

Daniel Schwartz : Office of Public Hearings
v. :
Attorney Michael Eagen : WBR/OPH No. 2008-095
: February 18, 2010

FINAL DECISION

Preliminary statement

On November 19, 2008, the complainant, Daniel Schwartz, M. S., D.V.M., Diplomate, American College of Laboratory Animal Medicine, a former employee of the University of Connecticut (University), filed a whistleblower retaliation complaint (complaint) with the chief human rights referee pursuant to General Statutes § 4-61dd (b) (3). In his complaint, Dr. Schwartz alleged that the respondent, Attorney Michael Eagen, an employee of the University, violated General Statutes § 4-61dd¹ by retaliating against him for his whistleblowing.² The complaint was amended on December 11, 2008, and revised on March 26, 2009.

For purposes of this hearing, Dr. Schwartz alleged that the respondent committed four retaliatory acts: (1) he denied Dr. Schwartz access to his office, computer and email; (2) he denied Dr. Schwartz access to the campus, under threat of arrest for trespassing; (3) he monitored Dr. Schwartz's phone messages and emails after he was denied access to his office; and (4) he failed to return to Dr. Schwartz all of his belongings from his office.³

The public hearing was held on January 5, 6 and 8, 2010 at which time the record closed.⁴

For the reasons set forth herein, it is found that Dr. Schwartz established by a preponderance of the evidence that, in retaliation for his whistleblowing, the respondent failed to return to him all of his personal belongings from his office. Dr. Schwartz is awarded \$5,000 in emotional distress damages. He did not establish by a preponderance of the evidence that the other alleged acts either were committed by the named respondent or, if they were committed by the respondent, were committed with a retaliatory animus.

Findings of fact (FF)

Based upon a review of the pleadings, exhibits and transcripts and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found:⁵

1. On December 11, 1995, the University hired Dr. Schwartz as a part-time consultant and attending veterinarian. Tr. 18-19; C-137, p. 5.
2. On September 1, 1996, the University hired Dr. Schwartz as its full-time attending laboratory animal veterinarian. Tr. 19; C-137, p. 5.
3. Dr. Schwartz worked in the University's Office of Animal Research Services (OARS). C-137, p. 6.
4. On September 2005, the University hired the respondent as its labor and employment specialist. Tr. 159-60. The respondent's duties include involvement in disciplinary matters. Tr. 161.

5. The respondent reports to Donna Munroe. Tr. 159-60. Ms Munroe is the University's associate vice president of human resources and payroll services. Tr. 160; C-9
6. Over the course of his employment at the University, and prior to filing the present complaint, Dr. Schwartz filed complaints about incidents that occurred at OARS. Stipulation of facts 1, filed November 16, 2009 (Stipulation).
7. Dr. Schwartz's prior complaints were filed both internally at the University and externally to outside agencies. Stipulation 2.
8. In these complaints, Dr. Schwarz expressed concerns that incidents in OARS, including its hiring practices, the treatment of animals, unauthorized access to restricted substances and improper distribution of controlled substances, were unethical practices and/or violated federal or state laws or regulations. Tr. 20-22, 36-42, 47-53, 56-60; C-48; C-56; C-57; C-59; C-134; C-137, pp. 6, 12-20, 25-27.
9. At all relevant times, the respondent was aware of Dr. Schwartz's prior complaints regarding incidents that occurred at OARS. Stipulation 3.
10. At all relevant times, Ms. Munroe was aware of Dr. Schwartz's prior complaints regarding incidents that occurred at OARS. Stipulation 4.
11. At all relevant times, Dr. Cecile Baccanale was aware of Dr. Schwartz's prior complaints regarding incidents that occurred at OARS. Stipulation 5.

Dr. Baccanale was the director of OARS. Tr. 9, C-30, p. 2 of 4. She was also Dr. Schwartz's supervisor. R-1.

12. At all relevant times, Attorney Keith Hood was aware of Dr. Schwartz's prior complaints regarding incidents that occurred at OARS. Stipulation 6. Attorney Hood was hired by the University in June 2007 as the University's manager of labor relations. Tr. 260.
13. At all relevant times, Richard Simoniello was aware of Dr. Schwartz's complaints. Mr. Simoniello was OARS' program director for animal care services and compliance. Tr. 69; C-44. Dr. Schwartz had filed complaints about Mr. Simoniello. Tr. 47-53; C-44, p. 6-7 of 7; C-134, p. 3 of 3; C-137, pp. 15-18.
14. Other employees of OARS and of the University in general were aware of Dr. Schwartz's prior complaints. Stipulation 7.
15. In August 2007, the respondent drafted a letter to Dr. Schwartz that OARS was considering disciplinary action against him based on a report submitted by Dr. Baccanale. The correspondence was signed by Gregory Anderson. Dr. Anderson was the University's vice provost for research and graduate education and the dean of its graduate school. C-41.
16. In September 2007, in response to a whistleblower complaint that Dr. Schwartz had made to the department of consumer protection regarding

Mr. Simoniello, Dr. Anderson placed “Whistle Blowers Policy – Schwartz” on a meeting agenda for discussion. C-44, p. 2 of 7.

17. On January 9, 2008, Dr. Baccanale discovered medical supplies in the OARS pharmacy which she believed had expired and been placed there by Dr. Schwartz. C-29, C-30. Expired medical supplies would be a violation of USDA regulations. Dr. Baccanale had hoped that the results of an investigation would serve as a basis for the University to terminate Dr. Schwartz’s employment. C-29, p. 4 of 13.
18. An independent investigation of the medical supplies, however, found that the supplies were old but had not expired and that there was no violation of USDA regulations. The investigation also concluded that the supplies had been in the pharmacy for at least six months before Dr. Baccanale reported them, that there was no conclusive evidence of who had put the supplies in the pharmacy or when they had been placed there, that the supplies may have been suitable for use under appropriate circumstances and that there was no evidence of any improper reasons for the placement of the supplies in the pharmacy. C-29, pp. 7-8 of 13.
19. The respondent was aware that, in April 2008, Dr. Baccanale wanted Dr. Schwartz’s emails examined to see if he was the source of a “leak”. C-28, p. 2 of 3.

