STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Stephen J. Samson, Complainant	:	No. OPH/WBR-2007-064
v.	:	
State of Connecticut Department of Public Safety, Respondent	:	June 20, 2008

RULING ON MOTION TO DISMISS

On December 14, 2007, the complainant, Stephen Samson, filed a whistleblower retaliation complaint pursuant to General Statutes § 4-61dd (b). After the respondent filed timely answers and special defenses, the complainant filed a lengthy reply combined with an amended complaint on February 12, 2008. The complainant's pleading provides more than a dozen pages of factual detail, describes anticipated testimony and evidence (and includes numerous evidentiary documents), challenges the credibility of other employees, and argues both factual and legal matters—all far exceeding the requirements for this type of pleading, yet inexplicably bypassing some of the deficiencies in the initial complaint that were highlighted in the respondent's answers and special defenses.

The initial complaint and amended complaint identify six specific actions taken by the respondent, allegedly in retaliation for his disclosure of information (that is, his "whistleblowing") to the Attorney General (AG) and the Auditors of Public Accounts (Auditors) pursuant to General Statutes § 4-61dd (a). All of these actions occurred during the three month period following the complainant's whistleblowing, although some of the pertinent dates were either imprecise or simply omitted in both the initial and the amended complaint.

On February 25, 2008, the respondent filed a motion to dismiss (the motion) the complaint, along with a memorandum of law. The complainant filed a written objection

to the motion on March 25, 2008 and the respondent replied to the objection on April 9, 2005.

Section 4-61dd-15 (c) of the Regulations of Connecticut State Agencies (regulations) authorizes the presiding referee to dismiss a complaint for, among other reasons, lack of jurisdiction or failure to state a claim upon which relief can be granted. The respondent contends that this case is time-barred by General Statutues § 4-61dd (b) (3) (A) because the complainant filed his complaint more 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 retaliation for his whistleblowing pursuant to § 4-61dd (a). The respondent also argues that the complainant has failed to state a claim on which relief can be granted because (1) none of the actions constituted an "adverse personnel action" as a matter of law; (2) none of the actions was retaliatory; and (3) the complainant failed to comply with the pertinent pleading regulations. In its reply to the complainant's objection, the respondent focuses primarily upon its timeliness argument and its claim that none of the alleged retaliatory acts rose to the level of an "adverse personal action."

Before proceeding with my evaluation of the motion, I must describe the alleged deficiencies in the complaint and amended complaint, along with the complainant's subsequent—and unsuccessful—attempts to rectify those deficiencies, for these deficiencies ultimately form the basis for this ruling.

The basic whistleblower retaliation complaint consists of a prepared form that requires specific information from a complainant. Language in the form itself encourages complainants to attach additional pages if needed to provide all of the requested information. The motion, for the most part, concerns the information requested in Part 9.A of the complaint form.

Part 9.A requests the date(s) on which the complainant learned of the threats or actions that he believes constituted retaliation for his whistleblowing disclosures. Answers to Part 9.A are critical in determining whether the complainant filed this retaliation complaint in a timely fashion—that is, within thirty days of learning of the retaliatory actions. In the attachment to his complaint, the complainant answered this question only with regard to four of the alleged six retaliatory actions. Even after the respondent's

answer and special defenses highlighted the deficiencies, the complainant's amended complaint failed to provide the needed information.

On May 14, 2008, I held a telephonic status conference with the parties and directed the complainant orally (followed by written confirmation) to amend his complaint—before I ruled on the motion to dismiss—by providing crucial, supplemental information, including the following:

> The complainant shall amend his allegations under part 9.A of the form complaint:
>
> A. By identifying the date he learned that he was not paid for his October 22, 2007 overtime work (and not just the date he informed that respondent that he had not been paid); and
> B. By identifying the date he learned that some individuals had received the 'safety of flight' memorandum before he did (a date that may not necessarily be the date he received the memorandum). . . .

