Andrew N. Matthews, Complainant	: Office of Public Hearing : c/o Commission on Human : Rights and Opportunities
v.	:
	: OPH/WBR No. 2007-062
Commissioner John Danaher, III, et al., Respondents	: February 20, 2008

Ruling re: the respondents' motion to dismiss the complaint

Procedural history

On November 23, 2007, the complainant filed a complaint with the chief human rights referee alleging that the respondents violated General Statutes § 4-61dd.[1] On December 6, 2007, the respondents filed their motion (motion) and supporting memorandum of law (memorandum) to dismiss the complaint, their answer, and their affirmative defenses. On January 29, 2008, the complainant filed an objection to the motion (objection), a motion to amend the complaint, and a response to the respondents' answer and affirmative defenses. The respondents filed their objection to the motion to amend on February 5, 2008, and filed a reply to the complainant's objection (reply) on February 6, 2008. Also on February 6, 2008, the complainant filed a response to respondents' objection to amending the complaint (response). The complainant's motion to amend his complaint was granted on February 8, 2008. The respondents filed a motion to dismiss the amended complaint on February 13, 2008 (amended motion).

Discussion

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In his complaint as amended (whistleblower retaliation complaint), the complainant alleged that the respondents violated General Statutes § 4-61dd when they retaliated against him for his protected disclosure of information by (1) transferring him into a hostile work environment and (2) threatening, in their tenth affirmative defense, to take personnel action against him. With respect to the complainant's allegation that his transfer was retaliatory, the respondents argue that the allegation should be dismissed because the human rights referees lack jurisdiction as: (1) the complainant filed grievances pursuant to his collective bargaining agreement prior to filing his whistleblower retaliation complaint; (2) an investigation of the transfer is currently being conducted by the attorney general at the complainant's request; and (3) the complainant failed to provide requisite information in his whistleblower retaliation complaint form. Motion, pp. 1-2; Memorandum, pp. 7-12.

A

According to the respondents, pursuant to a collective bargaining agreement between the respondents and the complainant, the complainant has filed three grievances, DPS # 06-021 (filed on or about May 26, 2006), DPS # 07-028 (filed on or about June 7, 2007) and DPS # 07-063 (filed on or about November 13, 2007). In DPS #06-021, the complainant alleged that his proposed transfer from Meriden to

Middletown was "a direct result of my status as a whistle-blower." In DPS #07-028, the complainant alleged that despite a report by the attorney general finding that he had been subjected to a hostile work environment, he continued to be assigned to an unsafe work environment. In DPS #07-063, the complainant contested the respondents' decision to reassign him to a permanent work location at Brainard Field, Hartford, effective on November 1, 2007. Respondents' exhibits C, D, E and F. The respondents contend that the complainant's filing of these grievances precludes him from filing a whistleblower retaliation complaint. In support thereof, the respondents cite the language of § 4-61dd (b) (4) (a), the complainant's failure to exhaust his administrative remedies, and the doctrines of estoppel and prior pending action. Memorandum, pp. 7-10.

In his objection, the complainant "maintains that it was absolutely appropriate to have both a Union grievance filed as well as a whistleblower retaliation complaint filed" with the chief human rights referee. Objection, p. 3. According to the complainant, "the Union grievance pertains to contractual violations, whereas the complaint at issue here is a human rights whistleblower retaliation violation." Id. The complainant further represented that he had requested that the union withdraw his November 13, 2007 grievance, DPS-#07-063. Id.

The applicable statutory provision is § 4-61dd (b) (4) which provides in relevant part: "*As an alternative* to the provisions of subdivisions (2) [notifying the attorney general] and (3) [filing a complaint with the chief human rights referee] 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 . . . .” (Emphasis added.) The statute is clear that an employee has an election of mutually exclusive alternative forums in which to challenge the consequences of a specific incident, regardless of the myriad of legal claims that may arise from the incident.

In the case of the complainant, a state employee who is covered by a collective bargaining agreement, his alternatives are filing a complaint with the human rights referee or filing a grievance in accordance with the procedure provided in his collective bargaining agreement. Only one of the grievances filed by the complainant, DPS #07-063, relates to the specific incident raised in the complainant’s whistleblower retaliation complaint, the respondents’ transfer of him to Brainard Field. Pursuant to the clear statutory language, the complainant cannot simultaneously pursue claims arising from this specific incident by both a grievance through his collective bargaining agreement and also a whistleblower retaliation complaint with the chief human rights referee. Although the complainant represented in his objection that he requested that his union withdraw the grievance, he filed no documentation that the grievance had been withdrawn. Therefore, on or before March 6, 2006, the complainant shall file and serve

a withdrawal either of the DPS #07-063 grievance or his allegation that the transfer was retaliatory claim. Failure to file a withdrawal of his grievance may result in a dismissal of the allegation that the November 1, 2007 transfer was retaliatory.