20. In May and June 2008, Dr. Schwartz filed a complaint with Kimberly Fearney, of the University's office of audit, compliance and ethics. His complaint included allegations of unethical practices, violations of the state's laws or regulations and mismanagement. Tr. 61-63. C-134, pp. 2-3; C-137, p. 21-23. The respondent received an email from the University's provost advising him, and others, that Dr. Schwartz "is engaged in these sorts of discussions with Kim Fearney." C-134, p. 2 of 3.
21. On July 29, 2008, the University placed Dr. Schwartz on paid administrative leave pending the outcome of a hearing to dismiss him from employment. Dr. Schwartz was instructed not to visit the University's Storrs campus and not to have any contact with any of the University's personnel without obtaining the written permission of Dr. Baccanale. The correspondence was drafted by the respondent and signed by Dr. Anderson. C-10, pp. 3-4 of 5; R-1.
22. Dr. Schwartz did not violate the terms of his administrative leave. Tr. 212.
23. By email dated July 29, 2008, the respondent advised various employees of the University that Dr. Schwartz could continue to use the University's fitness center during his administrative leave. C-10, p. 5 of 5.
24. Upon his being placed on administrative leave, Dr. Schwartz's access to his email, computer and voicemail were disabled. C-12; R-4.

25. By correspondence dated September 16, 2008, Peter J. Nicholls, provost for the University, notified Dr. Schwartz that effective September 19, 2008, his employment with the University was terminated.⁶ Provost Nicholls' correspondence also directed Dr. Schwartz to contact Jay Hickey at the University's department of human resources, labor relations unit, to make arrangements to retrieve his personal belongings from his office. R-2.
26. The termination letter contained no restrictions on Dr. Schwartz's access to campus. Tr. 212-14; R-2.
27. On September 18, 2008, the respondent advised Ms. Munroe that in lieu of having Dr. Schwartz come to his former office to pack his personal belongings, the respondent, as a representative of the human resources department, would supervise the inventory and packing of Dr. Schwartz's belongings and their delivery to Dr. Schwartz. C-11, p. 2 of 4.
28. Dr. Schwartz inquired numerous times about the return of his personal property, including on September 22, 2008; September 29, 2008; October 27, 2008; November 3, 2008; December 3, 2008 and December 5, 2008. Tr. 86; C-6; C-11, p. 4 of 4; C-14, p. 2 of 13; C-16; C-18. He was willing to pack his belongings himself. He was also willing to have a campus security officer or a union representative present during his packing. C-6, p. 3 of 4.

29. On September 22, 2008, Dr. Schwartz went to the University. He told Mr. Hickey that he would be contacting him regarding his personal belongings. Tr. 80; C-14, p. 2 of 13. He also spoke with Kim Fearney, who agreed to speak with him, regarding the internal complaint he had filed in May with her office of audit, compliance and ethics. Tr. 61-65; C-14, p. 2 of 13; C-134, p. 2 of 3. He also spoke briefly with the human resource department's leave administrator, Jean Germain, regarding his COBRA health care coverage. Tr. 80; C-137, p. 31.
30. The respondent advised University personnel not to speak with Dr. Schwartz following his termination. C-14, p. 2 of 13.
31. On September 26, 2008, Dr. Schwartz came to the University. R-11.
32. Following Dr. Schwartz's appearance at the University, Attorney Hood wrote to Dr. Schwartz. In the correspondence, Attorney Hood (1) reminded Dr. Schwartz that his employment had been terminated, (2) informed Dr. Schwartz that he was not permitted to visit campus facilities without a prior appointment and the approval from the appropriate administrator of the facility, and (3) further informed Dr. Schwartz that he was free to visit areas accessible to the public, such as the library and auditorium, but not offices, classroom buildings or laboratories. The correspondence was initiated and drafted by the respondent, but revised and signed by Attorney Hood. C-5; R-13.

33. On September 29, 2008, Dr. Schwartz went to the University's department of human resources to speak again with Ms. Germain regarding his COBRA health care coverage. Tr. 81-82, 146; C-137, p. 31. He also wanted to speak to Mr. Hickey about obtaining his personal belongings. Mr. Hickey was not present. Dr. Schwartz was met instead by the respondent and Attorney Hood who reminded Dr. Schwartz that he needed to make an appointment to visit University facilities, including the department of human resources. Tr. 81-82; C-11, p. 4 of 4; C-14, p. 3 of 14; C-137, p. 31; R-11.
34. Dr. Schwartz then emailed Mr. Hickey on September 29, 2008 regarding the schedule for moving his belongings. Mr. Hickey responded that the belongings would be packed by OARS with a representative from human resources, would be delivered to the union office, and Dr. Schwartz would then be contacted. Tr. 82; C-11.
35. Dr. Schwartz expressed his concern to Mr. Hickey and to the University's president that all of his belongings would not be packed and returned to him. C-6, p. 3 of 4; C-11, p. 3 of 4; C-16, p. 5 of 5.
36. On September 29, 2009, Dr. Schwartz emailed Attorney Hood with a request to attend a seminar. C-14, p. 11 of 13; R-12. The respondent did not have an objection to Dr. Schwartz attending. C-14, p. 8 of 13.

However, Attorney Hood, after consultation with other University personnel, denied the request. C-14, pp. 5 and 7 of 13; R-12.

