STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Wanda Torres, **Complainant**	**:**	**OPH/WBR NO: 2008-087**
v.		
Department of Environmental Protection, Bradford Robinson and Robert Issner, **Respondents**	**:**	**April 14, 2009**

RULING ON MOTION TO DISMISS

On September 24, 2008, the complainant, a state agency employee, filed a whistleblower retaliation complaint with the chief human rights referee (chief referee) at the Office of Public Hearings pursuant to General Statutes § 4-61dd (b) (3) (A). In her complaint the complainant alleged that the respondents retaliated against her by giving her a negative evaluation during her probationary period and demoting her to a lower pay grade because she complained that she was working "out of class" and expressed concerns about legal documentation not being processed correctly. On February 17, 2009, the respondents filed a motion to dismiss (motion) the complaint arguing that this tribunal does not have jurisdiction of the complaint because the complainant subsequently filed two grievance actions on October 17 and 24, 2009 and that § 4-61dd (b) (4) provides the complainant with mutually exclusive alternatives to filing her complaint, and thus she can not proceed with her complaint in two forums.

A motion to dismiss is an appropriate means to challenge a tribunal's jurisdiction to hear an action. See *Federal Deposit v. Peabody N.E.*, 239 Conn. 93, 99 (1996); see also *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. See *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; see *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). See also *Magda v. Diageo North America, Inc*., 2006 WL 4844065 (CHRO No. 0420213, March 16, 2006). After reviewing the motion and subsequent responses, along with the complaint and other material comprising the extant record, the motion is denied for the reasons set forth below.

In the respondents' motion, they argue that in the complainant's first grievance she contested her return to her previous position. The respondents also argue that the complainant's second grievance pertains to the complainant's concern that she was discriminated against and harassed in the work place. Ultimately, the respondents argue that since the complainant continues to pursue both grievance claims, she is foreclosed from proceeding with her complaint in this tribunal.

The complainant filed an objection to the respondents' motion on March 27, 2009 stating that if she is allowed to proceed only in one forum, she requests that the present complaint filed with the chief referee remain active. It appears in her objection that the complainant concurs with the respondents that she is foreclosed from pursuing her claims in more than one forum. She argues that she filed her whistleblower retaliation

complaint on September 24, 2008 and that "three" grievances were filed with the union on October 17, 2008. The complainant posits that "if only one alternative is to be retained, [she] respectfully request[s] that it be the [whistleblower retaliation] complaint, because it was filed first." She further argues that although the union grievances do not cover the non-contractual issues that this tribunal will cover, she is willing to request an immediate dismissal of her union grievances.

The complainant has not provided any information regarding the "three" grievances she stated were filed. I find that the two grievances submitted by the respondents with their motion pertain to the same issues in the complainant's whistleblower retaliation complaint. Other than to state that the grievances do not cover the "non-contractual" issues, the complainant has not provided specific details surrounding her grievances or the progress of her grievances. Regardless, the issue is not where in the process lie her grievances but whether the complainant pursued her claims simultaneously in more than one forum. The fact that she chose one forum first and then subsequently chose another forum to appeal similar adverse personnel action/s taken against her is prohibited by General Statutes § 4-61dd (b) (4).

General Statutes § 4-61dd (b) (4) provides in relevant part: "*As an alternative* to the provisions of subdivisions (2) [notifying the attorney general] and (3) [filing a complaint with the chief human rights referee] 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 . . . .” (Emphasis added.) “The statute is clear that an employee has an election of mutually exclusive alternative forums in which to challenge the consequences of a specific incident, regardless of the myriad of legal claims that may arise from the incident.” *Matthews v. Danaher, III, et al.,* OPH/WBR No. 2007-062, p. 4. (Ruling on Respondents’ Motion to Dismiss) (February 20, 2008); see also *Jones v. State of Connecticut, Judicial Branch, et al.* OPH/WBR 2006-032, pp. 2-4 (Ruling on Motion to Dismiss and Motion to Stay) (November 9, 2006).

Unlike in *Jones* and *Matthews* where both complainants filed grievances prior to filing their whistleblower retaliation complaints with the chief referee, here, the complainant, Wanda Torres first filed her whistleblower retaliation complaint with the chief referee and then subsequently filed her two grievances. Thus, pursuant to General Statutes § 4-61dd (b) (4), the complainant initially chose this forum to pursue her claims of retaliation and therefore, cannot also pursue similar claims through the grievance process. The filing of her grievances could have been done only in the alternative to filing with the chief referee; hence, the complainant must withdraw her grievances.

It is worth noting that had the complainant filed her grievances first (regardless of where they were in the grievance process) and then filed a whistleblower retaliation complaint with the chief referee, as the complainant did in *Jones v. State of Connecticut, OPH/WBR No. 2006-032*, the complainant’s complaint with the chief referee would have been dismissed.

The motion to dismiss is hereby denied and the complainant shall file with the office of public hearings and serve all parties a copy of the withdrawal of all grievances on or before April 28, 2009. If the complainant fails to file proof of the withdrawal of all her grievances on or before April 28, 2009, the present whistleblower retaliation complaint shall be dismissed.

So Ordered.

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The Honorable Donna Maria Wilkerson Brillant
Presiding Human Rights Referee

c. Assistant Attorney General Antoria Howard
Ms. Wanda Torres