

**STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS**

**Andrea L. Wilson,
Complainant**

: OPH/WBR NO: 2008-069

v.

**State of Connecticut
Judicial Branch,
Respondent**

: December 8, 2009

**ORDER
RE: Respondent's Motion to Dismiss**

On February 11, 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 beginning on January 14, 2008 when the respondent's employees "closely monitored and threatened her to not speak to anyone of authority"; when on or about January 17, 2008 the respondent's management limited her union activities; when the respondent sent her a letter on February 4, 2008 informing her that she was being placed on administrative leave with pay pending an investigation of her actions; and on June 5, 2008 when the complainant received a letter from the respondent notifying her that she was suspended for thirty days. The complainant alleged two subsequent retaliatory actions occurring on July 7 and 22, 2008 that are not a part of this motion to dismiss.

On August 10, 2009, the respondent filed their motion to dismiss on the grounds that this tribunal lacks subject matter jurisdiction. On October 16, 2009, the complainant

was ordered to file a response to the motion to dismiss on or before December 4, 2009. The complainant has not provided a response to the motion to dismiss.

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); *Upton 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, the complaint affidavit and other documents comprising the extant record, the motion is hereby Granted for the reasons set forth below.

In the motion, the respondent argued that this tribunal does not have jurisdiction of the complaint because the retaliatory actions of January 14, 2008, January 17, 2008, February 4, 2008 and June 5, 2008 were all part of a grievance filed on behalf of the complainant and an arbitration proceeding. A written arbitration decision was issued resolving the grievance on June 4, 2009. In addition, the respondent argued that the June 5, 2008 incident was previously dismissed pursuant to this tribunal's July 30, 2008

order, paragraph 3. As support, the respondent argued that § 4-61dd (b) (4) provides the complainant with mutually exclusive alternatives to filing her complaint, and thus she cannot proceed with her complaint for the same retaliatory (adverse) actions via her collective bargaining agreement using the grievance procedures and via the filing of a complaint with the chief human rights referee. Ultimately, the respondent argued that since the complainant elected to pursue those actions through her collective bargaining agreement, she is foreclosed from proceeding with her complaint in this tribunal and her claims based on the same adverse actions must be dismissed.

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).

The fact that the complainant chose one forum first and then subsequently chose another forum to appeal the same adverse personnel actions taken against her is prohibited by General Statutes § 4-61dd (b) (4). Although it appears the complainant filed her complaint with the chief referee prior to filing her grievance, the same retaliatory actions that were the subjects of her complaint were adjudicated via the collective bargaining agreement culminating in an arbitration award issued June 4, 2009. Therefore, withdrawing her grievances as was ordered in *Torres v. Bradford Robinson, et al.*, OPH/WBR 2008-087, p. 4 (Ruling on Motion to Dismiss) (April 14, 2009) is not an option here because an arbitration award already has been issued on the same claims. Hence, the complainant's claims of January 14 and 17, 2008, and February 4, 2008 are hereby dismissed. The June 5, 2008 claim is moot having already been dismissed.

So Ordered,

The Honorable Donna Maria Wilkerson Brilliant
Presiding Human Rights Referee

c. Attorney Richard D. O'Connor (via facsimile)
Ms. Andrea L. Wilson (via regular mail)
Attorney Martin R. Libbin (via facsimile)