(Emphasis added.) Directive re Amended Complaint May 14, 2008.[1]

The complainant filed his second amended complaint on May 30, 2008, but failed to provide the information requested in my directive. Upon review of the extant record, including the second amended complaint and the respondent's subsequent objection to the amendment, I now turn to the respondent's motion.

I. TIMELINESS

General Statutes § 4-61dd (b) (3) (A) requires an employee to file a retaliation complaint "[n]ot 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 retaliation for his whistleblowing pursuant to § 4-61dd (a). (Emphasis added.) This thirty-day filing requirement is technically not a jurisdictional prerequisite, but, in essence, is a mandatory statute of limitations. Thus, an untimely complaint will be barred unless waiver, consent, estoppel or some other compelling equitable tolling applies. See *Zipes v. Trans World Airlines, Inc*., 455 U.S. 385, 393 (1982) (re filing deadline for Title VII

[1] Indeed, the respondent itself suggested at the conclusion of its motion to dismiss that, as an alternative to dismissal, I direct the complainant to revise his complaint to provide the necessary information.

discrimination claims filed with EEOC); *Williams v. Commission on Human Rights & Opportunities,* 257 Conn. 258, 285 (2001) (re filing deadline for discrimination complaints pursuant to the Connecticut Fair Employment Practices Act [CFEPA]). Since the complainant filed his complaint on December 14, 2007, the statute, read literally, would only cover incidents he learned about on or after November 14, 2007. I will address each of the six actions below.

When, as here, the complainant alleges more than one adverse action, the "continuing violation" theory may equitably toll a statutory limitation period. Under Title VII [2] (and by inference, under other federal and state employment discrimination laws, as well as § 4-61dd and other Connecticut whistleblower protection statutes [3]), the continuing violation theory extends the limitations period for a series of related unlawful acts, including acts that standing alone would have been untimely, provided at least one of the acts occurred within the filing period. *Wilks v. Elizabeth Arden, Inc*., 507 F.Sup.2d 179, 191 (D.Conn. 2007); *Darling v. Potter*, 2005 WL 2045951, *3 (D.Conn.); *State of Connecticut v. Commission on Human Rights & Opportunities*, 211 Conn. 464, 473 (1989). Historically, when evidence supports a finding of a continuing violation, the deadline has been tolled when as at least one of the related incidents is not time-barred. See *Nader v. Brunalli Construction Co*., 2002 WL 724597, *7 (D.Conn.); *Commission on Human*

[2] Analysis of whistleblower retaliation claims follows the burden-shifting model for Title VII retaliation claims articulated in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) and its progeny. *LaFond v. General Physics Services Corp*., 50 F.3d 165, 172-73 (2nd Cir. 1995) (holding that Connecticut courts apply federal employment discrimination standards to a claim of retaliation under § 31-51m); *Arnone v. Town of Enfield*, 79 Conn. App. 501, 507, cert. denied, 266 Conn. 932 (2003) (retaliation under § 31-51m); *Ford v. Blue Cross Blue Shield of Connecticut, Inc*., 216 Conn. 40, 53-54 (1990) (retaliation under § 31-290a); *Reyes v. State of Connecticut, Office of the Comptroller,* 2004 WL 5000798 (CT Civ. Rts.) (OPH/WBR No. 2004-06, Ruling on Motion to Dismiss, March 18, 2004) (retaliation under § 4-61dd); *Stacy v. Department of Correction*, 2004 WL 5380919 (CT Civ. Rts.) (OPH/WBR No. 2003-02, Final Decision, March 1, 2004) (retaliation under § 4-61dd). The requirements of proof under *McDonnell Douglas* "must be tailored to the particular facts of each case." *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 204 (1991).

