STATE OF CONNECTICUT

OFFICE OF PUBLIC HEARINGS

Rachel Stutts, Complainant	:	OPH/WBR-2008-089
v.	:	
David Frost, Respondent	:	October 27, 2008

RULING ON MOTION TO DISMISS

On October 2, 2008, the complainant filed a timely whistleblower retaliation complaint pursuant to § 4-61dd (b) (3) (A). On October 15, 2008, the respondent filed a motion to dismiss the complaint (the motion). The complainant filed a written objection two days later.

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. *Jolly, Inc. v. Zoning Board of Appeals*, 237 Conn. 184 (1996); *Upson v. State*, 190 Conn. 622, 624 (1983). Indeed, § 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. A motion to dismiss admits all facts well-pleaded and invokes any record that accompanies the motion, including supporting affidavits that contain undisputed facts. *Malasky v. Metal Products Corp*., 44 Conn. App. 446, 451-52, cert. denied, 241 Conn. 906 (1997). In evaluating the motion, the complainant's allegations and evidence must be accepted as true and interpreted in a light most favorable to the complainant; every reasonable inference is to be drawn in her favor. *New England Savings Bank v. Bedford Realty Corp*., 246 Conn. 594, 608 (1998); see also *Lueder v. Southern Connecticut State University,* 2006 WL 2965504 (OPH/WBR-2005-011, March 16, 2006); *Bagnaschi-Maher v. Torrington Housing Authority,* 2006 WL 4753459 (OPH/WBR-2005-013, March 3, 2006). After review of the motion and objection, along with the cases, pleadings, and other supporting materials referenced therein or attached thereto, I hereby grant the motion to dismiss for the reasons set forth below.

The relevant facts in the extant record are as follows:

1. At all time pertinent hereto, both the complainant and the respondent were—and continue to be—employees of the Manchester Board of Education (the board). The board itself is not named as a respondent. The respondent is named in his official capacity.

2. In January 2008, the complainant, a cheerleading coach at Manchester High School (MHS) filed a sexual harassment complaint with the board against the respondent, who is the athletic director at MHS. This harassment complaint purports to be the whistleblowing activity made pursuant to—and protected by—General Statutes § 4-61dd (a).

3. On September 4, 2008, Joe Quaglia, the respondent's assistant, told the complainant that if she were to take a vacation, her pay would be deducted. (Quaglia appears to have been authorized to speak on the respondent's behalf.) Quaglia's statement purports to be the retaliatory threat of personnel action envisioned in § 4-61dd (b) (1). [1]

A. In his motion, the respondent argues that, notwithstanding the complainant's assertion, the board is not a state agency [2] but is a municipal entity established by the Town of Manchester pursuant to General Statutes §§ 10-240 et seq. If the board is not a state agency, then the respondent is not a state officer or employee regulated by § 4-61dd (b). Moreover, if the board is not a state agency, then the complainant herself is not a state employee and thus is not afforded the protections of § 4-61dd (b) (1).

Finally, if the board is not a state agency, the complainant's disclosure to the board of Frost's actions does not comport with the statutory requirement that a complainant disclose information to an employee of the Auditors of Public Accounts or the Attorney General, to an employee of the state agency where the retaliating person is employed, or to an employee of a state agency pursuant to a mandated reporter statute. Absent disclosure to the requisite person or entity, the complainant cannot avail herself of the statute's protections.[3] See *Dax v.*

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[1] Section 4-61dd (b) protects whistleblowers not only from retaliatory actions but also from threats of retaliatory action.

[2] The complainant does not claim that the board is quasi-public agency or a large state contractor.

[3] Although not raised by the respondent, one might also argue plausibly that the original whistleblower disclosure itself (that is, the January 2008 sexual harassment complaint) was not the type of disclosure envisioned by the legislature in the enactment of § 4-61dd (a). That subsection encourages disclosure 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 . . ." The complainant indicates that the phrase "violation of state laws" includes sexual harassment. Under the principle of *ejusdem generis*, however, when a statute sets forth a specific enumeration of like items, "general terms will be construed to embrace things of the same general kind or character as those specifically enumerated." *Heim v. Zoning Board of Appeals of Town of New Canaan*, 288 Conn. 628, 636 n. 9 (2008); *Hackett v. J.L.G. Properties, LLC*, 285 Conn. 498, 513-14 (2008). As Representative O'Rourke stated in legislative hearings on House Bill 5487, the purpose

Baran Institute of Technology, 2008 WL 916959 (OPH/WBR No. 2008-068, March 4, 2008).

