

State of Connecticut

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MEMORANDUM

To: All Counsel

From: Kimberly D. Morris, Secretary II, OPH 

Re: OPH/WBR No.2012-195
Marc Thornton v. State of CT, DOC, et al

Date: October 2, 2012

Enclosed is the Presiding Human Rights Referee's Ruling on Respondent's Motion to Dismiss.

cc.

Presiding Human Rights Referee Michele C. Mount
Kathleen Eldergill, Esq.-via fax only
Erik Lohr, Esq.-via fax only
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STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Marc Thornton, Complainant

OPH/WBR No. 2012-195

v.

State of CT, Department of Correction,
Et al., Respondents

October 1, 2012

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Ruling on Respondent's Motion to Dismiss

I.

PROCEEDURAL HISTORY

Complainant, Marc Thornton, sent a whistler-blower retaliation complaint by certified mail on April 25, 2012, to the Chief Human Rights Referee at the Office of Public Hearing (OPH), 21 Grand Street, Hartford, CT 06106. The complaint was received on April 27, 2012, and a certified return receipt was sent back to the complainant stating that the addressee had received the complaint. At the time of the mailing the complainant, the OPH and CHRO had moved their location to their current address at "25 Sigourney Street, Hartford CT." The complaint was not received by the Office of Public Hearing at its new location until May, 23, 2012. The Respondents filed a Motion to Dismiss, on August 9, 2012, arguing that Thornton's complaint should be dismissed based on lack of subject matter jurisdiction due to: 1. untimeliness; 2. the complaint was brought against Individual state employees; and 3. that complainant also filed a union grievance and elected his remedy. Based on the reasoning set forth

below, this tribunal finds that it does have jurisdiction and the respondent's motion to dismiss is **DENIED**.

II.

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 (1983). In considering a motion to dismiss, facts are to be construed in the light most favorable to the non-moving party, in this case, the Complainant. Every reasonable inference is to be drawn in the Complainant's favor. *New England Savings Bank v. Bedford Realty Corp.*, 246 Conn. 594, 608 (1998); *Pamela B. v. Ment*, 244 Conn. 296, 308 (1998). The moving party bears a substantial burden to sustain a motion to dismiss. During evaluation, there should be "presumption in favor of subject matter jurisdiction." *Williams v. Comm'n on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 A.2d 645, 651 (2001). See also *Kelly v. Albertsen*, 114 Conn. App. 600, 606, 970 A. 2d 787, 790 (2009) (stating that "every presumption favoring jurisdiction should be indulged.")

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. 1 Restatement (Second), Judgments § 11. *Craig v. Bronson*, 202 Conn. 93, 101, 520 A.2d 155 (1987). Jurisdiction of the subject-matter is the power to hear and determine cases of the general class to which the proceedings in question belong. *Henry F. Raab Connecticut, Inc. v. J.W. Fisher Co.*, 183 Conn. 108, 111-12, 438 A.2d 834 (1981); *E.M. Loew's Enterprises, Inc. v.*

International Alliance of Theatrical Stage Employees, 127 Conn. 415, 420, 17 A.2d 525 (1941); *Case v. Bush*, 93 Conn. 550, 552, 106 A. 822 (1919); *People v. Western Tire Auto Stores, Inc.*, 32 Ill.2d 527, 530, 207 N.E.2d 474 (1965). "A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. *Monroe v. Monroe*, 177 Conn. 173, 185, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S.Ct. 20, 62 L.Ed.2d 14 (1979); *Meinket v. Levinson*, 193 Conn. 110, 115, 474 A.2d 454 (1984); *Henry F. Raab Connecticut, Inc. v. J.W. Fisher Co.*, 183 Conn. at 112, 438 A.2d 834." (Internal quotations missing) (Italics added) *Demar v. Open Space and Conservation Com'n of Town of Rocky Hill*, 211 Conn. 412, 423, 424 A.2d 1103 (1989)

III.

DISCUSSION

A. Time Bar

"In light of the strong presumption in favor of jurisdiction, we require a strong showing of a legislative intent to create a time limitation that, in the event of noncompliance, acts as a subject matter jurisdictional bar." (Internal quotation marks omitted.) *Banks v. Thomas*, supra, 241 Conn. at 583, 698 A.2d 268. Time limitations under the Connecticut Fair Employment Practices Act (CEFPA) were analyzed in *Williams v. Comm'n on Human Rights & Opportunities*, 257 Conn. 258, 266, 777 A.2d 645, 651 (2001). *The William's* court considered the issue of whether the 180 day filing requirement under General Statue §46a-82(e)¹, implicates jurisdiction, or whether it was a statute of limitations subject to equitable tolling. The *Williams* court was consistent

¹ part of in the Connecticut Fair Employment Practices Act (CEFPA)

with the *Banks* decision, stating that there must be a strong showing of legislative intent to conclude that a time limit is jurisdictional and such a bar existed. The court decided that time limits in CFEPA were statute of limitations subject to equitable tolling.

