan and the department of correction (DOC) violated General Statutes § 4-61dd when they failed to promote him to

the position of lieutenant in retaliation for his whistleblowing activities. On September 28, 2007, the Lantz, Callahan and DOC filed their answer denying the allegations. Unless otherwise indicated, “respondents” refers to Lantz, Callahan and DOC.

The complainant withdrew complaint 2007-43 on November 28, 2007 and withdrew complaint 2007-50 on January 8, 2008.

The hearing was held on January 3, 2008; January 4, 2008; January 8 – 11, 2008; March 11 – 12, 2008; March 14, 2008; and March 25 - 26, 2008. The record closed on March 26, 2008.

For the reasons set forth herein, the complaints are dismissed.

Findings of fact

Based upon a review of the pleadings, exhibits and transcripts[4] and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found (FF):

1. The complainant is employed by DOC, a state agency. R-2, 3.
2. The respondents are the commissioner of DOC, the director of human resources for DOC (both named in their official capacity) and DOC. R-2, 3.
3. The complainant began his employment with DOC in June 1997 as a correction officer. R-1, 2, 3.

4. During the course of his employment with DOC, the complainant has been assigned to Hartford Correctional Center, Cheshire Correctional Institute (Cheshire), Northern Correctional Institute (Northern), Garner Correctional Institute and Manson Youth Institute. R-7.
5. The complainant received performance appraisal evaluations of either “fully successful” or “excellent”. R-7.
6. The complainant was assigned to Cheshire from approximately March 10, 1999 to April 30, 2004. R-7. Between March 23, 2004 and April 17, 2004, the complainant filed incident reports with the warden and/or other appropriate DOC employees alleging that the automobile of the co-worker he carpooled with had been damaged while parked at Cheshire, that he had received threats from DOC employees, and that he was being subjected to a hostile work environment. Tr. 116-19, 686; C-3A, B, C, D, E; R-2, 3.
7. The complainant was assigned to Northern from approximately April 30, 2004 to March 18, 2005. R-7. On September 20, 2004 and in February 2005, the complainant notified the warden about DOC’s investigation into his Cheshire complaints, of employee misconduct at Northern, the harassment he was receiving from employees at Northern, and his concerns for his personal safety. Tr. 116-19, 275, 286-87; C-4A, B, C, D, E; R-2, 3.
8. In December 2004, the complainant filed an incident report with the warden at Northern alleging that he was being threatened by another correction officer in

violation of DOC regulations. Tr. 275, 283, 300-02; R-38, 39, 40, 42. The employee accused of the threatening behavior received informal counseling. R-40.

9. DOC has regulations, known as directives, against workplace violence and employee misconduct. R-10, 12.

10. On August 31, 2005, the complainant filed a complaint with DOC's affirmative action officer alleging that he had been passed over for promotion to correction treatment officer and stating that he was "considered by the department [DOC] as a 'whistleblower' . . . ." R-1. The complainant was subsequently promoted to the position. R-7.

11. On September 2, 2005, the complainant filed a complaint with the chief human rights referee alleging that the respondents had violated § 4-61dd by denying him a supervisory position in retaliation for his whistleblowing. The complainant withdrew the complaint on June 20, 2006. R-1

12. The process for promotion to lieutenant is a multi-step procedure beginning with a written examination conducted by the department of administrative services (DAS). Tr. 567; R-9.

13. Notice of the examination is sent to all correctional facilities, posted on DAS's website, and posted on DOC's intranet and internet websites. Tr. 567-68. DOC correction officers have approximately one month to apply to take the

examination. DAS determines whether the correction officer is eligible to take the exam and grades the exam. Tr. 568.

14. After DAS has graded the exams, it provides DOC with a list, known as a certification list, of the scores and names of those correction officers who passed the exam. Tr. 569. DOC then initiates its internal selection process. DOC notifies the candidates of their scores, the deadline to apply for promotion and the additional information that it will need for consideration for promotion. Tr. 518, 570.

