STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Elaine Richardson Complainant	:	OPH/WBR No. 2009-107
v.		
Autotote Enterprises, Inc. Respondent	:	December 31, 2009

Memorandum on Respondent's
Motion to Dismiss

Procedural Background

The complainant filed a complaint pursuant to General Statutes § 4-61dd with the Chief Human Rights Referee on July 1, 2009 alleging that she is a victim of retaliatory treatment (termination) as a consequence of her "whistleblower" disclosure relating "illegal 10 percenting."

The respondent, on August 7, 2009 filed a motion to dismiss the pending complaint, challenging this tribunal's jurisdiction to adjudicate this matter. Specifically, the respondent proffers that a necessary predicate for bringing a whistleblower retaliation action pursuant to § 4-61dd requires that the named respondent must be one of three statutorily named entities. These being a state agency, a quasi-state agency or a large state contractor. In this instance the complainant alleges that the respondent is a large state contractor. [1]

[1] CGS § 4-61dd (B) (6) (h) (1) & (2) defines large state contractor as "…an entity that has entered into a large state contract with a state or quasi-public agency." Large state contract is defined as "a contract between an entity and a state or quasi-public agency, having a value of five million or more."

In support of its motion the respondent has filed a memorandum of law along with an affidavit of James Birney, General Manager of Autotote Enterprises averring to the fact that the respondent is not a large state contractor as defined. The respondent counter's the allegation that it qualifies as a large state contractor by proffering that its only contract with the state was executed and completed in 1993 approximately 5 years prior to § 4-61dd being amended by public act 98-91. This public act caused employees of large state contractors to be afforded protection from whistleblower retaliation.

Additionally it filed a copy of the 1993 contract which was a purchase agreement between the respondent and the State of Connecticut, Division of Special Revenue dated June 30, 1993 (Exhibit A), wherein the respondent purchased from the State of Connecticut the right to operate off-track betting (OTB) in Connecticut.

The complainant, on September 4, 2009 sought and was granted an extension of time to October 2, 2009 to respond to respondent's motion. The complainant, on October 1, 2009 filed her objection to the pending motion to dismiss. The objection, however, failed to address, in any meaningful manner, the issue of whether the respondent is a large state contractor thereby qualifying the complainant for protection under § 4-61dd.

For the reasons that follow the respondent's motion to dismiss the pending complaint is hereby GRANTED.

Analysis

"A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . When a . . . court decides a jurisdictional question raised by a pretrial motion to dismiss, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the [complainant]." (Citations omitted; internal quotation marks omitted.) *Cox v. Aiken*, 278 Conn. 204, 211 (2006). "The motion to dismiss . . . admits all facts which are well pleaded, invokes the existing record and must be decided upon that alone. . . . Where, however, as here, the motion is accompanied by supporting affidavits containing undisputed facts, the court may look to their content for determination of the jurisdictional issue and need not conclusively presume the validity of the allegations of the complaint." (Citations omitted; internal quotation marks omitted.) *Ferreira v. Pringle*, 255 Conn. 330, 346-47 (2001).

Having reviewed the parties' submissions, I conclude that the respondent is not a large state contractor as defined by statute. The consequence of this finding is that this tribunal is without the requisite jurisdiction to hear this matter. This conclusion is based on the following.

First, is that the complainant failed to address the issue of the respondent being a large state contractor. While this tribunal is prepared to give latitude to a pro se litigant, the extent of the latitude to be afforded cannot extend to ignoring a statutory prerequisite for bringing this type of claim. See *New Haven v. Bonner,* 272 Conn. 489, 498 (2005). In responding to the respondent's argument and Mr. Birney's affidavit that it is not a large state contractor, the complainant rather than merely stating the conclusory statement "the respondent is a large state contractor" could have cited to a specific contract that would support her allegation that the respondent is a large state contractor or she could have sought and obtained from the state auditors a statement that the respondent, according to their records, is a large state contractor.[2]

Second, and again not addressed by the complainant is the fact that the only contract to which the respondent and state or any of its agencies are parties to having a value over five million dollars was executed and completed in 1993. As the respondent points out that it is an established rule of construction that legislation is to be applied prospectively unless it is clear that the intention to apply retrospectively, *Cayer v. Western Connecticut State University,* 2005 WL 5746432.

The application of public act 98-191 would appear on its face to be intended to be applied prospectively based on the requirement found in section (e) of the public act that "[e]ach contract between a state or quasi-public agency and a large state contractor shall provide that, …employee… of a large state contractor takes or threatens to take

[2] This manner of seeking information as to an entity's status is suggested on the Office of Public Hearings website under frequently asked questions.

any personnel action against any employee… in retaliation for such employee's disclosure the contractor shall be liable…" Clearly, the public act was referring to contracts to be executed and not contracts executed 5 years prior.

The complainant being a pro se, I am compelled to inform her that she has pursuant to §§ 4-181a and 4-61dd-20 of Regulations of Connecticut State Agencies the right to seek a reconsideration of this ruling within 15 days. I would however strongly urge the complainant were she to consider filing such a request that she review the requirements of making such a request and that filing of that request be accompanied by a statement from the state auditors that the respondent is deemed a large state contractor.

For the reasons stated above the complainant's complaint is hereby dismissed for lack of jurisdiction.

It is so ordered the 31st day of December 2009.

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Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.

Elaine Richardson
Robert D. Tobin, Esq.