

Gladys Santiago-Tosado,
Complainant

OPH/WBR No. 2012-187

v.

UCONN, et al.
Respondents

June 12, 2012

ARTICULATED RULING ON RESPONDENT'S MOTION TO DISMISS

PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

The complainant, an employee of the University of Connecticut (UCONN), filed a complaint on January 11, 2012 with the Chief Human Rights Referee alleging retaliatory treatment. Complainant alleged that she informed UCONN's Office of Audit of Compliance and Ethics, on or around August 2011, regarding violations of state laws and regulations pursuant to General Statutes § 4-61dd (a). On May 18, 2012, the respondents filed a **motion to dismiss** arguing that the complainant failed to **allege facts** to establish jurisdiction under § 4-61 did (a) and (b) (3). On June 6, 2012 the same day a settlement conference was held this tribunal issued a short denial of respondent's Motion to Dismiss. The ruling opined that there were sufficient allegations in the complainant to withstand a motion to dismiss. The ruling further stated that a detailed articulation would follow shortly.

A short time after the preliminary order was issued; the complainant filed a "Response to Motion to Dismiss," and objected to the motion to dismiss prior to receiving this tribunal's order. On June 11, 2012 at 4:10pm, the respondent filed an unnecessary request for articulation and a motion for reconsideration. For the reasons set forth in the articulated ruling herein, the respondents' motion for reconsideration of this tribunal's denial of the respondent's **motion to dismiss** is DENIED.

STANDARD

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; every reasonable inference is to be drawn in his favor. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998). See *Proietto v. Whitney Manor Convalescent Center, Inc*, No. OPH/WBR-2005-009 (Ruling on Motion to Dismiss, March 1, 2006).

Dismissal is appropriate when it “appears beyond doubt that [the complainant] can prove no set of facts in support of her claim which would entitle her to relief.” *Calderon and Sarton v. State of Connecticut, Department of Corrections, et al.* 3:04 DV 1562 (JCH) (quoting *Davis v. Monroe County Board of Education*, 526 U.S. 629, 654 (1999). “The issue is not whether a [complainant] will ultimately prevail but whether the [complainant] is entitled to offer evidence to support the claims.” *York v. Association of Bar of City of New York*, 286 F.3d 122, 125 (2nd Cir. 2002) (quoting *Schever v. Rhodes*, 416 U.S. 232, 236 (1974).

Further, the requirements for filing a valid complaint and the instances when this tribunal can dismiss that complaint are listed in the 4-61dd-1 et seq. The most relevant is contained in General Statutes §4-61dd (d) (1).¹

Sec. 4-61dd-4 of the Regulations of Connecticut State Agencies states in relevant part that:

(a) The complaint shall contain sufficient information to place each respondent on notice of the claims against that respondent. The complaint shall be in writing and shall contain, at minimum, the following:

¹ d) (1) No state officer or employee, as defined in section 4-141, no quasi-public agency officer or employee, no officer or employee of a large state contractor and no appointing authority shall take or threaten to take any personnel action against any state or quasi-public agency employee or any employee of a large state contractor in retaliation for (A) such employee's or contractor's disclosure of information to (i) an employee of the Auditors of Public Accounts or the Attorney General under the provisions of subsection (a) of this section; (ii) **an employee of the state agency or quasi-public agency where such state officer or employee is employed**; (iii) an employee of a state agency pursuant to a mandated reporter statute or pursuant to subsection (b) of section 17a-28; or (iv) in the case of a large state contractor, an employee of the contracting state agency concerning information involving the large state contract; or (B) such employee's testimony or assistance in any proceeding under this section. (Emphasis added)

- (1) The full name, address and telephone number of the complainant;
- (2) The name and address of each respondent;
- (3) A plain and simple statement of the alleged facts, events or actions upon which the complaint is based;
- (4) The date of the alleged violation;
- (5) The location where the alleged violation occurred;
- (6) The relief sought; and
- (7) Such other information as the office of public hearings may require.

Sec. 4-61dd-15 of the Regulations of Connecticut State Agencies states in relevant part that:

- c) The presiding officer may, on his own or upon motion by a party, dismiss a complaint or a portion thereof if the complainant:
 - (1) Fails to establish subject matter jurisdiction or personal jurisdiction;
 - (2) Fails to appear at a lawfully noticed conference or hearing without good cause; or
 - (3) Fails to sustain his or her burden after presentation of evidence.