The complainant proffers a broader, more-inclusive definition of "state agency." Section 46a-61dd (b) (1) proscribes retaliatory actions by a "state officer or employee, as defined in section 4-141 . . ." Section 4-141 defines those persons to include "every person elected or appointed to or employed in any office, position or post in the state government, whatever such person's title, classification or function . . ." Although § 4-61dd does not refer to § 4-141 for the definition of "state agency," the latter defines the term to include "every department, division, board, office, commission, arm, agency and institution of the state government, whatever its title or function . . ." Relying on both common usage and the statutory definition, the complainant contends that the board is an agent or "arm" of the state Department of Education and, therefore, is subject to § 4-61dd. Her argument has some merit, but does not necessarily warrant denial of the motion to dismiss.

A municipal board of education may be an agent of the state for some purposes, but an agent of the municipality for others. See, e.g., *Purzycki v. Fairfield*, 244 Conn. 101, 112 (1998); *Heigl v. Board of Education*, 218 Conn. 1, 3-4 (1991); *Devonish v. Town of Bloomfield*, 2007 WL 2037081, *2 (Conn. Super.) Specifically, "[l]ocal boards of education act as agents of the state when fulfilling the statutory duties imposed upon them by the legislature in light of the state constitutional mandate to furnish public education. Local boards of education also are agents of the towns, subject to the law governing municipalities, when acting on behalf of the municipality in its function of mandating control over the public schools within the municipality's limits." (Citations omitted; internal quotation marks omitted.) *O'Farrell v. Claude Chester Elementary School*, 1995 WL 500661, *2 (Conn. Super.).

I need not determine which hat the board wears in this case, because even if the board is a state agency for the purposes of the specific matters before me, the complainant herself is not a state employee. In one of the Superior Court's few published decisions on a § 4-61dd (b) retaliation claim, the court held that although boards of education are agents of the state when implementing state mandates, their members and employees lack standing to pursue a retaliation complaint under that statute. *Cross v. Nearine*, 1995 WL 91411, *7 (Conn. Super.) Specifically, the court stated:

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of the bill that, when passed as Public Act 02-91, gave this tribunal authority to adjudicate whistleblower-retaliation cases, was "to create a more favorable environment whereby state workers and employees of large state contractors feel free to bring forth important information of waste, fraud, abuse and possible cases of corruption . . . " 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2857. (Emphasis added.) See *Proietto v. Whitney Manor Convalescent Center, Inc*., OPH/WBR-2005-009 (Ruling on Motion to Dismiss, March 1, 2006). Limiting the statute in this fashion casts doubt on its use in a case such as this.

> The defendants [i.e., the Hartford Board of Education and its employee, Robert Nearine] . . . argue that the plaintiff's claim of retaliatory discharge, brought pursuant to General Statutes § 4-61dd must be dismissed, on the ground that the plaintiff lacks standing to sue under said statute. General Statutes § 4-61dd provides, in pertinent part, that:
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> (b) No state officer or employee, as defined in section 4-141 and no appointing authority shall take or threaten to take any personnel action against any state employee in retaliation. . ..
>
> The defendants argue that the plaintiff lacks standing to sue under this statute, because there is no "state officer or employee" against whom the plaintiff can claim a violation of the statute. Additionally, the defendants argue that although the statute governs 'threat[s] to take any personnel action against any state employee in retaliation,' the plaintiff, as an employee of the Hartford Board of Education, was not a state employee.
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> Under General Statutes § 4-141, a 'state employee' is defined as 'every person elected or appointed to or employed in any office, position or post in the state government.' Our Supreme Court has specifically recognized that a school teacher does not come within this definition. *Sansone v. Bechtel,* 180 Conn. 96, 100 (1980), the court stating: (sic)
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> Although a town board of education is an agent of the state when carrying out the interests of the state, <u>its members are not state but town officers. Similarly, teachers as employees of a town board of education are also not employed in the state government.</u>
>
> Accordingly, the plaintiff has failed to establish that she has standing to pursue a claim of retaliatory discharge under General Statutes § 4-61dd, thereby requiring dismissal of said claim.