[3] Like General Statutes § 4-61dd, § 31-51m protects certain employees from retaliatory actions when the employees have in good faith filed a whistleblower complaint. The paucity of interpretive law under § 4-61dd has led this tribunal to rely consistently upon cases construing § 31-51m. See, e.g., *Irwin v. Lantz*, 2008 WL 2311544 (CT Civ. Rts.) (No. OPH/WBR-2007-040, Final Decision, May 9, 2008); *Stacy v. Department of Correction*, supra, 2004 WL 5380919).

Rights & Opportunities ex rel. Ward v. Black Point Beach Club Association, 2002 WL 33957399 (CT Civ. Rts.) (CHRO No. 0150047, Final Decision, August 30, 2002).

In 2002, however, the United States Supreme Court constrained the use of the continuing violation theory. According to *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101 (2002) (along with the myriad federal and Connecticut cases following *Morgan*), under Title VII, each discrete act of discrimination or retaliation constitutes a separate, actionable incident and an employee cannot proceed on claims based on discrete acts occurring beyond the appropriate time period, even if they are related to acts alleged in a timely manner. Id., 113-14; see also *Patterson v. County of Oneida*, 375 F.3d 206, 220 (2nd Cir. 2004) (Title VII precludes recovery for discrete acts of discrimination that occurred outside of the statutory period, even if other related acts occurred within the time period); Commission *on Human Rights & Opportunities ex rel. Magda v. Diageo North America, Inc*., 2006 WL 2965493 (CT Civ. Rts.) (CHRO No. 0420213, Ruling on Motion to Dismiss, March 16, 2006). Discrete acts "that fall within the statutory time period do not make timely acts that fall outside the time period." *National Railroad v. Morgan*, supra, 112. One exception to this tenet, as discussed in detail below, may occur in a situation involving a hostile work environment. *Darling v. Potter*, supra, 2005 WL 2045951, *4.

A discrete act is a "single completed activity that occurs at a specific time, and typically is actionable on its own." *Elmenayer v. ABF Freight System, Inc*., 318 F.3d 130, 135 (2nd Cir. 2003) An employer "performs a separate employment practice [that is, a discrete act] each time it takes adverse action against an employee, even if the action is simply a periodic implementation of an adverse decision previously made." Id., 134. Discrete acts may include, but are not limited to, refusal to hire, termination, transfer (or denial thereof), failure to promote, demotion, discontinuance of a specific work assignment, denial of a private office or failure to compensate adequately. *National Railroad v. Morgan*, supra, 536 U.S. 114; *Kassner v. 2nd Avenue Delicatessen, Inc.,* 2007 WL 2119769,*4 (2nd Cir.)*; Coudert v. Janney Montgomery Scott, LLC,* 2005 WL 1563325, *6 (D.Conn.); *Mills v. Connecticut Judicial Department,* 2003 WL 1860523,*4 (D.Conn.). On this record, it appears that all six of the alleged retaliatory actions described by the complainant occurred prior to the thirty-day deadline. If, as the respondent argues, those actions are discrete acts, they are time barred and must be dismissed. My task of determining whether the complainant has described timely

discrete acts or, alternatively, can rely in any way upon the limited continuing violation theory, is rendered more difficult by the complainant's failure to provide the necessary information in his second amended complaint.

II. THE SIX SPECIFIC INCIDENTS

(1) The complainant alleges that on September 28, 2007, the respondent required him to write a memorandum explaining his tardiness that day. In addition to asserting that, in fact, he was not tardy, the complainant notes that other employees were frequently tardy and not required to prepare such a memorandum. In light of the thirty-day filing deadline, discrete events occurring prior to November 14, 2007 are barred by the statute of limitations. This particular claim, based on an incident occurring late September 2007, is therefore untimely.

(2) The complainant claims that although he worked rotating shifts for the prior six years of his employment with the respondent, his commanding officer placed him on "straight evening" shifts shortly after his whistleblowing disclosures in September 2007.