In *Connecticut Dept. of Mental Health and Addiction Services v. Saeedi* 2012 WL 695512 (February 07, 2012) the court similarly analyzed whether the time filing provision in General Statute § 4-61dd² is also a statute of limitations subject to equitable tolling as in CFEPA. The *Saeedi* court agreed with *Williams* and found that no such legislative intent was contained in the Whistle-blower statutes either. The *Sadeedi* court concluded that General Statute §4-61dd (c) (2) (A) is like other statutes enforced by CHRO, therefore, subject to equitable tolling.³

The complaint form, which was generated by the Office of Public Hearings (OPH), indicated that a complaint should be mailed to the OPH at "21 Grand Street, Hartford, CT 06106." At the time of the mailing the complainant, the OPH and CHRO had moved their location to their current address at "25 Sigourney Street, Hartford CT." The complaint was mailed certified mail on April 25, 2012 well within the 90 day time frame. The complainant was delayed due to an error was caused by the OPH supplying the wrong address and it would be inherently unfair and inequitable to punish the complainant in this situation. Therefore, the ninety-day filing period is tolled and the complaint is not time barred and the respondent's motion to dismiss is denied.

² General Statute §4-61dd (b) (3) (A) which is applicable in the present instance.

³ This tribunal recognizes that *Connecticut Dept. of Mental Health and Addiction Services v. Saeedi*, 2012 WL 695512 (February 07, 2012), is on appeal. It may be several years before a final Appellate decision is forthcoming. The decision by the Superior Court is currently the controlling law and will be followed to by this referee.

B. Individual Liability

The respondents' motion to dismiss also argues that there is a lack of jurisdiction over parties named individually pursuant to General Statutes §4-61dd.⁴ Aggrieved employees claiming retaliation in violation of General Statute §4-61dd, as amended by Public Act 11-48 may file their complaints against "[a] state agency, quasi-public agency, large contractor or appointing authority," pursuant to 4-61dd (d) (2) (A). Prior to amendment there was no such enumeration of entities.⁵

In Complainant's response to Respondent's Motion to Dismiss, she notes that the current statutory language includes "appointing authority." The definition of "appointing authority" under the State Personnel Act General Statute § 5-196 provides that an "appointing authority" means a board, commission, *officer*, commissioner, *person* or group of persons having the power to make appointments by virtue of a statute or by lawfully delegated authority." That provision would suggest that an individual, as an appointing authority, may be named in as a respondent. Moreover, there is strong precedent that states that individuals, maybe named in their official

⁴ 4-61dd (2) (A) Not later than ninety days after learning of the specific incident giving rise to a claim that a personnel action has been threatened or has occurred in violation of subdivision (1) of this subsection, a state or quasi-public agency employee, an employee of a large state contractor or the employee's attorney may file a complaint against the state agency, quasi-public agency, large state contractor or appointing authority concerning such personnel action with the Chief Human Rights Referee designated under section 46a-57. Such 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. The Chief Human Rights Referee shall assign the complaint to a human rights referee appointed under section 46a-57, who shall conduct a hearing and issue a decision concerning whether the officer or employee taking or threatening to take the personnel action violated any provision of this section.

⁵ Prior to P.A. 11-48 the relevant provision of General Statute §4-61dd (b) (3) (A) simply stated that the aggrieved employee or their attorney may, "file a complaint concerning such personnel action."

capacity; and in some instances where an individual in their official capacity maybe liable.

General Statute 4-61dd (d) (1)⁶ provides that:

"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)

Once again the term "appointing authority" is used, as well the term no state officer or employees of qualifying entities, when referring to the prohibited retaliatory action. This language is identical in the version immediately preceding P.A. 11-48 and in current the Whistle-blower statute.

The Construction of general words and phrases in statutes is governed by General Statute § 1-1, which, provides in relevant t part that "(a) In the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly. Further, General Statute § 1-2z, the plain meaning rule, states that, "The meaning of a statute shall, in the first instance, be ascertained from the text of

⁶ General Statutes §4-61dd et seq. will collectively be referred as the Whistleblower Statues.

the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extra textual evidence of the meaning of the statute shall not be considered.”