15. DOC's internal promotional process involves an evaluation consisting of seven categories. These categories are the candidate's: (1) score on DAS's written examination; (2) previous two performance appraisals; (3) time and attendance record; (4) areas of strengths, proficiencies and developmental opportunities identified in the facility's evaluation (or recommendation) of the candidate; (5) completed questionnaire; (6) disciplinary record; and (7) correct responses to the interview questions. The scores of these categories are recorded on the "lieutenant candidate review form". These categories have equal weight and are averaged into an overall ranking. R-8, pp. 1-5.[5]

16. The categories for a candidate's overall ranking are excellent, very good, average, below average and disqualified. Tr. 579.

17. The information a candidate must supply DOC includes DOC's facility selection form on which the candidate selects the correctional facilities at which the

candidate would like to work. Candidates can be offered a promotion only to facilities that they have selected on DOC's facility selection form. Tr. 81-82, 228, 234-35, 518-20.

18. When a vacancy for a lieutenant's position occurs, the personnel officer for the facility submits a recruitment request form to DOC's recruitment unit. Several people at DOC must approve the filling of the position. Approval to fill the position must also be obtained from DAS and the office of policy and management. Tr. 572-73. If the requisite approvals are obtained, the personnel officer is notified of the approval to fill the vacancy. Tr. 573.

19. Pursuant to the applicable collective bargaining agreement between DOC and its employees, prior to a lieutenant vacancy being filled by promotion, employees who currently hold the position of lieutenant are given first opportunity to fill the vacancy by transferring from the correctional facility where they are currently assigned. Tr. 56, 82, 219, 573.

20. Once the transfer list has been exhausted, DOC's human resources office will contact the warden of the correctional facility, provide a list of candidates who selected that facility and advise the warden as to DOC's affirmative action promotional goals. Tr. 573, 600-01.

21. For every job classification, DOC's affirmative action unit provides hiring and promotional goals (by race and sex) that need to be considered when making a selection for a position. Goals vary with time and are based on the labor market

and DOC's workforce. Except in unusual circumstances when the warden can demonstrate that a non-goal candidate is superior to a goal candidate with the same overall ranking, a goal candidate is to be selected for the promotional position rather than the non-goal candidate. Tr. 487, 559-60; 602, 604, 612, 620-31, 704, 831-32.

22. Candidates who received an overall ranking of excellent must be offered the promotion before the position can be offered to candidates who received an overall ranking of very good. Tr. 53, 81, 600-01, 604-05, 703-04, 844-46.

23. The warden will make a recommended selection from the eligible candidate list, which must be approved by DOC's recruitment office, director of human resources, equal employment and assurance office, and deputy commissioner of operations. Tr. 482-83, 574, 782, 890-92; R-25 – 29.

24. Unless extended, the certification list expires after two years, resulting in another written examination and promotional process. Tr. 34, 73-74, 605-06.

25. The promotional cycle that is the subject of the complaints is 2006-2007. Tr. 558.

26. On March 9, 2006, DAS issued notice of a promotional examination for current DOC employees for the position of DOC correctional lieutenant. The application deadline was March 27, 2006 and the written examination was May 6, 2006. R-5.

27. The complainant scored a 91 out of a possible 100 on the written exam. R-8, 22.

28. On July 24, 2006, DOC issued its internal notice of job opportunity for promotion to correctional lieutenant. Candidates must have passed the May 6, 2006 written

examination, be on the certification list and, by August 9, 2006, submit a cover letter, their previous two performance appraisals and an application for employment form. R-6.

29. The certification list was issued in August 2006. Interviews were held in September 2006, and candidate packages were compiled by November 2006. Tr. 570.

30. In December 2006, candidates received notice of their overall ranking based on the seven categories. Tr. 572. Approximately twelve candidates received an overall ranking of excellent; 209 received a very good, 52 received an overall ranking of disqualified, one received an “FA”, and one received no ranking as he had previously been a lieutenant. R-22.

31. The complainant received an overall ranking of very good. In the seven categories, he received an excellent for his written exam score, an average based on his prior two performance appraisals, an excellent in time and attendance, a very good in his facility’s evaluation, an average for his questionnaire, an excellent for his disciplinary record, and a very good for his interview. R-8.