The complainant did not indicate precisely when he learned of the schedule change, but he did state in his amended complaint that "Lt. Stevens advised Complainant that the shift change was only temporary; however, during a subsequent meeting on 10-26-07 he then stated that this shift change would be made permanently." (Amended complaint, p. 3) The respondent's version of this schedule change differs in small but significant ways. The respondent admits that it first changed the complainant's shift on September 10, 2007, but with the complainant's acquiescence. (The complainant never provided a date for this initial change and did not contradict the respondent's representations.) Although the complainant grew dissatisfied with straight evening shifts, he refused to work with certain individuals on the day shift, thus undercutting the respondent's ability in late October to rotate the complainant's shifts between day and night.

The uncontested documents before me reveal that the complainant learned of the initial change in September 2007 and of the allegedly permanent change in late October. Both fall outside of the limitations period. Standing along, without demonstration that they were part of a cognizable continuing violation, these schedule changes cannot provide the basis for a timely claim.

(3) According to a letter appended to the original complaint, the respondent "removed [him] from the flight schedules for fixwing (sic) training." The respondent admits that, for a period of time, it removed the complainant from the fixed-wing training schedule, but explains that the complainant's level of experience no longer required scheduled training and that he was free to engage in such training at his convenience. Indeed, the first amended complaint confirms that on or about September 26, 2007, a Federal Aviation Administration flight instructor cleared the complainant to fly solo, thus obviating the need for formally scheduled fixed-wing training.

Moreover, the complainant initially failed to provide the date he learned of his removal from the schedule; it is his burden to do so and Part 9A of the standardized complaint form specifically requires this information. In his first amended complaint, however, he acknowledged that the respondent kept him on the schedule for fixed-wing training "leading up to the week of 11-02-07 to 11-07-07." Since the complainant was informed that his final scheduled week was either the week of November 2 or the preceding week, he was thus apprised of the change prior to November 14 and this claim, whatever its merits, is untimely.

(4) The complainant alleges that he was the victim of retaliatory treatment when the respondent did not provide him with a specific "safety of flight" missive until November 8, 2007, although it distributed the document to other personnel prior to that date. The respondent counters with the assertion that most unit personnel, with only one or two exceptions, were in fact notified the same day as the complainant.

To assess the timeliness of this claim, the correct triggering date would not be when the complainant received the message, but when he learned that he had been treated differently— that is, that others had received it before him. He may have learned this the same day he received the message or, possibly and logically, subsequent to his receipt of the message. Nonetheless, even after being afforded the opportunity to rectify his omission and provide this critical date via the second amended complaint, he failed to do so. Accordingly, I cannot find that the complaint was timely filed with regard to this particular incident.

(5) The complainant alleges that the respondent scheduled him to work on Christmas day--an unprecedented assignment in his six years of employment with the respondent.

The respondent explains that this was merely a clerical error and it did not intend the complainant work that holiday shift. The complainant apparently understood this to be the case and he neither worked on Christmas nor received any discipline for his absence that day. Attachments to the amended complaint reveal that the December schedule was distributed to all employees on November 13, 2007; because that is the date the complainant learned of the potential adverse action, this particular claim is untimely.

(6) The complainant alleges that the respondent failed to pay him for two hours of overtime earned on October 22, 2007. The respondent concedes this fact, but blames this omission on a clerical error occurring during a change in its personnel timekeeping system. The respondent explains—and an attachment to the complaint confirms—that the complainant brought the omission to the respondent's attention on December 5, 2007 and, within a day or two, the respondent authorized the payment for those two hours.

As with some of the other incidents, the complainant did not provide the date he actually learned of the oversight. His pleadings merely imply—unconvincingly—that he learned of the error on December 5, the date he complained about the oversight to management. However, taking notice of the fact that state employees are paid bi-weekly, and further noticing that the pay period at issue ended October 25, 2007, I could just as easily infer that he realized the deficiency when the relevant paycheck was issued two weeks later, November 8, beyond the thirty-day filing period. Although I afforded the complainant the opportunity to rectify his omission and provide this critical date via the second amended complaint, he failed to do so. Accordingly, I cannot find that the complaint was timely filed with regard to this particular incident.