(Emphasis added.) Id. *6-7. Although portions of *Cross v. Nearine* have been criticized and distinguished in other cases, its legal authority for the issue before me remains unchallenged. Whatever the status of the board itself, both the complainant and the respondent, as board employees, cannot be considered employees of the state. In other words, whether the board is acting as a state agent or municipal agent, its employees remain municipal employees at all times and thus are not afforded the protections of § 4-61dd.

B. The complainant next argues that her complaint should not be dismissed in light of the CHRO Sexual Harassment Prevention Policy and Complaint Procedure, which states:

> Retaliation against employees, volunteers, parties or visitors who report sexual harassment, who object to sexual harassment or assist in a sexual harassment investigation, is prohibited by law and by CHRO. There will be no adverse consequences in the terms and conditions of employment and receipt of services of such an employee, volunteer, party or visitor.

The complainant does not explain why this policy statement is relevant, and her reliance on the statement is misplaced. All state agencies (among other employers) must have a sexual harassment policy; [4] the quoted excerpt derives from CHRO's own policy and applies only to harassment and retaliation occurring within the CHRO itself. This particular policy does not apply to any employer other than the CHRO.

C. Finally, the complainant argues that "[t]he only procedure listed on the CHRO website for filing a complaint for retaliation is thru (sic) the use of the whistleblower retaliation complaint form." Again, the complainant is incorrect. First of all, the CHRO website contains overviews of various programs in terms geared toward lay readers (and pro se parties). Such overviews are not comprehensive and are accompanied by disclaimers that indicate that an overview is not a substitute either for the actual discrimination and whistleblower protection statutes—which also appear on the website via numerous links—or for professional legal advice. For example, the whistleblower protection "Overview" section of the website explains to the reader:

> This overview is not intended to serve as, or in lieu of, legal advice. The CHRO, the Office of Public Hearings, and the Referees cannot give legal advice. A person considering filing a whistleblower retaliation complaint may wish to consult with an attorney.

Another section of the website, "Contested Cases Processes and Procedures," contains the following caveat:

> The purpose of this memorandum is to briefly acquaint interested persons and parties with the processes and procedures utilized by the Commission on Human Rights and Opportunities (Commission) to

[4] According to General Statutes § 46a-54 (15) (A), the commission is empowered to "require an employer having three or more employees to post in a prominent and accessible location information concerning the illegality of sexual harassment and remedies available to victims of sexual harassment . . ." As an employer, the commission itself must have such policy as well.

> implement its public hearing functions in contested case proceedings. By publishing this memorandum, the Commission does not intend that any person or party should rely on it in lieu of applicable statutes and regulations that govern contested case proceedings. See generally General Statutes § 46a-51 *et seq.*, as amended, Chapter 814c; General Statutes § 4-166 *et seq.*, as amended, Chapter 54, (UAPA); and § 46a-54-78a *et seq*. of the Regulations of Connecticut State Agencies.

(Emphasis in original.)

Perusal of the aforementioned statutes (readily accessible on the website) would readily reveal that an appropriate mechanism exists for filing a claim of retaliation that occurs in response to a complaint of sexual harassment. According to General Statutes § 46a-60 (a) (4), an actionable claim of unlawful discrimination arises when "any person [or] employer . . . discharge[s], expel[s], or otherwise discriminate[s] against any person because such person has opposed any discriminatory employment practice . . ." (Emphasis added.) An appropriate retaliation complaint could be filed, subject to the appropriate conditions precedent, at the CHRO or in state court. See, e.g., *Thames Talent v. Commission on Human Rights & Opportunities*, 30 Conn. L. Rptr. 485 (Conn. Super, August 27, 2001) (affirming decision of CHRO human rights referee), aff'd, 265 Conn. 127 (2003); *Majewski v. Bridgeport Board of Education*, 2005 WL 469135, *14-17 (Conn. Super.); *Commission on Human Rights & Opportunities ex rel. Shea v. Spruance*, 1999 WL 34765987 (CT Civ. Rts., CHRO No. 9640243, October 26, 1999).

In light of the foregoing, the complaint is hereby dismissed.

Dated at Hartford, CT this ____ day of October.

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David S. Knishkowy
Human Rights Referee

Encl.: Party List

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