32. In October 2006, DOC’s human resource office attempted to get an updated facility selection form for the complainant’s application. Tr. 607-09; R-7. In the absence of an updated selection form, DOC used a facility selection form the complainant had previously provided with his 2004 promotional application to

determine which facilities the complainant was interested in being promoted to. Tr. 535.

33. Forty to fifty lieutenant promotional positions may become available annually. Tr. 465.

34. Between December 2006 and October 2007, inclusive, thirty seven correction officers were promoted to the position of lieutenant. Nine of the officers had received an overall ranking of excellent. Twenty eight of the officers had received an overall ranking of very good. R-22.

35. Of those correction officers who were promoted from the very good category, seven were white males who had written test scores equal to or lower than the complainant's score. R-22. Only one of the seven was identified by the complainant in his complaints. Complaint OPH/WBR 2007-045.

36. The complainant learned of the promotions referenced in complaints 2007-40 through -46 on or about March 10, 2007. Tr. 953.

37. The complainant learned of the promotions referred to in complaints 2007-50 through -53 and 2007-55 on or about August 31, 2007. Tr. 956; attachment to Complaint 2007-056.

38. The complainant learned of the promotion referenced in complaint number 2007-054 on July 30, 2007. R-46.

39. Of the twelve correction officers promoted to lieutenant identified in complaints 2007-40-42, 44-46 and 51-56, three received an overall ranking of excellent. R-

22. All three had lower scores on their written examinations than the complainant. R-22. One had less seniority than the complainant. Tr. 48.

40. The remaining nine promoted officers identified in the complaints 2007-40-42, 44-46 and 51-56, received an overall ranking of very good. R-22. They all received lower written examination scores than the complainant. R-22. Eight of the officers were non-white males who met DOC's affirmative action hiring goals. Tr. 619 – 29. One officer, a white male who scored lower on the written examination than the complainant, was promoted to a lieutenant position at DOC's Maloney Center for Training & Staff Development. R-24; Complaint OPH/WBR 2007-045. This position has a separate DOC job posting and an additional interview than lieutenant positions for other facilities. Tr. 131-32, 139, 766; R-18, 21, 24. Six of the nine officers ranked very good had less seniority than the complainant. Tr. 129, 153, 199, 230-31, 640, 657.

41. The complainant is a white male. Tr. 933; R-22. He is not an affirmative action hiring goal candidate. Tr. 707.

Analysis

I

Section 4-61dd (b) (3) requires, in part, that a retaliation complaint be filed with the chief human rights referee no later than thirty days after the complainant becomes

aware of the specific incident of retaliation. With respect to complaint number 2007-054, the complainant became aware on July 30, 2007 that he had not received the promotion that is the subject of that complaint. FF 38. He did not file his retaliation complaint until September 18, 2007; R-3; more than thirty days thereafter. The complaint is untimely and no evidence was offered that would support a claim of equitable tolling or equitable estoppel.

II

A

1

Whistleblower retaliation cases brought under § 4-61dd are typically analyzed under the three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and also under case law interpreting other anti-retaliatory statutes. *Stacy v. Dept. of Correction*, OPH/WBR No. 2003-002 (Final decision, March 1, 2004) (2004 WL 5000797). In interpreting Connecticut's anti-discrimination law, it is appropriate to look to federal precedent for guidance. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53 (1990). The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. *Stacy v. Dept. of Correction*, supra, OPH/WBR No. 2003-002, 4. The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of his prima facie case, (2) the respondent's burden in the presentation of its non-retaliatory explanation for the adverse personnel

action, and (3) the complainant's ultimate burden of proving the respondent retaliated against him because of his disclosure of protected information. Id.

The complainant's prima facie evidentiary burden has three elements. To fulfill the first element, the complainant must show that he engaged in a protected activity by satisfying the statutory prerequisites. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995).