37. By email dated October 3, 2008, Attorney Hood informed Dr. Schwartz that his request to attend the seminar was denied. Attorney Hood also reminded Dr. Schwartz of his September 26, 2008 correspondence in which Attorney Hood had advised Dr. Schwartz that he was not permitted to visit campus facilities without a prior appointment and approval but that he was permitted access to areas open to the public. Attorney Hood also informed Dr. Schwartz that he could use the Connecticut Veterinary Medical Diagnostics Laboratory to the same extent as any other member of the public. C-14, pp. 5-6 of 13 .
38. On October 27, 2008, the University delivered twenty-four boxes of items from his office to Dr. Schwartz. Tr. 152; C-15.
39. On October 27, 2008, Dr. Schwartz was permitted to retrieve some items from his office. Tr. 153; C-16; R-6, R-8. When Dr. Schwartz picked up the items, the respondent did not allow him to look through or to take two boxes of items in the office that had been packed. Tr. 86; C-16; R-9.
40. On October 29, 2009, Dr. Schwartz provided his union with a partial list of personal items that had not been returned in the October 27, 2008 delivery or pick-up. C-16.

41. On November 10, 2008, Dr. Schwartz attended, without incident, a luncheon at which some of his former co-workers were present. C-12, p. 8 of 8.
42. On December 5, 2008, the University delivered eleven boxes of items to Dr. Schwartz. Tr. 153; C-17.
43. On December 5, 2008, Dr. Schwartz provided his union with a partial list of items that had not been included in the delivery earlier that day. C-18.
44. On January 15, 2009, the University made its final delivery of items to Dr. Schwartz. Tr. 153; C-19.
45. The items had been packed by the respondent's administrative assistant and by a representative from OARS. Tr. 175.
46. Some of the items in Dr. Schwartz's office were not returned to him. Tr. 175; R-7.
47. The University's policies provide, in part, that an employee separated from employment is to be reminded to collect his personal belongings. R-3.
48. The University maintains a policy on the use of its computer and network resources that provides, in part, that such resources are for faculty, students and staff to use for University business. R-14.
49. According to University policy, upon Dr. Schwartz's termination, his access to email and to the departmental mainframe was disabled and his

voice mail password was reset. An out of office message was to be set and a back-up CD of exchange mail was required. His account was not to be deleted prior to the normal expiration (approximately 30 days) but he was not to have access to it. The department was to maintain access to his mailbox and the integrity of the account was to be preserved. Tr. 78; R-3; R-4.

50. As recently as December 2009, Dr. Schwartz's automated office voicemail still had Dr. Schwartz's recorded voicemail advising callers that he was away from his desk and directing them to leave him a message. Tr. 93, 106-09; C-137, pp. 45-46.
51. Dr. Schwartz's inability to access his voicemail and email resulted in the delay and/or denial of access to professional contacts. Tr. 11, 77, 93; C-99; C-137, pp. 29, 38-39.
52. Dr. Schwartz's inability to access his voicemail and email resulted in the delay and/or denial of access to employment opportunities. Tr. 11, 79-80; C-137, p. 30.
53. Among the personal items not returned to Dr. Schwartz were forms issued and assigned to him by the USDA. Tr. 91-92; C-18; C-137, pp. 37-38.

54. Dr. Schwartz was embarrassed by having to contact the USDA to request the reissuance of the forms and to explain why the forms needed to be reissued. Tr. 92, 128.
55. Among the personal items not returned to Dr. Schwartz was a letter of appreciation he had received for donating the proceeds from the sales of a book he had written to the American Association of Laboratory Animal Science. Tr. 89, 155-56.
56. Other items of personal property not returned to Dr. Schwartz included significant material he had received during his years as a member and officer of the American Association of Laboratory Animal Science. Tr. 89-90, 155-56.
57. Dr. Schwartz received eleven empty folders. He did not keep empty folders. Tr. 8-89, 155-56; C-137, pp. 36-37.
58. Dr. Schwartz did not threaten any of his co-workers. Tr. 214.

Analysis

I

A

Section 4-61dd (b) (1) provides in relevant part: “No state officer or employee . . . 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 . . . (B) an employee of the state

agency or quasi-public agency where such state officer or employee is employed” The statute thus makes it illegal for an employer covered by the statute to retaliate against an employee when the employee, in good faith, had disclosed information (made a whistleblower complaint) pursuant to § 4-61dd (a). Section 4-61dd “is remedial in nature and as such should be read broadly in favor of those whom the law is intended to protect.” *Colson v. Petrovision, Inc.*, Superior Court, judicial district of Middlesex at Middletown, Docket No. CV 99-0090098 (September 26, 2000) (28 Conn. L. Rptr. 334, 335) (2000 WL 1475850, 3) (construing the anti-retaliation provisions of General Statutes § 31-51m).

B

1

Whistleblower retaliation cases brought under § 4-61dd are analyzed under federal and state case law interpreting other anti-retaliatory and anti-discrimination statutes. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, 216 Conn. 40, 53-54 (1990); *O’Sullivan v. Depart. of Mental Health and Addiction Services*, OPH/WBR No. 2008-086, Ruling re: the respondents’ motion to dismiss and Order re: amending the complaint, 2 (November 20, 2008) (2008 WL 5122194); *Irwin v. Lantz*, OPH/WBR 2007-40 et seq., Final Decision, 11 (May 9, 2008) (2008 WL 2311544); *Stacy v. Dept. of Correction*, OPH/WBR No. 2003-002, Final decision, 4 (March 1, 2004) (2004 WL 5380919). Therefore, it is useful to begin with a review of the U. S. Supreme Court’s discussion of Title VII’s anti-retaliation provisions in *Burlington Northern & Santa Fe*

Railway Co. v. White, 548 U.S. 53 (2006) to determine both (1) the scope of § 4-61dd's anti-retaliatory provision and (2) the degree of harm a complainant must incur for a retaliatory act to fall within the scope of § 4-61dd.

