STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

David Taylor, OPH/WBR No. 2007-059
Complainant

v.

David Brown, DOC, September 12, 2008
Respondent

Ruling on Respondent's
Motion to Dismiss

The complainant on October 30, 2007 filed with the Chief Human Rights Referee a whistleblower retaliation complaint pursuant to General Statutes § 4-61dd (b) which named as respondents, the Connecticut Department of Correction and David Brown, Director of Prison Industries. The complainant alleges that as a result of his disclosing information as described in § 4-61dd (a) to employees of the state on or about January or February 2006 to wit: "Gov. Rell, [Department of Correction] Comm. T. Lantz; Dr. Matt Conway…, Comm. of DMV; Kevin Johnston, Auditor of Public Accounts, OSHA, NFPA, Department of Public Safety," he was retaliated against. The information disclosed by the complainant as described in his complaint related to Department of Correction personnel smoking in a non-designated area thus creating a dangerous condition and subjecting the complainant to second hand smoke. The alleged acts of retaliation occurring as a result of his "blowing the whistle" that form the basis of the complaint are as follows; 1) the complainant was removed from his assigned job on December 15, 2005; 2) he was transferred to the MacDougall-Walker Facility on February 7, 2006; and 3) when he arrived at the MacDougall-Walker Facility the

complainant he was informed on that same date that he will never be allowed to work in prison industries again[1].

The respondents on November 16, 2007 filed their answer denying all claims of retaliation along with ten special defenses claiming inter alia that the complainant's claims are time-barred and that this tribunal is without jurisdiction to adjudicate the pending matter as the complainant "is not a state employer [which is] a prerequisite for protection under Connecticut General Statutes § 4-61dd."

On November 30, 2007, the respondents filed a motion to dismiss arguing that the complainant failed to satisfy the statutory predicate for bringing a whistleblower retaliation complaint. Specifically, respondents proffer that in as much as the complainant is a sentenced prisoner in the care and custody of the Department of Correction he is without the wherewithal to satisfy the statutory requirement of being an employee of a state department or agency, a quasi-public agency, or a large state contractor. Additionally, the respondents argue that the allegations made by the complainant were not in compliance with the 30 day statute of limitations as set forth in § 4-61dd and are thus time-barred.

The complainant has responded to the pending motion to dismiss in numerous pleadings as well as at a hearing on the motion to dismiss heard on May 28, 2008.

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[1] The dates relating to the alleged retaliatory actions though not referenced in the complaint despite being requested (see paragraph 9A.) were testified to by the respondent at the hearing on the motion to dismiss.

As to the timeliness of his complaint, the complainant's argument is limited to the following brief statements: 1) he attempted in good faith to comply with the filing requirements; and 2) that he has limited resources not faced by the general public at large.

Having considered the numerous pleadings filed by all parties and for reasons set for below I conclude that the complainant did not file a timely complainant and his actionable claims - if in fact he has any - are time-barred and the matter is dismissed.

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). The motion 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 and every reasonable inference is to be drawn in his favor; *New England Savings Bank v. Bedford Realty Corp.,* 246 Conn. 594, 608 (1998); and "[e]very presumption favoring jurisdiction shall be indulged." *Conn. Light & Power Co. v. Costle,* 179 Conn. 415, 421 (1980).

Section 4-61dd states that any person having knowledge of corruption, unethical practices, violation of laws, mismanagement, gross waste of funds, and abuse of authority or danger to the public safety in any state agency, quasi-public agency or large state contractor may disclose that information 1) to an employee of the state auditors of public accounts or the attorney general' 2) an employee of the state agency or quasi-public agency where the "whistleblower" is employed; 3) an employee of a state agency pursuant to a mandated reporter statute; or 4) in the case of a large state agency concerning information involving the large state contract. Furthermore, no state officer or employee, no quasi-public agency officer or employee or an employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against an employee of the state, quasi-public agency or a large state contractor for disclosing information as described above. Were an employee to believe that he or she has been retaliated against for disclosing that information, that employee has 30 days after learning of the threatened or actual personnel action to file a complaint with the chief human rights referee.

In the present matter the complainant failed to provide a responsive answer to paragraph 9A of the whistleblower complaint form which asks "[o]n what date did you learn about the personnel action(s) threatened or taken against you because of the information you disclosed…" The complainant instead chose to respond that he has "never been able to regain employment…" The actual dates the complainant is relying on to support that the alleged retaliation occurred were not identified until the hearing on

the motion to dismiss, and all were beyond the 30 day statute of limitations provided for in the statute.[2]

"The [30] day filing requirement is comparable to statute of limitations, with which one must comply absent factors such as consent, waiver or equitable tolling. *National Railroad Passenger Corp. v. Morgan,* 536, U.S. 101, 113 (2002) (discussing EEOC filing deadlines); *Williams v. Commission on Human Rights and Opportunities,* 257 Conn. 258, 284 (2001) (discussing filing deadlines for complaints filed under the Connecticut Fair Employment Practices Act [CFEPA]). In certain circumstances, an employer's behavior in delaying the filing of a complaint may toll the statute of limitations. *Williams v. Commission on Human Rights and Opportunities,* 67 Conn. App. 316, 329 (2001); *Rodriquez v. Connecticut Board of Education,* OPH/WBR No. 2007-065 (ruling on motion to dismiss, February 6, 2008)." *Cassidy v. University of Connecticut Health Center,* OPH/WBR No. 2008-072, 2008 WL 2683293 (ruling on motion to dismiss) (June 5, 2008).

In the present matter certain acts and dates are not in dispute. These are the dates the complainant was removed from his position in Cheshire Correctional Facilities Industries on December 15, 2005 and his transfer to MacDougall-Walker Correctional Institution on February 5, 2006. While the issue as to whether these actions were retaliatory is most certainly in dispute the dates themselves and the action taken are not. Just as the aforementioned dates are not in question, neither is the date of the filing of the

[2] See motion to dismiss transcript of May 28, 2008 pages 44-47.

complainant's whistleblower complaint (October 30, 2007). For the complainant to overcome this significant time delay in filing his whistleblower retaliation complaint, an argument relating to such concepts of consent, waiver or equitable tolling should have been made along with facts to support such an argument.

In this instance these three principles are neither specifically mentioned nor even alluded to. The complainant's only response to his failure to file timely is that he acted in good faith and he is faced with obstacles not generally dealt with by members of the general public, which I presume means individuals not incarcerated. While I have no reason at this time to disbelieve his actions were and are made in good faith, I cannot use this as a basis to overlook or explain why he should not be held to the statutory 30 day filing requirement. Furthermore, the complainant, by his own admissions found no trouble in forwarding correspondence to both individuals and agencies that are identified in his complaint when he alleged he "blew the whistle." Furthermore, in this matter the complainant has filed no fewer than eighteen motions, memoranda and letters with this tribunal. From this, I can only conclude that the complainant had and has the wherewithal to effectively communicate despite being incarcerated and as such I cannot find any basis that would allow me to employ consent, waiver or equitable tolling that would expand the 30 day filing requirement.

Having determined that the pending complaint was filed beyond the statutory period, I must and do hereby dismiss this complaint. This ruling being dispositive of this case

renders any pending motions or issues moot. As to any scheduled dates pertaining to this case, these are now cancelled.

It is so ordered this 12th day of September 2008.

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Thomas C. Austin, Jr.
Presiding Human Rights Referee

cc.
David Taylor
Nicole Anker, Esq.