In sum, although the complainant had ample opportunities to rectify critical deficiencies in his complaint, he did not avail himself of the chance to re-plead and thus has done no more than describe six discrete incidents, none of which occurred within thirty days of the filing of this complaint. Unless the continuing violation theory were to apply, each claim is untimely and must be barred by the statute of limitations.

III. HOSTILE WORK ENVIRONMENT

Although the *Morgan* decision's well-entrenched limitation on the continuing violation theory would preclude recovery for discrete acts occurring beyond the statutory filing period, even if one related act were timely, a claim of hostile work environment is treated differently. While an employer's creation of a hostile work environment is also an adverse employment action; *Gregory v. Daly*, 243 F.3d 687, 701 (2nd Cir. 2001); *Commission on Human Rights & Opportunities ex rel. Payton v. Connecticut Department of Mental Health & Addiction Services,* 2004 WL 5380916 (CT Civ. Rts.) (CHRO No. 0220394, Ruling on Motion to Dismiss, July 6, 2004); a hostile work environment differs from discrete acts (or a series of discrete acts) because it ultimately comprises one continuous and persistent event—that is, "separate acts that collectively constitute one unlawful employment practice." *National Railroad v. Morgan,* supra, 536 U.S. 117; see *Elmenayer v. ABF Freight,* supra, 318 F.3d 134. A hostile work environment does not usually occur on any particular day; it occurs "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *National Railroad v. Morgan*, supra, 115. "[A] charge alleging a hostile work environment . . . will not be time-barred so long as all acts which constitute the claim are part of the same unlawful practice and at least one act falls within the period." *Id.,* 122; see also *Hoag v. Cellco Partnership*, 2007 WL 2904197,*4 (D.Conn.) (same rule applies to claims under CFEPA); *Tosado v. State of Connecticut, Judicial Branch,* 2007 WL 969392, *4 (Conn. Super.) (same rule for CFEPA claims).

Whether the complainant has properly pleaded a "hostile work environment" is unquestionably subject to debate. His initial complaint highlights six discrete actions, but contains no explicit mention of a hostile work environment. His fourteen-page amended complaint alludes only once to "hostile work environment"—he claims that he temporary shift change was intended to isolate him from co-workers and thus cause a hostile work environment; no explanation or other details are provided. (Amended complaint, p. 4) [4]

[4] The amended complaint is also accompanied by a copy of the complainant's November 26, 2007 letter to the "Attorney General Whistleblower Unit" stating, "I worked in a hostile work environment for more than two years before reluctantly filing this whistleblower complaint." Such time sequence, with the adverse actions occurring prior to the protected activity, casts strong doubt on whether the actions could be deemed retaliatory.

The second amended complaint adds nothing regarding a hostile work environment, and his objection to the motion to dismiss merely indicates, without specificity, that he "worked in an extremely hostile work environment as a direct result of the publication (sic) of his whistleblower activities throughout the department in general and within [his] unit in particular." (Complainant's objection, p. 2)

Nonetheless, even construing all of allegations in support of the complaint, and drawing favorable inferences from the scant references to a hostile work environment, I conclude that any possible claim, whether explicit or implied, of a hostile work environment, must fail simply because all of the individual acts collectively that might constitute a hostile environment are themselves untimely. See *National Railroad v. Morgan,* supra*,* 536 U.S. 122; *Tosado v. State of Connecticut, Judicial Branch,* supra, 2007 WL 969392, *4.

IV. ADVERSE ACTIONS

Because this case is time-barred by the thirty day statute of limitations, I need not determine whether the claimed adverse actions, individually or collectively, are legally sufficient to state a claim upon which relief can be granted.

V. RULING

In light of the foregoing, I conclude that all of the alleged retaliatory actions are barred by the statute of limitations. Accordingly, this case must be, and hereby is, dismissed.

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David S. Knishkowy
Human Rights Referee

c: All parties of record via certified mail