

**STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES
OFFICE OF PUBLIC HEARINGS**

**Commission on Human Rights
and Opportunities ex rel.
Ann D. Weichman,
Complainant** : **CHRO No. 0710348
EEOC No. 16A200700931**

v.

**Department of Environmental Protection,
Respondent** : **May 19, 2009**

RULING ON MOTION TO DISMISS

Preliminary Statement

On April 4, 2007, the complainant filed an affidavit of illegal discriminatory practice (complaint) with the commission on human rights and opportunities (commission). In her complaint, the complainant alleged that the respondent failed to accommodate her disability, subjected her to unequal terms and conditions of employment and terminated her because of her physical disability and her age in violation of General Statutes §§ 46a-58 (a), 46a-60 (a) (1), 46a-70, and Title VII of the Civil Rights Act of 1964, as amended, and the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967 (ADEA) and the American with Disabilities Act (ADA). On March 11, 2009, the respondent filed a motion to dismiss (motion) the complaint arguing that this tribunal does not have subject matter jurisdiction over the complaint on the grounds that the doctrine of sovereign immunity bars the complainant's state claims of §§ 46a-60 and 46a-70 against the State of Connecticut, and that § 46a-58 (a) does not cover the complainant's federal claims of discriminatory employment

(ADA, the ADEA and Title VII). On April 16, 2009, the commission filed an objection to the motion, arguing that sovereign immunity is not applicable and that the laws of the United States as protected under § 46a-58 (a) include the ADA, ADEA and Title VII.

DISCUSSION

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 and subsequent responses, along with the complaint and other material comprising the extant record, the motion is granted in part and denied in part for the reasons set forth below.

I. SOVEREIGN IMMUNITY

In the respondent's motion, the respondent argued that under *Lyon v. Jones*, 104 Conn. App. 547 (2007) the complainant must obtain permission from the Connecticut claims commissioner before instituting a suit against the state because the state has sovereign immunity. The respondent did recognize that this very issue was on appeal to the Supreme Court awaiting a decision. A decision, *Lyon v. Jones*, 291 Conn. 384 (2009), was issued on May 5, 2009. The Supreme Court held that the plaintiff's § 46a-60 claim falls within the exceptions provided under §§ 4-142 (2) and (3). Section 4-142 (3) specifically exempts from the claims commissioner's jurisdiction "claims for which an administrative hearing procedure otherwise is established by law Section 46a-82 (a) provides just such an alternative administrative procedure Thus, it is apparent that claims over which the commission has statutory jurisdiction are, by the express terms of § 4-142 (3), excluded from the purview of the claims commissioner." *Lyon v. Jones*, supra, 291 Conn. 402.

"Moreover, § 4-142 (2), read together with § 46a-101, also operates to exempt a claim brought under § 46a-60 from the claims commissioner's jurisdiction. Section 46a-101 (a) provides: 'No action may be brought in accordance with section 46a-100 unless the complainant has received a release from the commission in accordance with the provisions of this section. . . . A complaint brought before the commission alleging a violation of § 46a-60 is simply not 'cognizable' by the claims commissioner" *Lyon v. Jones*, supra, 291 Conn. 402-03. "[Section] 46a-100 represents an unambiguous waiver of sovereign immunity, authorizing actions against the state for alleged discriminatory employment practices in violation of § 46a-60." *Id.*, 397.

In addressing the § 46a-70 claim, the respondent also argued that § 46a-70 pertains to suits against individual state officials and supervisory personnel. It argued that the complainant has not sued a state official in addition to the state agency, department of environmental protection; therefore, the § 46a-70 claim is not applicable and also should be dismissed. “Employment discrimination by state agencies is statutorily proscribed in [§ 46a-70 (a)].” *State of Connecticut v. Employees’ Review Board, et al*, Superior Court of Connecticut, Judicial District of Hartford-New Britain at Hartford, Docket No. 701585 (May 28, 1992) (Schaller, J.) (1992 WL 124099). In *Commission on Human Rights & Opportunities ex rel. Collette v. University of Connecticut Health Center*, CHRO No. 0610446, p. 4, (Ruling on Motion to Dismiss, July 22, 2008), this tribunal ruled that the complainant’s § 46a-70 claims were valid because § 46a-70 applies to employment discrimination in state agencies. Plaintiffs have had valid § 46a-70 claims against state agencies in which individual state officials or personnel were not named defendants along with the named state agency. See *Commission on Human Rights & Opportunities ex rel. Johnson v. State of Connecticut*, CHRO No. 9740163 (Final Decision, March 9, 2000); see also *Oakley v. Connecticut Commission on Human Rights & Opportunities*, 38 Conn.App. 506 (1995). Therefore, the complainant’s § 46a-70 claim is valid and this tribunal has jurisdiction over that claim.