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 the 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" (protected information). § 4-61dd (a). Fourth, the complainant must have disclosed the protected information to an employee of (1) the auditors of public accounts (auditors); (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 (whistleblowing). § 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." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008) (2008 WL 793597, 7). 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.*, supra, 2008 WL 793597, 4-6.[6]

To satisfy the second element of his prima facie case, the complainant must show that he suffered or was threatened with an adverse personnel action by a regulated entity subsequent to his whistleblowing. §4-61dd (b) (1). Disadvantageous employment actions that constitute an adverse personnel action include, but are not limited to, termination of employment, reduction of wages or salary, a less distinguished title, a material loss of benefits or other indicia unique to a particular situation. *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). Nevertheless, "the means by which an employer can retaliate against an employee are not limited to discriminatory actions that affect the terms and conditions of employment. . . . . Instead, retaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct . . . such as hiring, firing, change in benefits, or reassignment. . . . . Again, the

plaintiff must show that his employer's actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, supra, 537 F.Sup.2d 355-56; *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6).

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; *Gordon v. New York City Bd. of Educ.*, supra, 232 F.3d 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.

The complainant's "burden of proof at the prima facie stage is *de minimis*." *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173. Section 4-61dd "is

remedial in nature and as such should be read broadly in favor of those whom the law is intended to protect." *Colson v. Petrovision, Inc.*, 2000 WL 1475850, 3 (Conn. Super.) (28 Conn. L. Rptr. 334) (construing General Statutes § 31-51m).

If the complainant establishes a prima facie case through indirect circumstantial evidence, the analysis proceeds to the second burden-shifting step in which the respondents must produce a legitimate, non-retaliatory reason for their actions; *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 53-54; which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the respondents' actions. *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174. If the respondents do not produce a legitimate, non-retaliatory reason, the complainant prevails. If the respondents do produce a reason, the analysis proceeds to its third step.

In the third burden-shifting step, the complainant must prove by a preponderance of the evidence that he was retaliated against because of his whistleblowing. The complainant can show that he was a victim of retaliation through overt evidence directly persuading the factfinder that a retaliatory reason more likely the employer's action. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 54. Alternatively, he can persuade the factfinder that he was the victim of retaliation through evidence of an indirect circumstantial nature "showing that the employer's proffered explanation is unworthy of credence" and a pretext for the retaliatory personnel action. (Internal quotation marks omitted) Id. 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 Enfield*, 79 Conn. App. 501, 507; cert. denied, 266 Conn. 932 (2003). "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 compromising the prima facie case, without more . . . ." (Internal quotations omitted; citation omitted.) *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174.

To satisfy this burden, the complainant "need not prove that the defendant's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, supra, 2008 WL 793597, 8. 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. *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173.

2

Unlike the *McDonnell Douglas* analysis applied when the complainant's evidence is limited to indirect circumstantial evidence of pretext, the analytical framework differs when the complainant has established his prima facie case through evidence of direct retaliatory animus motivating the respondents' actions or through the statutory

rebuttable presumption. If the complainant "can provide direct evidence of retaliatory animus, he need not provide indirect evidence of a causal connection by showing that the protected activity closely followed the adverse action. Indeed, the *McDonnell Douglas* test itself is inappropriate in cases where there is direct evidence that retaliation played a part in the employment decision. . . . . Instead, the court would apply the test set forth in *Price Waterhouse v. Hopkins* . . . whereby the relevant inquiry is whether retaliation was a substantial or motivating factor in the decision making process. In showing retaliation to be a substantial or motivating factor, plaintiffs need not show the retaliation to be the determinative or deciding factor, or that defendants' decision would have been different, absent this factor. . . . . The burden then shifts to the employer to show that it would have subjected the employee to the same adverse conduct even if retaliation had not been considered in its decision." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, supra, 537 F. Sup.2d 354-55; *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 205 (1991).

Also, if the personnel action occurred within one year of the complainant's whistleblowing to the auditors or to the attorney general, then, because of the statutory rebuttable presumption, the respondents' burden is one of both production and persuasion. "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 . . . ." (Internal citations omitted.) *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. Dept. 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 quotations omitted.) Id., 339-40.