In *Burlington Northern*, the Court noted that although words such as “‘hire,’ ‘discharge,’ ‘compensation, terms, conditions, or privileges of employment,’ ‘employment opportunities,’ and ‘status as an employee’ – explicitly limit the scope of [Title VII’s substantive anti-discrimination] provision to actions that affect employment or alter the conditions of the workplace[, n]o such limiting words appear in the antiretaliation provision.” *Id.*, 62. Similarly, there are no such limiting words in § 4-61dd that would restrict its application only to adverse employment decisions affecting employment or altering conditions of the workplace. As the Court noted, a “provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the antiretaliation provision’s primary purpose, namely, [m]aintaining unfettered access to statutory remedial mechanisms.” (Internal quotation marks omitted.) *Id.*, 64. “Interpreting the antiretaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishments of the Act’s primary objective depends.” *Id.*, 67.

The anti-retaliatory provision protects a complainant from actions which “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” (Internal quotation marks omitted.) *Id.*, 68. “We refer to reactions of a

reasonable employee because we believe that the provision's standard for judging harm must be objective. An objective standard is judicially administrable. It avoids the uncertainties and unfair discrepancies that can plague a judicial effort to determinate a plaintiff's unusual subjective feelings." *Id.*, 68-69. "We phrase the standard in general terms because the significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." *Id.*, 69.

"Most often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat" (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 708 (2006).

2

The three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802-803 (1973) is typically used in evaluating whistleblower retaliation cases brought under § 4-61dd. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra 216 Conn. 53-54; *O'Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 2; *Irwin v. Lantz*, supra, 11; *Stacy v. Dept. of Correction*, supra, 4. The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of his prima facie case; (2) the respondent's burden in the presentation of his non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving that the respondent retaliated against him because of his whistleblowing. *O'Sullivan v. Depart. of Mental Health and Addiction*

Services, supra, 2; *Irwin v. Lantz*, supra, 11-12. The requirements of proof under *McDonnell Douglas* are appropriately adjusted when applying this analysis to § 4-61dd cases. *O’Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 2-3; *Irwin v. Lantz*, supra, 11.

With respect to the first evidentiary burden, the complainant’s prima facie case of whistleblower retaliation has three elements: (1) the complainant must have engaged in a protected activity as defined by the applicable statute; (2) the complainant must have incurred or been threatened with an adverse personnel action; and (3) there must be a causal connection between the actual or threatened personnel action and the protected activity. *LaFond v. General Physics Services Corp.*, 50 F.3d 165, 173 (2d Cir. 1995); *O’Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 3; *Irwin v. Lantz*, supra, 12-14. *Stacy v. Dept. of Correction*, supra, 5-7.

As to the first prima facie element, the four statutory components of a protected activity as defined by § 4-61dd are, first, the respondent must be a state department or agency, a quasi-public agency, a large state contractor or an employee thereof (regulated entity). §§ 4-61dd (b) (1), 4-61dd (h) (2), General Statutes §§ 1-120, 4-141. Second, the complainant must be an employee of the regulated entity. § 4-61dd (b). Third, the complainant must have knowledge either of (1) “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 a quasi-public agency” or of (2) “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” (protected information). § 4-61dd (a). Fourth, the complainant must have disclosed the protected information to an employee of (1) the auditors of public accounts; (2) the attorney general; (3) the state agency or quasi-public agency where he is employed; (4) a state agency pursuant to a mandatory reporter statute; or (5) the contracting state agency concerning a large state contractor (whistleblowing). § 4-61dd (b) (1). *O’Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 3-4; *Irwin v. Lantz*, supra, 12.

As to the third statutory component, the complainant need not show that the conduct he reported actually violated § 4-61dd (a), but only that he had a reasonable, good faith belief that the reported conduct was a violation. § 4-61dd (c) and (g); *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 176; *Pappas v Watson Wyatt & Co.*, United States District Court, No. 3:04-CV-304 (EBB) (D. Conn. March 20, 2008) (2008 WL 793597, 4); *O’Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 4; *Irwin v. Lantz*, supra, 13. Regarding the fourth statutory component of a protected activity, the complainant “need only establish general corporate knowledge that [he] has engaged in a protected activity.” (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, supra, 2008 WL 793597, 7.

To satisfy the second element of his prima facie case of whistleblower retaliation, the complainant must show that he suffered or was threatened with an adverse personnel action by a regulated entity subsequent to his whistleblowing. §4-61dd (b) (1).

“[R]etaliatio[n] claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct . . . such as hiring, firing, change in benefits, or reassignment. . . . Again, the plaintiff must show that his employer’s actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.” (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, 537 F. Sup.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut, Judicial Branch*, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6); *O’Sullivan v. Depart. of Mental Health and Addiction Services*, *supra*, 4-5; *Irwin v. Lantz*, *supra*, 13-14.

The third element of a prima facie case of a whistleblower retaliation case requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and his whistleblowing. *LaFond v. General Physics Services Corp.*, *supra* 50 F.3d 173. The complainant can establish the inference of causation by three methods: (1) indirectly, for example, by showing that the whistleblowing was followed closely in time by discriminatory treatment or through other circumstantial evidence such as disparate treatment of similarly situated co-workers; *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 117 (2d Cir. 2000); *Farrar v. Stratford*, *supra*, 537 F. Sup.2d 354; (2) directly, for example, through evidence of retaliatory animus directed against the complainant by the respondent; *Gordon v. New York City Bd. of Educ.*, *supra*, 232 F.3d 117; *Farrar v. Stratford*, *supra*, 537 F. Sup.2d 354; or (3) by operation of statute as a rebuttable

presumption; § 4-61dd (b) (5); *O'Sullivan v. Depart. of Mental Health and Addiction Services*, supra, 5; *Irwin v. Lantz*, supra, 14; *Stacy v. Dept. of Correction*, supra, 6-7.