B

The respondents next argued that the pending investigation by the attorney general into whether the transfer was retaliatory deprives the human rights referees of jurisdiction to hear this whistleblower retaliation complaint. Memorandum, pp. 10-11. Section 47 of Public Act 05-287, however, eliminated the previous requirement that an employee had to wait until the conclusion of an investigation by the attorney general before he could file a complaint with the chief human rights referee

C

The respondents further argued that the whistleblower retaliation complaint should be dismissed because the complainant failed to include in paragraph 8 of the complaint form information necessary to enable them to answer, investigate and prepare a defense to his complaint. Memorandum, pp. 11-12. Attached to the whistleblower retaliation complaint, though, is a detailed report of the investigation conducted by the attorney general pursuant to § 4-61dd of the complainant's allegations of retaliation committed by the Connecticut state police. The whistleblower retaliation complaint is deemed to incorporate the attorney general's report, which provides sufficient information to satisfy the information sought in paragraph 8. Further, the

whistleblower retaliation complaint provides the respondents with clear and unambiguous notice of the complainant's allegations that his transfer was in retaliation for his disclosure of information to the auditors and attorney general.

II

In response to the November 27, 2007 complaint, the respondents filed an answer and affirmative defenses. In their tenth affirmative defense, the respondents asserted that the human rights referees lack "subject matter jurisdiction over this matter because Complainant is properly subject to discipline under Conn. Gen. Gen. Stat. § 4-61dd for knowingly and maliciously making false charges of retaliation under subsection (a) thereof." Answer and affirmative defenses, p. 4. Thereafter, the complainant amended his complaint to allege that this statement is a retaliatory threat that violates § 4-61dd. According to the complainant, by this statement the respondents are "threatening to take a personnel action against the Complainant for exercising his right to make a complaint of retaliation, pursuant to Conn. Gen. Statute § 4-61dd (b)." Motion to amend complaint, p. 2; Response, pp. 1-3. According to the respondents, the complainant's allegation should be dismissed, for failing to state a claim upon which relief can be granted, because: (1) their tenth affirmative defense is not a threat of a retaliatory act but a defense that the complainant's misconduct removes him from the protections of § 4-61dd and (2) the respondents were unaware that the tenth affirmative defense had been asserted until after it was filed. Objection to the motion to amend the complaint, pp. 1-3; Amended motion, pp. 2-3.

A

In arguing for the dismissal of this claim, the respondents first contend that the complainant offers "no factual allegations supporting his assertion of a pending or threatening retaliatory personnel action." Objection to motion to amend complaint, p. 2. According to the respondents, "[e]ven the most cursory review of the allegations of the Tenth Defense confirms that it cannot reasonably be read as alleging that Complainant has been disciplined, or threatened with discipline" by the respondents. Id., pp. 2-3 "The Tenth Defense merely alleges that Complainant's misconduct has deprived [the human rights referees] of jurisdiction to adjudicate this matter". Id., p 3.

This is not a situation in which the complainant claims that the transfer is an illegal retaliatory act while the respondents claim that the transfer is a proper disciplinary act resulting from the complainant's knowingly false and malicious statements to the auditors and attorney general. The respondents here do not claim that the transfer was disciplinary. Rather, they assert that the transfer was, in part, because "we have identified Brainard Field as a suitable work location for Sgt. Matthews and Lt. Pagoni where they can work together in the Risk Management Unit." Affidavit of John Danaher, III, exhibit A. p. 2.

In evaluating a motion to dismiss, "the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in [his] favor." *Mary Bagnaschi-Maher v.*

Torrington Housing Authority, OPH/WBR No. 2005-013, 2 (March 3, 2006). Construing the allegations in a light most favorable to the complainant, in the tenth affirmative defense, the respondents are charging the complainant with making unspecified false charges and committing indeterminate misconduct that warrants unidentified discipline. The tenth affirmative defense is in itself the factual allegation supporting the complainant's position that the tenth affirmative defense is a threat of adverse personnel action.

B

The respondents next contend that the "Complainant has likewise not asserted a single fact suggesting that Respondents are responsible for the assertion of that defense. Indeed, it is equally as plausible, if not more so, that Respondents played no role whatsoever in the assertion of the Tenth Defense." Amended motion, p. 3. "In fact, discovery will confirm that neither Respondent was even aware that the Tenth Defense was asserted until after the filing of the Answer and Affirmative Defenses." Id., n. 2. The tenth affirmative defense is not a figment of the complainant's imagination; it is contained in the respondents' own answer and affirmative defenses. The respondents have offered no authority that parties are not responsible for the information contained in their own pleadings.

Ruling and order

1. The respondents' motion to dismiss is denied.

2. On or before on or before March 6, 2006, the complainant shall file and serve either documentation that the grievance DPS #07-063 has been withdrawn or a withdrawal of his allegation that the November 1, 2007 transfer was retaliatory. Failure to file such documentation or withdrawal may result in a dismissal of the allegation that the November 1, 2007 transfer was retaliatory.

3. The dates previously ordered for prehearing activities are modified as follows: requests for production of documents to be served by March 19, 2008; objections to be served and filed and compliance with requests not objected to be served by April 23, 2008; motions to compel to be served and filed by May 24, 2008; and witness and exhibit lists to be served and filed by June 25, 2008.

4. The dates previously ordered remain as scheduled for the objections to proposed witnesses and exhibits, July 10, 2008; the prehearing conference, August 6, 2008 at 10:00 AM; and the hearing, August 19-21, 26-28, 2008 at 9:30 AM.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

c:
Sergeant Andrew N. Matthews
John P. Shea, Esq.

[1] 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.”