DISCUSSION

This tribunal has the power to dismiss a case sua sponta on the issue of subject matter jurisdiction. (See § 4-61dd -15 of the Regulations of Connecticut State Agencies.) It follows that this tribunal may, at any point, also make a favorable determination that there is subject matter jurisdiction. (See § 4-611dd -14 of the Regulations of Connecticut State Agencies.) Respondent's "representation" that the complainant never filed an objection to the Motion to Dismiss, (which is not correct) is irrelevant. Especially in light of the fact that this tribunal's ruling is favorable to the complainant.

Complainant's allegations, viewed in the most favorable light, do allege facts sufficient to state a claim which falls under the statutory jurisdiction granted to the Office of Public Hearings. In ¶ 5 of the complaint, complainant alleges that she "filed a complaint," with UCONN'S Office of Audit, Compliance and Ethics (Office) in August of 2011. Her complaint concerned UCONN's potentially unethical conduct regarding a grant between the District Cooperative Grant for the Kids and UCONN Bridging Education Program (KUBE). Further, it is alleged that the Office issued a report of their findings on December 1, 2011 and that the complainant was terminated on December 13, 2011 as a result of the KUBE Grant matter.

The respondent argues that complainant never filed any documentation with the Office, but rather wrote a letter to her supervisor Dana McGee, an employee of UCONN, and that letter was forwarded to the Office run by UCONN. The complainant alleges she did file a complaint and the veracity of that statement is assumed for the purposes of a Motion to Dismiss. Regardless, if the letter was merely forwarded and not directly submitted to the office, the complaint was made to Dana McGee, an employee of the agency where complainant worked and to an internal department of the agency. A disclosure made to an employee, or an internal department where the complainant worked, qualify as a protected acts under General Statutes §4-61dd. As a result, the burden of persuasion shifts to the respondent to show that the **alleged** adverse actions taken were not in retaliation for the complainant having transmitted facts to an employee of the state agency (UCONN). See General Statute §4-61dd (d) (4). The respondent is left to its proof at a hearing regarding its claim that complainant's allegations are false.

Additionally, the respondent argues that by complainant's own admission in C. ¶ 13, regarding her disclosure of inappropriate conduct to the State Board of Education as stated in C. ¶ 3, "is not a contemplated method of disclosure under General Statutes §4-61dd. In C.¶ 3 complainant alleges that, "On April 18, 2011 Complainant disclosed to the State Department of Education what she in good faith believed to be inaccurate, misleading, and/or potentially false information included in connection with a grant application for an Inter District Cooperative Grant for the Kids and UCONN Bridging Education (KUBE) Program. She did so in her capacity as Director of PRLACC pursuant to the duties and responsibilities spelled out in her job description." In ¶ 13 the complainant alleges that, "[t]his Complainant points out that although her report on the matters in item #3 was not undertaken in the way contemplated by §4-66dd [sic] of the General Statutes, such condition was precipitated by the University's requirement in its Code of Conduct that her complaint be filed and investigated internally. Likewise her ability to meet the statutory requirement was hampered by her termination latter action was not recommended by the Office of Audit Compliance and Ethics." (Emphasis added.) This tribunal makes no assumption regarding this allegation other than to note that the General Statutes contain no such section as "§4-66d," and this tribunal makes no determination as to whether or not this is a typographical error. Nevertheless, whether or not it is a typographical error is of no matter as the contents of C.¶ 3 are not essential to the complaint.

The argument forwarded by the respondent involves conflicting matters of facts, which are not appropriate for a motion to dismiss. The majority of the facts in dispute arise out of the allegations in C.¶5 of the complaint. The motion to dismiss tests only the sufficiency of the allegations made and whether the complaint taken as whole states a

cause of action. The respondent fails to address the legal sufficiency of the allegations contained in C. ¶ 5 of the complaint and attempts to ascribe allegations contained in C. ¶13 by the complainant with regard to C.¶3 to the entire complaint.

Moreover, the **alleged** adverse personnel action occurred within two years of the complainant's internal disclosures to an employee of the state agency. As a result, the burden of persuasion shifts to the respondent to show that the **alleged** adverse actions taken were not in retaliation for the complainant having transmitted facts to the employee of the state agency (UCONN) where the complainant was employed. See General Statute §4-61dd (d) (4). For the foregoing reasons articulated above, the Respondent's Motion to Dismiss is **DENIED**.

It is so ordered this 12th day of June 2012.

Michele C. Mount, Human Rights Referee

cc.

Ruben E. Acosta, Esq.-via fax only
Colleen Valentine, Esq.-via fax only
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