The complainant's "burden of proof at the prima facie stage is *de minimis*." *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 173.

If the complainant establishes a prima facie case through indirect evidence, the analysis proceeds to the second burden-shifting step in which the respondent must produce a legitimate, non-retaliatory reason for his actions; *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 53-54; which, if taken as true, would permit the conclusion that there was a non-retaliatory reason for the respondent's actions. *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174. If the respondent does not produce a legitimate, non-retaliatory reason, the complainant prevails. If the respondent does produce a reason, the analysis proceeds to its third burden-shifting step.

In the third burden-shifting step, the complainant must prove by a preponderance of the evidence that he was retaliated against because of his whistleblowing. The complainant can show that he was a victim of retaliation through overt evidence directly persuading the factfinder that a retaliatory reason more likely motivated the employer's action. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.*, supra, 216 Conn. 54. Alternatively, he can persuade the factfinder that he was the victim of retaliation through evidence of an indirect nature "showing that the employer's proffered explanation is unworthy of credence." (Internal quotation marks omitted.) *Id.* The complainant "must

offer some significantly probative evidence showing that the [respondent's] proffered reason is pretextual and that a retaliatory intention resulted" in the adverse personnel action. *Arnone v Enfield*, 79 Conn. App. 501, 507; cert. denied, 266 Conn. 932 (2003). "Pretext may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence compromising the prima facie case, without more" (Internal quotations omitted.) *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174.

To satisfy this burden, the complainant "need not prove that the defendant's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the motivating factors." (Internal quotation marks omitted.) *Pappas v Watson Wyatt & Co.*, supra, 2008 WL 793597, 8. Ultimately, the complainant bears the burden of persuasion to establish by a preponderance of the evidence that retaliation was a motive in the employer's decision. *LaFond v. General Physics Services Corp.*, supra, 50 F.3d 174.

C

Unlike the *McDonnell Douglas* analysis that is applied when the complainant's evidence is limited to indirect evidence of pretext, the analytical framework differs when the complainant has established his prima facie case either through overt evidence of retaliatory animus motivating the respondent's actions or through the statutory rebuttable presumption.

If the complainant “can provide direct evidence of retaliatory animus, he need not provide indirect evidence of a causal connection by showing that the protected activity closely followed the adverse action. Indeed, the *McDonnell Douglas* test itself is inappropriate in cases where there is direct evidence that retaliation played a part in the employment decision. . . . Instead, the court would apply the test set forth in *Price Waterhouse v. Hopkins* . . . whereby the relevant inquiry is whether retaliation was a substantial or motivating factor in the decision making process. In showing retaliation to be a substantial or motivating factor, plaintiffs need not show the retaliation to be the determinative or deciding factor, or that defendants’ decision would have been different, absent this factor. . . . The burden then shifts to the employer to show that it would have subjected the employee to the same adverse conduct even if retaliation had not been considered in its decision.” (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, supra, 537 F. Sup.2d 354-55; *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 204-05 (1991); *Irwin v. Lantz*, supra, 16-17.

Similarly, if the personnel action occurred within one year of the complainant’s whistleblowing to the auditors or to the attorney general; § 4-61dd (b) (5); then, because of the statutory rebuttable presumption, the respondent’s burden is one of both production and persuasion. “A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact. That burden is met when it is more

probable than not that the fact presumed is not true.” *Salmeri v. Dept. of Public Safety*, 70 Conn. App. 321, 339, cert. denied, 261 Conn. 919 (2002). The evidence presented by a respondent must be “sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function.” (Internal quotations omitted.) *Id.*, 339-40; *Irwin v. Lantz*, *supra*, 17-18.

II

A

In this case, the complainant established the three elements of a prima facie case. With respect to the four statutory components of the first prima facie element, the respondent is an employee of a state agency, the University of Connecticut. FF 4. The complainant was an employee of a state agency, also the University of Connecticut. FF 1, 2, 3. The complainant had protected information; FF 8, 20; that he whistleblow to the state agency at which he was employed; FF 6, 7, 20; and the respondent was aware of the whistleblower complaints; FF 9, 20; Tr. 311.

With respect to the second prima facie element, the complainant alleged that he incurred the following adverse personnel actions: (1) the denial of access to his office, computer and email; (2) the denial of access to the campus, under threat of arrest for trespassing; (3) the monitoring of his phone messages and emails after he was denied access to his office; and (4) the failure to return to him all of his belongings from his office.

While these actions may not suffice to establish an adverse action in a discrimination claim, they do, in the context of this case, meet the threshold of establishing an adverse action for a retaliation claim as these actions, either individually or collectively, would dissuade a reasonable employee from whistleblowing. Dr. Schwartz did not receive all of his personal property. FF 53, 55, 56, 59. Dr. Schwartz's access to professional contacts was denied or delayed. FF 51. Dr. Schwartz was denied continuing professional educational opportunities. FF 36, 37; Tr. 85; C-137, pp. 34-35. Dr. Schwartz's access to employment opportunities was delayed or denied. FF 52; Tr. 79-80; C-137, p. 30. These retaliatory actions caused Dr. Schwartz to have an embarrassing conversation with USDA personnel over the replacement of forms. FF 54; Tr. 91-93; C-137, p. 37-38. These actions negatively impacted his professional reputation. Tr. 79-80, 85, 91-92, 93, 127-28; C-14, p. 7 of 13; C-99; C-137, pp. 30, 34-35, 37-38, 57-58. These are the known consequences of these actions. Given the complainant's lack of access to his email and voicemail and to his belongings while they were being packed, the full consequences may never be known. These are the types of retaliatory acts that would dissuade a reasonable person from whistleblowing.

