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	:	April 10, 2008

RULING ON MOTION TO AMEND SEVENTH AFFIRMATIVE DEFENSE :

Pursuant to General Statutes § 4-61dd (b), the complainant, Stephen Samson, filed a whistleblower retaliation claim on or about December 14, 2007. On January 22, 2008, the respondent filed its answer and affirmative defenses. According to Its seventh affirmative defense:

> The CHRO Office of Public Hearing 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. Upon information and belief, Complainant learned in late August or early September of 2007 that Respondent was aware that Complainant had attempted to collect overtime for each of two jobs he was purportedly working at the same time. Upon information and belief, Complainant thereafter attempted to shield himself from any potential discipline for his actions by seeking whistleblower status by immediately contacting the Office of the Attorney General in early September and providing information pertaining to events years old which had already been addressed by the [respondent]. Complainant is now both exploiting routine clerical errors which have not adversely affected him, and omitting pertinent information, in an effort to further cement his purported whistleblower status. It is anticipated that Respondent will hereafter challenge as retaliatory the disciplinary action, if any, resulting from any investigation into his misconduct.

(Emphasis added.)

The complainant filed a reply to the respondent's answer and affirmative defenses, noting simply, with regard to the seventh defense, that he had never knowingly or maliciously made false claims and that he had never attempted to shield his own actions by "whistleblowing."

On March 5, 2008, the respondent filed a motion for permission to amend its seventh affirmative defense by deleting the final sentence and by replacing the first sentence with the following language:

> The CHRO Office of Public Hearing 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 conduct are not in the class of persons Conn. Gen. Stat. § 4-61dd was intended to protect.

On March 25, 2008, the complainant filed written opposition to the proposed amendment.

According to the applicable regulations, the presiding referee "shall, upon motion by a party, permit reasonable amendment of the answer and shall allow parties sufficient time to respond and to prepare their case in light of the amendment." Regulations of Connecticut State Agencies § 4-61dd-8 (d). Notwithstanding the regulation's use of the word "shall," allowing an amendment to a pleading rests in the sound discretion of the tribunal. *Rizzuto v. Davidson Ladders, Inc*., 280 Conn. 225, 255 (2006). The tribunal may determine such amendment to be "unreasonable" upon consideration of criteria such as the length of delay the amendment would cause, the fairness to the other party, and the negligence, if any, of the party offering the amendment. See, e.g., *Rizzuto v. Davidson Ladders*, supra, 228 n. 12; *Vegliante v. Town of East Haven*, 2007 WL 1120565, *3 (Conn. Super.).

Rather than addressing these criteria in his objection, the complainant simply contests the facts alleged in the proposed defense. His challenge is technically premature; normally, such factual arguments are raised after an amendment is

allowed and would unfold within the context of the evidentiary proceeding and the post-hearing arguments set forth in a memorandum of law. Additionally, the complainant refers this tribunal to arguments contained in an earlier pleading—his objection to the respondent's February 25 motion to dismiss. Indeed, the motion to dismiss raises various jurisdictional challenges, each of which the complainant addresses in turn, but none of those challenges mirrors, or even resembles, the one raised in the proposed amendment to the seventh affirmative defense.[1]

Despite the brevity and misplaced focus of the complainant's objections, I am nonetheless compelled to deny the motion to amend on my own. Were I to allow the amendment, I would be faced with what the respondent perceives as a jurisdictional defect (which normally requires immediate disposition), yet it is a defect that cannot be determined until after a full adjudication of the pertinent facts. Only then, to follow the respondent's argument, might I lose subject matter jurisdiction.

For this reason, among others, logic dictates § 4-61dd (c) may provide a factual defense, but cannot be used to challenge subject matter jurisdiction, at least not in the manner described here. While the proffered amendment may not necessarily appear unreasonable in light of the standard evaluative criteria, the respondent's unwieldy and anomalous suggestion that I find no jurisdiction after fully exploring a factual issue defies the very purpose (and timing) of a jurisdictional challenge. At present, the respondent seeks a ruling that simply cannot be made on the extant record at this time. Thus, I find it unreasonable to allow the amendment to the seventh affirmative defense.

Also problematic is the respondent's contention that this tribunal lacks jurisdiction because the complainant "knowingly and maliciously" made "false charges of retaliation" and thus must be excluded from "the class of persons . . . § 4-61dd

[1] I have not yet issued my ruling on the motion to dismiss.

was intended to protect." (Emphasis added.) The respondent misreads the statute on this point. According to § 4-61dd (c),

> Any employee of a state or quasi-public agency . . . who is found [2] to have knowingly and maliciously made false charges under subsection (a) of this section shall be subject to disciplinary action by his appointing authority up to and including dismissal.

This subsection concerns those employees who have knowingly and maliciously made false charges under subsection (a)—that is, false disclosures of, for example, corruption, unethical practices, mismanagement or gross waste of funds. Subsection (c) does not concern itself with false and malicious claims of retaliation.

The foregoing analysis underscores two conclusions: (1) the respondent's claim may properly be raised as a defense, but it does not involve an issue of subject matter jurisdiction; and (2) General Statutes § 4-61dd (c) concerns bad faith disclosure (i.e., whistleblowing) under § 4-61dd (a), not, as alleged, bad faith retaliation claims. Accordingly, the motion to amend the seventh affirmative defense is denied.

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David S. Knishkowy
Human Rights Referee

c: All parties of record

[2] Because of the provision's use of the passive voice, one cannot readily determine who makes such a finding. Is it the human rights referee presiding over the retaliation case? The assistant attorney general performing an investigation under § 4-61dd (a) or (b) (2)? The employer, pursuant to its own internal investigation? Other Connecticut whistleblower protection statutes (e.g., § 31-51m(c); § 4-37j; § 16-8a) contain similar language, but also lack any interpretive case law to guide my understanding or facilitate my application of this phrase. The legislative history of the statute is silent on this matter.