B

The complainant established a prima facie case that the respondents violated § 4-61dd. He is an employee of the respondent DOC, a state agency and regulated entity. FF 12 . The respondents were aware of the complainant's whistleblowing. He reported to DOC instances of what were, or what he reasonably in good faith believed to be, instances of employee misconduct that violated state laws and regulations. FF 6-9. He had also previously filed a whistleblower retaliation complaint against the respondents and identified himself as a "whistleblower" in correspondence with a DOC affirmative action officer. FF 10, 11. Further, he was not promoted to the position of lieutenant despite having a test score higher than or equivalent to those correction

officers (goal and non-goal candidates) who were promoted and also having more seniority than most of the promoted candidates identified in his complaints. FF 34, 25, 39, 40.

The respondents' non-discriminatory reasons for not promoting the complainant are: (1) he did not select some of the correctional facilities to which his comparators were promoted; (2) he could not have been promoted over candidates who received overall rankings of excellent; and (3) no warden contacted the recruitment office indicating that the complainant had superior qualifications to the goal candidates who were selected. Tr. 617-31.

Although the complainant established a prima facie case, he did not meet his ultimate burden of persuasion to establish by a preponderance of the evidence that the respondents' failure to promote him to the positions he identified in his complaints was in retaliation for his whistleblowing. Because the complainant did not whistleblow to the auditors or attorney general, he does not benefit from the statutory one-year presumption. Also, there is no evidence of any direct animus between the complainant and the decision-makers. The respondents granted his requests to transfer to other correctional facilities. R-7. He received a promotion to the position of correction treatment officer, albeit as a mutually agreed resolution of a complaint he filed with DOC's affirmative action unit. R-7. Further, testimony by the respondents' management was consistent that the complainant was not the topic of discussion at any management

meetings and no one gave or received any instructions not to promote him. Tr. 324-25, 381-82, 490, 495, 556, 710-11, 768, 808-09, 835-36, 867-68, 878, 896-97, 975.

The complainant believes that he should have been promoted because of his score of 91 on the written promotional exam, his clean disciplinary record, attendance, training, seniority, awards, excellent communication skills, experience in several correctional facilities dealing with diverse inmate populations and the lack of inmate grievances filed against him. Tr. 921-24, 926, 931, 933, 958-59. As evidence of retaliation, he noted that not all of the promotional procedures used by DOC are included in its regulations. Tr. 444-45, 449, 454; R-9. The respondents have developed a multi-faceted promotional process that includes consideration of the candidate's examination score, performance appraisals, attendance, years of experience, departmental awards (though not facility awards), education, disciplinary record and an interview involving the same pre-determined questions and correct answers for all interviewing candidates. FF 12-20. Although the process may not be entirely free of subjectivity, much of the process is objective and there is no evidence that the procedures were was applied differently to the complainant than to other promotional candidates.

The complainant's indirect circumstantial evidence of retaliation is also based on the promotions of correction officers who had lower test scores, less seniority and less experience with varied inmate populations than he had. Tr. 922, 931, 942-43, 958-59. While it is evident from his testimony and personnel file that the complainant is qualified

to be promoted to lieutenant, it is also evident from the testimony of the employees identified in the complaints that, while they may not have the complainant's exact qualifications, they also are qualified for the position of lieutenant. In addition, it is clear from the testimony that candidates who receive an overall rating of excellent are promoted before those rating very good. FF 22. It is also evident from the testimony that given DOC's emphasis on promoting candidates who satisfied its affirmative action hiring and promotional goals, the complainant, a non-goal candidate, would not likely have been selected by the wardens at the facilities at issue in his complaints. FF 21, 41; Tr. 703-07. There is evidence that the respondents promoted seven white males who also ranked very good. FF 35. One of them was promoted to DOC's Mahoney Center; FF 40; and there is no evidence that the complainant applied to that position. There is no evidence of the facilities to which the remaining six were promoted or the circumstances involved in their promotions.