With respect to the third prima facie element, the complainant successfully established an inference of a causal connection between the adverse personnel action and the whistleblowing. The dean placed on an agenda the University's whistleblowing policy and specifically identified the complainant as a topic for discussion, and the OARS director wanted him investigated for leaking information. FF 16, 19. There is

also the temporal connection between his whistleblowing in May and June 2008; FF 20; and the retaliatory actions that form the basis of this complaint. There is a history of the complainant's whistleblowing followed by such adverse actions as demotion, removal from an important University committee and poor performance evaluations. Tr. 20-22, 25-26, 33-36, 42, 129. Further, after Dr. Schwartz was restricted from his computer and email, the access to his computer and email was given to Mr. Simoniello, against whom the complainant had made whistleblowing complaints. FF 13, 16, 20; Tr. 47-53; C-137, pp. 15-18.

B

In this case, the burden of persuasion does not shift to the respondent. Although the alleged retaliatory action occurred within one year of his May and June 2008 whistleblowing, because Dr. Schwartz's whistleblowing was not made to the auditors or the attorney general, he does not receive the benefit of the rebuttable presumption in § 4-61dd (b) (5). Also, the only named respondent is Attorney Eagen, and the evidence as to him is not of the direct or overt nature that would shift the burden of persuasion.

In response to the complainant's prima facie case, the respondent's burden, then, is to articulate non-retaliatory reasons for the adverse actions. The articulated reasons are that the actions taken were typical for employees placed on administrative leave and terminated. Tr. 167-68, 184-85, 279-80, 295. According to the respondent, the complainant was not the only employee restricted from campus while being on administrative leave. Tr. 168. As a routine precaution, employees placed on

administrative leave are restricted from access to their computers, campus and colleagues to protect the integrity of the investigation. Tr. 167-68. The complainant would have been allowed access if he needed information relevant for his dismissal proceedings. Tr. 184.

The respondent drafted the complainant's termination letter because, in the course of his job duties, he normally drafts termination letters in circumstances involving faculty or union members in a contested case. In the complainant's case, his termination was initiated by Dr. Anderson. Tr. 169. Following his termination, the complainant was not given access to the computer and email because he was no longer a member of the faculty or staff. When an employee is placed on leave and/or discharged, it is typical to have someone else assigned to monitor computer and phone messages to provide for continuity of service in business-related communications. Tr. 184-85.

Also according to the respondent, the complainant was not allowed to pack and remove his belongings from his office because it would have been awkward and embarrassing for him to return to his former office. C-11, p. 2 of 4.

C

The respondent having articulated non-retaliatory reasons for the adverse actions, the complainant must prove by a preponderance of the evidence that the adverse actions were retaliation for his whistleblowing.

the denial of access to his office, computer and email

The complainant was denied access to his office, computer and email both during his administrative leave and also subsequent to his termination. There is no persuasive evidence that the respondent was involved in these decisions. First, the disabling of the complainant's access to his email and computer appear to have been occurred as a result of an email from Mr. Simoniello to the University's information office. C-12, pp 3-5 of 8.

Second, there is no evidence contradicting the respondent's assertion that employees placed on administrative leave are restricted from access to their computers, campus and colleagues as a routine precaution and a standard procedure to protect the integrity of the investigation or its assertion that the complainant has not the only employee restricted from campus while being on administrative leave. Tr. 167-68, 184, 279.

Third, following his termination the complainant had no justifiable right to the University's computer, office and email as he was no longer an employee and was no different than any other member of the general public. Tr. 295.

**the monitoring of his phone messages and emails after he was denied
access to his office**

During his administrative leave and following his termination, Dr. Schwartz's phone messages and emails were monitored by Mr. Simoniello. It appears, though, that

Mr. Simoniello was given such access not by the respondent but by the University's information technology office. C-12, p. 5 of 8. Further, it is typical, and reasonable, to have someone else assigned to monitor computer and phone messages to ensure continuity of service in business-related communications. Tr. 184-85.

The motivation in giving Mr. Simoniello access to Dr. Schwartz's voice and email messages is suspicious, as Dr. Schwartz had made whistleblower complaints against Mr. Simoniello. FF 13, 16, 20; Tr. 47-53; C-137, pp. 15-18. It is also suspicious that as recently as December 8, 2009, people calling Dr. Schwartz at his former office were still receiving his voicemail message saying that he was not in and to leave a message. FF 50; Tr. 93, 106-09. Further, it seems rather petty not to have changed the voicemail and not to have forwarded to Dr. Schwartz, an employee of thirteen years, voicemail or email messages that had been sent to him. However, there is insufficient persuasive evidence that these decisions were made by the respondent.

the denial of access to the campus, under threat of arrest for trespassing

Dr. Schwartz was denied access to the campus during his administrative leave. He was also instructed not to visit the University's Storrs campus and not to have any contact with any of the University's personnel without obtaining the written permission of Dr. Baccanale. C-10, pp. 2-4 of 5; R-1. Employees placed on administrative leave, however, are routinely restricted from campus and colleagues to protect the integrity of the investigation, and the complainant has not the only employee restricted from campus while being on administrative leave. Tr. 167-68. Though Dr. Schwartz was

restricted from campus, the respondent notified several University employees that Dr. Schwartz was permitted to continue utilizing the University's fitness center during his administrative leave. C-10, p. 5 of 5.