II.
FEDERAL CLAIMS UNDER § 46a-58 (a)

General Statutes § 46a-58 (a) provides in relevant part that “[i]t shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities,

secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, sexual orientation, blindness or physical disability.” The respondent argued this tribunal does not have jurisdiction over the complainant’s federal claims of Title VII and ADA pursuant to § 46a-58 (a) because, as stated in *Commission on Human Rights & Opportunities v. Truelove & Maclean, Inc.* 238 Conn. 337, 346-47 (1996), “§ 46a-58 (a) provides no basis for claims of discriminatory employment practices that fall within the scope of § 46a-60.” Respondent Memo, pp. 4-5. Also, it argued that since the complainant claimed similar violations under § 46a-60, the more specific statute, then § 46a-58 (a), the more general statute, does not apply.

In addition, the respondent argued that as stated in *Commission on Human Rights & Opportunities ex rel. Robinson v. State of Connecticut, Department of Mental Health & Addiction Services*, CHRO NO. 0630292 (Ruling on Motion to Dismiss, March 26, 2008), because the protected class of age is not a protected class covered under § 46a-58 (a), the complainant’s ADEA claim should be dismissed.

The commission argued that § 46a-86 (a) authorizes the presiding referee to determine whether a respondent engaged in a discriminatory practice, e.g. a violation of 46a-58 (a). It further argued that § 46a-58 (a) specifically refers to the laws of the United States, which includes ADA, the ADEA and Title VII claims and, therefore, this tribunal has jurisdiction over the complainant’s ADA, ADEA and Title VII claims.

The respondent is correct in that 46a-58 (a) does not cover age discrimination and, therefore, the ADEA claim is dismissed. See *Commission on Human Rights & Opportunities ex rel. Robinson v. Department of Mental Health & Addiction Services*,

supra, p.3. However, in regard to Title VII and the ADA, “[I]n *Trimachi v. Connecticut Workers Compensation Committee* (sic), 2000 WL 872451, *7 Page 3 of 5 (Conn. Super), the Connecticut Superior Court reiterated the legal tenet long espoused in commission administrative decisions that General Statutes § 46a-58 (a) expressly converts a violation of federal antidiscrimination laws into a violation of Connecticut antidiscrimination laws. See, e.g., *Commission on Human Rights & Opportunities ex rel. Adam Szydlo v. EDAC Technologies Corporation*, 2007 WL 4623072 (CHRO No. 0510368, November 19, 2007); *Commission on Human Rights & Opportunities ex rel. Dexter v. Connecticut Dept. of Correction*, 2005 WL 4828672 (CHRO No. 0320165, August 31, 2005). Thus, for example, this tribunal has jurisdiction to adjudicate [Title VII and ADA claims] provided [they are] raised under the aegis of (and thus converted to a claim under) § 46a-58 (a).” *Commission on Human Rights & Opportunities ex rel. Robinson v. Department of Mental Health & Addiction Services*, *supra*, p.3. Here, the complainant’s Title VII and ADA claims are covered under 46a-58 (a).

Lastly, the respondent argued that the 11th amendment to the United States constitution bars ADEA and ADA claims in federal courts. Respondent Memo, pp. 6-7. Since this tribunal is not a federal court, the issue is moot.

III.
CONCLUSION

The motion is granted as to the ADEA claim and denied as to the ADA, Title VII, §§ 46a-58 (a), 46a-60 (a) (1) and 46a-70 claims.

So Ordered.

The Honorable Donna Maria Wilkerson Brilliant
Presiding Human Rights Referee

c. Assistant Attorney General Maria C. Rodriguez
Attorney Alix Simonetti
Ms. Ann Weichman