There is a dispute between the complainant and the respondent regarding the facility selection form. This form is provided by DOC with its internal promotional application package and it lists DOC's twenty facilities. The candidate initials those facilities where he would like to be considered for promotion. The candidate then returns the form to DOC. From the complainant's questioning of witnesses, it appears that his position is (1) the DOC facility form was not included in the application materials he received from DOC, and (2) DOC should have used the DAS geographical selection form that he submitted to DAS with his application for the written exam. In response,

DOC claims that when it did not receive a facility selection form from the complainant, its recruitment office, on October 27, 2006, faxed the form to the personnel office at the complainant's facility to be given to the complainant for completion and returned to the recruitment office. R-7. When the form was not returned, the recruitment office used the DOC facility selection form submitted by the complainant with his prior 2004 promotional application. FF 32. The respondent further explained that it does not use the DAS geographical form for any promotional candidate because DAS's geographical regions do not correspond to DOC's facility locations. Tr. 539. The complainant did not explain why he did not respond to the recruitment office's October 2006 request for a selection form. He also did not identify any promotional candidate for whom DOC had used DAS's geographical form instead of its own facility selection form.

Although the complainant believes that his reporting of staff misconduct has prevented his promotion, witnesses at the hearing who had been involved in investigations or who had reported employee misconduct testified that they themselves had been promoted after making their reports; Tr. 214-216, 224, 395, 409, 789, 863; and were unaware of any DOC employee being retaliated against for reporting employee misconduct. Tr. 855.

Conclusions of law

1. Complaint number 2007-054 was untimely filed.

2. The complainant established a prima facie case of retaliation.
3. The respondents produced non-retaliatory explanations for not promoting the complainant to the lieutenant positions he identified in his complaints.
4. The complainant did not establish by a preponderance of the evidence that the respondents' failure to promote him to the lieutenant positions identified in his complaints was in retaliation for his whistleblowing.

Order

The complaints are dismissed.

_____
Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Mr. Shawn Irwin
Commissioner Theresa Lantz
Mr. Daniel Callahan
Attorney Nancy Brouillet/Attorney Richard Miller

[1] In each of the seven complaints, the complainant identified a DOC employee whom the complainant believes was promoted to the position of lieutenant instead of him.

[2] 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 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

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

[3] In each of these seven complaints, the complainant identified an additional DOC employee whom the complainant believes was promoted to the position of lieutenant instead of him.

[4] Complainant's exhibits are identified as "C-"followed by the exhibit number. The respondents' exhibits are identified as "R-"followed by the exhibit number. Transcript pages are referenced as "Tr." followed by the transcript page number.

[5] The performance evaluation score is based on the ratings of the employee's prior two performance appraisals. R-8. The facility recommendation is an evaluation of the candidate's supervisory potential. Tr. 586. It is based on an assessment by the employee's captain or the unit commander in direct contact with the employee, with a sign-off by the warden, of the employee's strengths, proficiencies and need for development in twelve categories. Tr. 69, 533, 587; R-8. The employee questionnaire is also designed to determine whether the employee has any supervisory skills or experience gained by activities outside of DOC. Tr. 588. In addition to an employee's supervisory experience, it also seeks information on the employee's years of service, DOC awards received by an employee and the employee's post-high school educational achievement. R-8. For consistency during the interviews, the interviewers are provided with questions and predetermined answers. The interviewers record the number of the interviewee's correct answers. Tr. 571; R-8. Disciplinary actions are written reprimands, suspensions and dismissal. Informal and formal counseling are not

considered disciplinary actions and are not considered in the promotion process. Tr. 470-74.

[6] Pursuant to § 4-61dd (a), an employee may transmit information to the auditors or the attorney general who shall conduct an investigation. If, at the conclusion of the investigation, the auditors or the attorney general make a specific finding that the employee knowingly and maliciously made false charges under subsection (a), the employer may subject the employee to disciplinary action because of the employee's knowingly and maliciously false charge. If, after the imposition of such disciplinary action, the employee files a retaliation complaint with the chief human rights referee, the employer may raise as a jurisdictional defense the prior finding by the auditors or the attorney general that the employee knowingly and maliciously made false charges under § 4-61dd (a). § 4-61dd (c). Absent the specific finding by the auditors or attorney general, the employee's status as a protected whistleblower is not a jurisdictional defense.