When, after his termination, Dr. Schwartz returned to campus, the respondent wanted a notice issued to Dr. Schwartz regarding "his rights/responsibilities post-employment." The respondent noted that if Dr. Schwartz violated the terms of the notice, "he could be arrested for trespass." C-5, p. 2 of 6. The respondent drafted the notice dated September 26, 2008 and saved it in a file named "trespass letter". C-5, p. 5 of 6. The notice actually sent to Dr. Schwartz, however, does not mention the word trespass nor does it threaten Dr. Schwartz with arrest. It also does not deny him access to the campus; it restricts his access to those areas of the campus accessible to any member of the public and restricts his access from those areas of the campus that would reasonably be limited to students, faculty and staff. Even the restriction from these areas has an exception: Dr. Schwartz may be permitted to visit those areas if he has a prior appointment and the approval of the administrator of the facility. Tr. 144-46, 295; C-5, p. 6 of 6; R-13. In addition, Dr. Schwartz also was given permission to access the Connecticut Veterinarian Medical Diagnostic Laboratory consistent with any member of the general public with a legitimate reason to use the laboratory. Tr. 269-70; C-14, p. 5 of 13.

Although Dr. Schwartz was denied his request to attend a series of seminars, that decision was made not by the respondent, but by Attorney Hood. FF 36, 37; Tr.

183, 267; C-14, p. 5 of 13. The respondent actually had no objection to Dr. Schwartz attending. FF 36; C-14, p. 8 of 13.

failure to return all of his belongings

Dr. Schwartz met his burden of persuasion the respondent failed to return to him all of his personal property from his office in retaliation for his whistleblowing. Further, the respondent's explanation for not allowing him to retrieve his belongings from his office is not worthy of credence and is a pretext for retaliation. The explanation, that Dr. Schwartz's presence "would be very awkward for him" and "embarrassing for him"; C-11, p. 2 of 4; is flatly contradicted by Dr. Schwartz's repeated communications that he wanted to retrieve his belongings; FF 28; by Dr. Schwartz's coming to the University without embarrassment to meet with human resource personnel; FF 29, 31, 33; R-11, R-13; and by Dr. Schwartz coming to the University to retrieve some of his belongings from his office on October 27, 2008; FF 39; R-6, R-8, R-9. He was also willing to have campus security officers or representatives from his union present during his packing. FF 28; Tr. 86; C-6, p. 3 of 4; R-10. The respondent's refusal to allow Dr. Schwartz to pack his own belongings resulting in not all of Dr. Schwartz's personal property being returned to him.

Dr Schwartz specifically identified USDA forms that had been issued to him and a letter of appreciation that he had received for donating proceeds from a book he had written as personal property that was not returned to him. FF 53, 55. He was also able to provide a general description of other documents that were not returned to him. FF

56; Tr. 89-90, 155-56. He further testified that he received eleven empty folders, but that he did not keep empty folders. FF 57; Tr. 85, 92-93, 155-56; C-137, pp. 37-38. The respondent's argument that Dr. Schwartz cannot identify what, if any, further specific items are missing is a specious argument as the reason that Dr. Schwartz cannot specify items is because the respondent refused to allow him to assist or to be present in the packing of the items. FF 27, 39. It is unreasonable to expect any employee, particularly a thirteen-year employee, to have maintained an inventory of items in his office.

In his testimony, the respondent posited a slightly different explanation for why Dr. Schwartz was not permitted to pack his own belongings: not only was there concern about embarrassing Dr. Schwartz, but there were also a security concern about letting him come to his office. Tr. 174-75. This belated security concern lacks credibility not only because it was not raised at the time the decision was made; see C-11, p. 2 of 4; but also because the purported safety concern is discredited by the respondent's own testimony that he was unaware of Dr. Schwartz having threatened anyone. FF 58; Tr. 214. The respondent also conceded that he was not aware of any violations by the complainant of the terms of his administrative leave. FF 22; Tr. 212.

Following his termination, Dr. Schwartz came to campus four times, September 22, September 26, September 29 and October 27, 2008. Despite the angst claimed by Dr. Baccanale and Mr. Simoniello after they had heard that Dr. Schwartz was on the campus; Tr. 177, 182; C-10; R-11; there is no evidence that on any of these occasions

he attempted to see either of them. In his testimony, the respondent acknowledged that one of the people the complainant did see, Kim Fearney, thought it was “a little bit unusual” that the complainant came to her office without an appointment but “[s]he wasn’t overly alarmed” Tr. 182. Dr. Schwartz also attended, without incident; a luncheon at which some of his former co-workers were present. C-12, p. 8 of 8.

Finally, the purported security concern lacks credibility because Dr. Schwartz was not only allowed to return to his office to pack some items; FF 39, Tr. 179-80; he was also allowed access, without any kind of restrictions, to areas of the University that any member of the public could access; FF 32, 37, R-13.

For the foregoing reasons, Dr. Schwartz established by a preponderance of the evidence that the respondent’s articulated reasons for not allowing him access to his office to pack his belongings was a pretext to not return to him all of his belongings in retaliation for his whistleblowing.

III

A

Section 4-61dd (b) (3) (A) provides in relevant part: “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.” (Emphasis added.) The plain language of the statute thus makes clear that damages are not limited to those

specifically listed, but include other damages suffered by the complainant. Emotional distress is an element of damages suffered by Dr. Schwartz.

The award for emotional distress damages must be limited to compensatory, rather than punitive, amounts. *Chestnut Realty, Inc. v. Commission on Human Rights & Opportunities*, 201 Conn. 350, 366 (1986). “That such compensatory damages may be incapable of precise mathematical computation and necessarily uncertain does not, however, prevent them from being awarded. ‘That damages may be difficult to assess is, in itself, insufficient reason for refusing them once the right to damages has been established.’ *Griffin v. Nationwide Moving & Storage Co.*, 187 Conn. 405, 420 (1982).” *Commission on Human Rights & Opportunities ex rel. Cohen v. Menillo*, CHRO Case No. 9420047, Memorandum of Decision, 12-13 (June 21, 1995).