The Whistle-blower statutes prohibit certain actors from retaliating against employees who report certain wrong doings. It would be illogical and unworkable to ban the actors from such prohibited conduct, and not provide a method to find them liable for their actions. Additionally, looking at all the provisions within the statute, it would be inconsistent with the general purpose of the Public Act 11-48, which expands protection for whistle-blowers.⁷ Individuals are additionally referenced in General Statutes §4-61dd (d) (1) which looks to General Statute §4-141⁸ for the definition of a “state officer or employee.”⁹

The liability of the “state officer or employee” is addressed in General Statute §5-141d (a) which also references General Statute § 1-141. The relevant part of § 5-141(d)

⁷ The legislative summary for P.A. 11-48 states, “The act restructures the process for investigating whistleblower complaints, expands existing whistleblower protections, and establishes new ones.”

⁸ The relevant portion of General Statute §4-141 provides that, “state officers and employees’ includes every person elected or appointed to or employed in any office, position or post in the state government, whatever such person’s title, classification or function and whether such person serves with or without remuneration or compensation, including judges of probate courts, employees of such courts and special limited conservators appointed by such courts pursuant to section 17a-543a.”

⁹ The state shall save harmless and indemnify any state officer or employee, as defined in section 4-141, “and any member of the Public Defender Services Commission from financial loss and expense arising out of any claim, demand, suit or judgment by reason of his alleged negligence or alleged deprivation of any person’s civil rights or other act or omission resulting in damage or injury, if the officer, employee or member is found to have been acting in the discharge of his duties or within the scope of his employment and such act or omission is found not to have been wanton, reckless or malicious.” See also *Eagan v CHRO*, 2011 WL 1168499 (February 25, 2011).

provides that "the state shall save harmless and indemnify **any state officer or employee, as defined in section 4-141 ...**" (Emphasis added)

The Whistler-blower statute provides that individual employees are prohibited from qualifying retaliatory acts, and indemnifies them if they are acting in their official capacity. Indemnification would not be necessary if individuals could not be named. A fortiori individuals are proper respondents when they are named in their official capacity. No individual liability will attach absent a showing of wanton, reckless or malicious act or omission pursuant to General Statute §5-141d (a); or if individuals acted as appointing authorities. In either case no individual will be liable absent a finding pursuant to General Statutes § 5-141d (a). The Respondents Motion to Dismiss as to individual liability **is denied.**

C. Election of Remedies

When a respondent challenges a complaint on the ground that a complainant has elected an exclusive remedy, the issue is properly raised by a special defense and not a motion to dismiss since "[i]t is both rational and fair to place the burden of pleading and proving an election of remedies on the party asserting the claim ..." *Grant v. Bassman*, 221 Conn. 465, 604 A.2d 814 (1992). The purpose of a special defense is to plead facts that are consistent with the allegations of the complaint but demonstrate, nonetheless, that the plaintiff has no cause of action. Practice Book 164.

In Levasseur v. Town of Bethany 2012 WL 1435239 (Conn.Super.) the court opined that "the defendant is essentially asserting, in a motion to dismiss, that regardless of the truth of the allegations in the plaintiff's complaint, she cannot maintain

a common-law action because she had elected workers' compensation as her exclusive remedy." *Id.* The *Levasseur* court concluded that a special defense, and not a motion to dismiss, is the proper procedural vehicle for pleading the defendant's challenge to the plaintiff's complaint and that motion to dismiss was denied. This tribunal agrees that based purely on procedural grounds this motion to dismiss should be denied. Nevertheless, this ruling will address the substance of the respondent's argument.

The most important query in the instant case is what avenues of redress are available to the complainant? In paragraph 9 of the complaint, the complainant alleged that he filed a union grievance that "does not make a claim of whistler-blower retaliation." The substance of the union grievance is not disclosed. This alone requires an analysis of facts outside the pleadings and is not proper for a motion to dismiss.

Additionally, it is worth noting that respondent's excerpt of Legislative history attached to its Motion to Dismiss does not bolster its argument that the legislature clearly intended to provide a mutually exclusive election of remedies. There was an illuminating discussion of the legislative history of Public Act 02-91(which amended General Statue §4-61dd) in *Saeedi v. Department of Mental Health and Addiction Services, et al.* 2010 WL 5517188.

