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	: March 27, 2008

Ruling re: the respondents' motion for reconsideration

The complainant filed his complaint with the chief human rights referee on November 23, 2007. On December 6, 2007, the respondents filed their answer and affirmative defenses. The complainant's motion to amend his complaint to allege that the respondents' tenth affirmative defense was a threat of retaliatory action was granted on February 8, 2008. On March 4, 2008, the respondents moved to amend their tenth affirmative defense. The complainant filed his objection on March 5, 2008. The motion to amend was denied on March 7, 2008. On March 10, 2008, the respondents filed a motion for reconsideration (reconsideration motion) of the ruling denying the amendment. The complainant filed his objection on March 18, 2008.

The respondents' reconsideration motion is denied.

According to § 4-61dd-20 of the Regulations of Connecticut State Agencies, a final decision may be reconsidered in accordance with General Statutes § 4-181a,

which provides for reconsideration of a final decision "on the ground that (A) An error of fact or law should be corrected; (B) new evidence has been discovered which materially affects the merits of the case and which for good reasons was not presented in the agency proceeding; or (C) other good cause for reconsideration has been shown."[1] The respondents argue that the undersigned committed an error of law that should be corrected. According to the respondents, their proposed amendment does not delay the proceeding, does not prejudice the complainant's ability to present his case and is timely filed. Therefore, assert the respondents, the amendment is reasonable and must be permitted. Reconsideration motion, pp. 1, 3.

The respondents are not proposing to add a special defense. Rather, they propose to replace the existing tenth affirmative defense with a materially different one. The existing tenth affirmative defense is: "The CHRO Office of Public Hearings lacks subject matter jurisdiction over this matter because Complainant is properly subject to discipline under Conn. Gen. Stat. § 4-61dd for knowingly and maliciously making false charges of retaliation under subsection (a) thereof." The respondents' proposed substitution is: "The CHRO Office of Public Hearings lacks subject matter jurisdiction over this matter to the extent it determines that Complainant has knowingly and maliciously made false charges of retaliation, as individuals who engage in such

[1] The same criteria shall be applied to requests to reconsider a ruling

conduct are not in the class of persons Conn. Gen. Stat. § 4-61dd was intended to protect." For reasons including those given by the respondents themselves in their reconsideration motion, the proposed amendment is unreasonable because it would unfairly prejudice the complainant's case.

In support of their proposed amendment, the respondents argue that "[i]n fact, the Amended Defense reduces, as opposed to enlarges, the factual or legal issues raised by the original Tenth Affirmative Defense." Reconsideration motion, p. 2. The amended defense "simply withdraws certain factual assertions Complainant has misread as evidencing the existence of certain pending or threatened personnel actions." Reconsideration motion, p. 4. Obviously, permitting the respondents to withdraw factual and legal issues raised by the complainant as part of his case would indeed unfairly prejudice the complainant's case.

According to the respondents, it "would appear axiomatic that Respondents would be encouraged, if not expected, to amend, clarify or otherwise 'retract' a communication that Complainant, a proclaimed whistleblower, has misconstrued to be threatening adverse personnel action." Reconsideration motion, p. 3. Further, "as Respondents would be free to amend or rescind any other communication which Complainant misinterpreted as threatening a retaliatory personnel action, they must be permitted to amend their pleadings here." Reconsideration motion, p. 4. Whether the

tenth affirmative defense is a threatened personnel action, as alleged by the complainant, or is the complainant's misconception of a threatened personnel action, as alleged by the respondents, is an evidentiary matter for the hearing, at which time the evidentiary burden will be on the complainant as to the allegations of retaliation in his amended complaint. While the respondents, indeed any employer, are free to rescind a communication or action that may be retaliatory or perceived to be retaliatory, the rescission itself is relevant only to the issue of damages not to the issue of liability. The communication or action remains as disputed evidence of retaliation.

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Hon. Jon P. FitzGerald
Presiding Human Rights Referee

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