The criteria to be considered for awarding an emotional distress award are: (1) most importantly, “the subjective internal emotional reaction of the complainant to the discriminatory experience which he has undergone . . . [2] whether the discrimination occurred in front of other people . . . [3] the degree of offensiveness of the discrimination and [4] the impact on the complain[ant].” (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities ex rel. Harrison vs. Greco*, CHRO Case No. 7930433, Memorandum of decision, 15, (June 3, 1985).

B

1

Applying the emotional distress criteria to this case, Dr. Schwartz was embarrassed by having to request replacement USDA forms and having to explain the circumstances of why he had to request new forms. FF 54; Tr. 92-93; C-18, p. 2 of 2; C-137, pp. 37-38. He was also upset over the loss of the appreciation letter and the significant material he had received during his years as a member and officer of the American Association of Laboratory Animal Science; FF 55, 56; sentimental value not to be underestimated. He had repeatedly inquired about the return of his property; FF 28; and expressed both to the University's labor relations unit and its president his concerns that he would not receive all of his property. FF 35. Although the University's policies provide that an employee separated from employment is to be reminded to collect his personal belongings; FF 47; Dr. Schwartz was not allowed to participate in the packing; FF 27, 39; and, therefore, has the uncertainty of never really knowing what unreturned items had been in the eleven empty folders; FF 57; Tr. 85, 155-56; and what other personal items were not returned.

It is offensive that Dr. Schwartz was not provided with a timetable of when his property would be delivered, that he received no explanation of why it was taking so long to send him his property, that the packing and delivery took nearly four months and that he did not receive all of his personal property. Further, it appears that the second

and third deliveries were made only after complaints by Dr. Schwartz that he had not received all the items in the preceding delivery. FF 38, 40, 42-44.

The knowledge that Dr. Schwartz was not retrieving his own belongings was public. The packing was done by the respondent's administrative assistant and a representative from OARS; FF 27; and known to other University employees including Ms. Munroe, Dr. Baccanale; C-11, p. 2 of 4; and Jay Hickey; C-11, p. 3 of 4.

As was evident from Dr. Schwartz's credible testimony, the impact of the missing items has a continuing emotionally distressful impact.

Applying the criteria for determining emotional distress damages, the complainant is awarded \$5,000 for his emotional distress.

2

Among the damages sought by the complainant were compensation for being demoted in 2006 and \$2 million in front pay in lieu of reinstatement. Tr. 134, 137. The complainant's demotion and termination were not the subjects of this case, and the complainant's proposed damage claims are unrelated to the retaliatory act for which liability was found.

Conclusion of law

1. The complainant established a prima facie case that the respondent violated General Statutes § 4-61dd.
2. The respondent articulated non-retaliatory reasons for the adverse actions taken against the complainant.

3. The complainant failed to establish by a preponderance of the evidence that the denial of access to his office, computer and email; the denial of access to the campus, under threat of arrest for trespassing; and the monitoring of his phone messages and emails after he was denied access to his office were the result of decisions made by the respondent or, even if so, were the result of retaliatory animus by the respondent.
4. The complainant established by a preponderance of the evidence that the respondent's failure to return to him all of his belongings from his office was the result of retaliatory animus.

Order

1. The respondent is ordered to pay Dr. Schwartz \$5,000 in emotional distress damages.
2. The complainant is awarded postjudgment interest at 10% per annum compounded annually effective March 18, 2010.
- 3.

Hon. Jon P. FitzGerald
Presiding Human Rights Referee

C:
Dr. Daniel R. Schwartz
Michael Eagen, Esq.
Antoria Howard, Esq./Josephine S. Graff, Esq.

¹ General Statute § 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.

² The complainant's evidence includes allegations of retaliatory acts committed by other University employees. While the timing of his whistleblowing and the alleged retaliatory acts may be suspicious, those employees and the University itself were not named as respondents in this action. It should be noted, though, that in September 2005, Dr. Schwartz was described by a drug control agent as being "scrupulous beyond scruples; he won't do anything illegal." C-64, p. 3 of 3.

³ Status conference summary and order, October 22, 2009, p. 2, ¶ 7.

⁴ David S. Knishkowsky was appointed presiding human rights referee on November 20, 2008, and the case was reassigned to the undersigned on July 1, 2009. The transcripts were filed on January 22, 2010.

⁵ References to an exhibit are by party designation and number. The complainant's exhibits are denoted as "C" followed by the exhibit number, and the respondent's exhibits are denoted as "R" followed by the exhibit number. Those exhibits that were proffered by both the complainant and the respondent may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number. The complainant's testimony was presented as a written narrative entered as an exhibit; C-137; and was read by him into the transcript. The transcript indicates those portions of C-137 where the respondent's objections were sustained. The complainant's exhibits usually consisted of related, multipage documents grouped together by subject matter (rather than a single, multi-page document). The complainant numbered the pages of his exhibits; e.g., page 2 of 4, page 3 of 4. For ease of reference, the complainant's pagination is used when referring to his exhibits.

⁶ Section 4-61dd (b) (4) provides in part that a complainant may not challenge the same adverse action both through a grievance filed pursuant to a collective bargaining agreement and also through a complaint filed with the chief human rights referee. Because Dr. Schwartz opted to challenge his termination through the collective bargaining process rather than include the claim in his complaint to the chief human rights referee, there is no finding as to whether the termination was for just cause or retaliatory.