"In its 2002 session, the legislature enacted P.A. 02-91, introduced as H. B. 5487. In their discussion of the proposed bill, the legislators made clear that the 'only changes we're making to the existing whistleblower statute in this bill is creating a rebuttable presumption if the job action took place within one year of a whistleblower stepping forward. And the second thing we're doing here to the underlying law is creating a new alternative avenue for a person to bring the complaint as an alternative to the existing avenues that are in the law as we speak.' 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2881. The 'new route that this bill before us creates is with the Attorney General and the Chief Human Rights Referee. The existing routes that at employee can take today are to file with the

employee review board or they can grieve under the provisions of their state contract, if their state contract includes such a provision or they can bring a civil action in court.' 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2882. In Dr. Saeedi's case, his state collective bargaining contract does not have a provision allowing a grievance to be filed for whistleblower retaliation." *Saeedi v. Department of Mental Health and Addiction Services, et al.* 2010 WL 5517188.

Similarly, Mr. Thornton does not have a provision under his collective bargaining agreement, and like Dr. Saeedi, that avenue of redress is closed to him.

General Statute §4-61dd (d) (3) states that, as an alternative, an appeal may be taken to the Employee Review Board within 90 days of "knowledge of the specific incident giving rise to such claim," in accordance with General Statute § 5-202 of the State Personnel Act. General Statute § 5-202 provides a myriad of causes of action in addition to retaliation.¹⁰ In debating H.B. 5487, which became Public Act 02-91, there was a discussion regarding bringing an action under General Statutes §4-61dd, verses

¹⁰ 5-202. Individual and group appeals, (a) Any employee who is not included in any collective bargaining unit of state employees and who has achieved a permanent appointment as defined in subdivision (19) of section 5-196 may appeal to the Employees' Review Board if such employee receives an unsatisfactory performance evaluation or is demoted, suspended or dismissed, or is aggrieved as a result of alleged discrimination, or unsafe or unhealthy working conditions or violations involving the interpretation and application of a specific state personnel statute, regulation or rule. Such employee must have complied with preliminary review procedures, except as otherwise provided in subsection (l) of this section. Such an appeal shall be submitted to the board not later than thirty days from the completion of the final level of the preliminary review procedure, provided the first level of the procedure shall have been initiated no later than thirty calendar days from the date of the alleged violation, except that in cases of dismissal, demotion or suspension the grievance must be submitted directly to the third level of the procedure and shall have been initiated no later than thirty calendar days from the effective date of such action.

(b) Any group of employees that is not included in any collective bargaining unit of state employees may file an appeal as a group directly with the Employees' Review Board if such group of employees is laid off or dismissed, or is aggrieved as a result of alleged discrimination, or unsafe or unhealthy working conditions or violations involving the interpretation and application of a specific state personnel statute, regulation or rule, provided each member of such group (1) is appealing the same or a similar issue, as determined by the Employees' Review Board, (2) is a permanent employee, as defined in subdivision (20) of section 5-196, and (3) has achieved a permanent appointment, as defined in subdivision (19) of section 5-196. Such an appeal shall be submitted to the board not later than thirty calendar days from the specific incident or effective date of action giving rise to such appeal.

General Statute §31-51m and whether they are mutually exclusive. 45 H.R. Proc., Pt. 9, 2002 Sess on pg 215. General Statute § 31-51m provides protection of employees who disclose employer's illegal activities or unethical practices. Rep O'Rourke states that, the legislation under debate does not affect current law, it only provides additional protection. *Id.* While both statutes pertain to retaliation, §31-51m covers illegal action and §4-61dd expands the whistler-blower protection to other types of wrong doing such as: gross waste of funds, mismanagement, and so forth. Once again making it clear that purpose of Public Act 02-91 was to add protections not eliminate them.

The *raison d'être* of a General Statute §4-61dd retaliation claim is to provide whistle-blowers with additional job protection and to create an environment that encourages employees to bring the applicable wrong doing to light. General Statute §4-61dd only provides redress for claims of retaliation, a fortiori, the language providing alternative paths for "such claims" refers to retaliation claims. It is clear that reading that the Whistle-blower protection statute in conjunction with other statutory provisions,¹¹ the Saeedi precedent and, and the legislative intent to create more protection for whistle-blowers, not less, demonstrates that a retaliation action under §4-61dd would not preclude an action regarding other additional relief that may be available for other types of claims. (See footnote 5)

In deciding a motion to dismiss this tribunal must read the complainant's allegations in the light most favorable to maintain the complaint. The complainant

¹¹ See GS 1-2z supra

alleged that the grievance filed did not relate to whistle-blower retaliation. Therefore, for the foregoing reasons the respondent's motion to dismiss must be **DENIED**.

It is so ordered this 1st day of October 2012.



Michele C. Mount,
Presiding Human Rights Referee

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