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February 25, 2014

WBR/OPH No. 2012-207 -- Mary Ziomek, Complainant v. State of CT, Department of Labor, et al., Respondents

Pre-Hearing and Status Conferences Summary and Order Regarding the Filing of an Answer in Response to the Amended Complaint Filed February 24, 2014

On February 4, 2014, in the Office of Public Hearings ("OPH"), the undersigned presiding referee convened a pre-hearing conference in this matter. In attendance were the self-represented complainant[1], Mary Ziomek, Commission Counsel Yvonne Duncan, and Assistant Attorneys General ("AAG") Josephine Graff and Matthew Larock.

During the pre-hearing conference, the undersigned explained that while it is necessary for the complainant to establish that she made a whistleblower complaint that satisfies the requirements of section 4-61dd, including the material elements of the complaint, any evidence regarding the conduct of the associated whistleblower investigation was not relevant to proving whether the respondent's actions amounted to a violation section 4-61dd.

In light of this fact, and the respondent's objection to the complainant's witness and exhibit list, dated December 11, 2013, the undersigned required the complainant to file a revised witness

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[1] The complainant elected to represent herself in this case; notwithstanding the fact that the whistleblower retaliation law also provides a complainant the right to retain counsel and to recoup reasonable attorney's fees if, after hearing, the presiding human rights referee determines that the law has been violated. The complainant, as a self-represented litigant, must become familiar with the requirements of the laws, regulations and orders that govern these proceedings. The Office of Public Hearings, including its appointed referee, cannot assist any party to a contested case within our jurisdiction; our responsibility is to ensure a "just, economic, and efficient" adjudication of the dispute.

It is also worth noting, as counsel for the commission on human rights and opportunity stated during the February 13, 2014 status conference, and as with discrimination cases pursuant to the Connecticut Fair Employment Practices Act ("CFEPA"), commission counsel does not represent a complainant in this matter. Commission Counsel, however, may be assigned to intervene in whistleblower cases to "protect any public interest" that it identifies. Subsection (b) of section 46a-55.

list that complied with the directive of the Hearing Conference Summary and Order ("HCSO"), dated December 13, 2012.

Also, during the pre-hearing conference, the respondent's motion to dismiss the complaint with respect to the individuals named therein, the undersigned verbally granted that motion, because, as amended by section 17 of public act 11-48, section 4-61dd specifies that an employee may file a complaint against his or her employer if that employer is a " state agency, quasi-public agency, large state contractor or appointing authority."

Furthermore, at the pre-hearing conference, the complainant, alleged that the adverse personnel action taken against her by the respondent included, not merely some negative comments contained in her performance review, but also that she was subjected to a hostile work environment ("HWE"). Although the complaint filed with the OPH, on October 23, 2012, did not include any factual allegations, events or actions indicative of a HWE claim, the complainant asserted that a statement she prepared at the request of the then Acting-Commissioner of the Department of Labor, Dennis Murphy, and that was subsequently produced in response to the respondent's discovery request, contained adequate information to put the respondent on notice of this claim.

To avoid postponing the hearing that was scheduled to commence on February 25, 2014, the undersigned directed the respondent to review the specified document, and if it did, indeed, provide notice of the HWE claim, the public hearing would convene as scheduled. Furthermore, at that time, the undersigned scheduled a status conference for February 13, 2014, to confirm whether such notice existed and if there was any reason that the case would not proceed as scheduled. The parties were invited to participate in the status conference by telephone.

The undersigned convened the status conference on February 13, 2014. The complainant and AAGs Graff and Larock participated by telephone. Commission Counsels Yvonne Duncan and Cheryl Sharp appeared in person at the OPH.

The following issues were addressed: (1) the respondent had not agreed to engage in settlement discussions that had been requested by Commission Counsel, (2) upon review by the parties, the statement prepared by the complainant, purportedly at the request of the respondent's acting commissioner, did not contain information to provide notice to the respondent of the HWE claims, although the complainant had represented it did at the pre-hearing conference, and (3) the undersigned noted that section 4-61dd(d)(2) provides that the "complaint may be amended if an additional incident giving rise to a claim under this subdivision occurs subsequent to the filing of the original complaint."

In light of representations made by the complainant during this status conference, she was allowed to submit an amended complaint, on or before March 4, 2014. The amended complaint was filed timely on February 24, 2014.

In recognition of the complainant's pro se status, the undersigned stated, during the status conference, that the amended complaint was to contain factual allegations, i.e., describe who did what and when, including the relevant actions of the complainant. It was further explained that those factual allegations (assumed to be true for pleading purposes) must collectively establish that the whistleblower retaliation statute was violated. The complainant was told that, to prevail ultimately on the merits, at the hearing she must present evidence the permits the presiding referee to find facts that support the conclusion that the actions of the respondent violated the whistleblower retaliation statute.

The Amended Complaint

The amended complaint does not comply fully with either the directive of the regulations that govern whistleblower complaints or the instructions provided at the status conference. Among the other minimum requirements for a complaint, instruction is provided to include "a plain and simple statement of alleged facts, events or action upon which the complaint is based." Regulations of Conn. State Agencies ("Regulation") section 4-61dd-3.

The amended complaint contains a number of statements that are not allegations of fact, events or actions. Many of the statements are assertions, arguments, characterizations, or conclusions. Such statements should not be included in a complaint.

The inclusion of statements beyond factual allegations, events or actions is problematic because the respondent is required only to "admit, deny or plead insufficient knowledge to each and every allegation, or portion thereof, of the complaint." Regulation 4-61dd-8. The time for the parties to articulate their respective legal arguments, assertions, characterizations, conclusions, and proposed findings of facts is after the public hearing -- when post-hearing briefs and reply briefs are filed.

Additionally, the complaint includes references to various documents that do not comprise the complaint -- nor should they. Any documents that a party intends to be evidence should be introduced at the public hearing, not attached to the complaint.

ORDER:

Under the authority granted to a presiding referee pursuant to Regulation 4-61dd-2(c), I hereby order the respondent to exercise a reasonable good faith effort to identify, enumerate and

quote in its answer each factual allegation, event, and action contained in the amended complaint. The respondent, in accordance with Regulation 4-61dd-8, is to admit, deny, of plead insufficient knowledge and each identified allegation, event or action immediately following its description. The requirement of Regulation 4-61dd-8(c) is waived.

Additionally, I order that this case be bifurcated. First, the parties will address only the merits of the whistleblower retaliation complaint. Second, if after the parties have rested their cases on the merits and submitted their respective briefs and reply briefs, the undersigned concludes that the respondent violated the pertinent provisions of section 4-61dd, a hearing will be convened to determine the damages, if any, the complainant is entitled to receive.

The respondent must file an answer to the amended complaint on or before March 28, 2014.

A status conference is ordered for April 23, 2014 at 1:30 p.m. in the Office of Public Hearings to discuss any issues that arise once the required answer is has been filed, including, but not limited to, the need for additional discovery, and the rescheduling of the public hearing. Also to be addressed is whether the parties believe that they can stipulate to all relevant facts, and if so, a deadline will be scheduled for the parties to file such stipulations, briefs and reply briefs.

So ordered.

Dated this 25th day of February 2014.

Alvin R. Wilson, Jr.
Presiding Human Rights Referee

c:
Mary Ziomek – email only
Josephine Graff, Esq. and Matthew Larock, Esq. – email only
Yvonne Duncan, Esq. and Cheryl Sharp, Esq. – email only