STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

DRAFT FINDING OF NO REASONABLE CAUSE – ADMINISTRATIVE DISMISSAL

Marilee Corr Clark
COMPLAINANT

vs.

Louis Bucari
RESPONDENT

CHRO NO: 1710323 DATE FILED: 1/14/16

PARTIES

COMPLAINT:

Marilee Corr Clark
19 Country Club Road
South Glastonbury, CT 06073

COMPLAINANT'S REPRESENTATIVE:

Atty. Emily A. Gianquinto
emily@eaglawllc.com

RESPONDENT:

Louis P. Bucari, Jr.
louis.bucari@po.state.ct.us

RESPONDENT'S REPRESENTATIVE:

JURISDICTION

☐ The investigator concludes that the Commission has jurisdiction to receive, investigate and issue a determination upon the merits of this complaint.

☒ The investigator concludes that the Commission does not have jurisdiction to receive, investigate and issue a determination upon the merits of this complaint. Therefore this complaint is administratively dismissed due to the following:

FINDINGS OF FACT / CONCLUSIONS OF LAW

1. Marilee Corr Clark (Complainant) filed a complaint against Louis Bucari (Respondent) on 1/6/17. Both are employed by the CT Dept. of Revenue Services (DRS).

2. Because the Respondent is not the Complainant's employer, the Respondent's liability is limited to instances of retaliation or aiding and abetting. Employees are not individually liable for other discriminatory actions; the employer is. The complainant charges the Respondent only with retaliation.

3. Retaliation claims are of two types: (1) opposing a discriminatory practice; or (2) filing a complaint with the Commission or participating in a Commission proceeding.

4. The Complainant complained internally on 10/6/15 that the Respondent had created a hostile work environment with his favoritism and possible affair with Erica McKenzie, a DRS employee under the Complainant's supervision. The complaint led to an investigation by DRS. DRS found the Respondent exercised poor judgment and demonstrated preferential treatment toward McKenzie, and resulted in the Respondent's being reprimanded. Whether the discipline fit the offense exceeds the scope of the Commission's inquiry.

5. Except in cases involving continuing violations or where some equitable doctrine such as tolling applies, CONN. GEN. STAT. § 46a-82(f) requires complaints to be filed with the Commission within 180 days of an alleged discriminatory practice. 180 days prior to 1/6/17 is 7/10/16. Events occurring prior to 7/10/16 are untimely.

6. The Complainant offers events such as the following that occurred on or after 7/10/17 as being retaliatory:

(a) a substantial revision of her job duties and removal of direct reports on 7/12/16;

(b) the issuance of a declaratory ruling on 9/22/16 by the Respondent without the Complainant's input;

(c) a request to Scot Anderson on 9/23/16 for a copy of the declaratory ruling that she received 3 days later when it was sent to all staff;

(d) the Complainant's discovery in mid-October 2016 that the Respondent had been accessing and monitoring her emails, and forwarding them to Erica McKenzie;

(e) the Respondent's continuation of an alleged affair with McKenzie; and

(f) the Respondent's withholding of information and assigning high-level legal work to the Complainant's subordinates.

7. In determining when a discriminatory act has occurred, Section 46a-54-34a of the REGULATIONS OF CT STATE AGENCIES directs the Commission to consider: "(1) The date or dates on which the alleged act or acts of discrimination occurred; (2) The date on which the complainant knew or reasonably should have known that the alleged act or acts of discrimination occurred; and (3) The date on which the complainant knew or reasonably should have known that the alleged acts may have constituted discrimination."

8. The Complainant knew or should have known about the DRS reorganization by at least 6/29/16, when she emailed her new supervisor, Joseph Mooney, about stickers for moving boxes. About the only thing that was occurring as late as 7/12/16 was that the empty moving boxes were to be returned so they could be reused. The retaliation claim based on the removal of job duties and direct reports is untimely. "[T]he proper focus is on the time of the *discriminatory act*, not the point at which the *consequences* of the act become painful." (Emphasis in original.) Chardon v. Fernandez, 454 U.S. 6, 8 (1981).[1] On 7/12/16 (and every day thereafter) the Complainant quite possibly was experiencing the "present effect to a past act of discrimination", but not an act that could support a charge of retaliation. United Air Lines, Inc. v. Evans, 431 U.S. 553, 558 (1977).

9. On 9/22/16 the Respondent was no longer the Complainant's supervisor. As part of the DRS reorganization the Complainant's duties were revised. The Complainant was reassigned to head the Office of Legal and Research and report to Mooney. Her complaint indicates that her "primary responsibility was to be drafting, monitoring and implementing legislation and otherwise managing all aspects of the legislative process with respect to DRS."

10. While professional courtesy might have dictated that the Respondent provide at least a draft of the ruling and ask for the Complainant's input since their duties overlapped to some degree when it came to declaratory rulings (there is dispute between the Complainant and the Respondent over their respective roles concerning the subject of this particular ruling), (1) application of the hospital tax does seem to at least arguably fall to the Respondent, or at least the Respondent could in good faith think it did; and (2) the Respondent's failure to seek input from the Complainant is unlikely to be an adverse employment action.

11. " 'A plaintiff sustains an adverse employment action if he or she endures a materially adverse change in the terms and conditions of employment....To be materially adverse a change in working conditions must be more disruptive than a mere inconvenience or an alteration of job responsibilities.' (Citation omitted; internal

[1] But see Vollemans v. Wallingford, 289 Conn. 57 (2008) (per curiam), which repudiates Chardon in the case of termination of employment. And see Green v. Brennan, 136 S. Ct. 1769, 1780-81 (2016) for a further erosion of Chardon regarding the accrual of a cause of action in constructive discharge cases under Title VII. Neither situation presents here.

quotation marks omitted.) Brown v. American Golf Corp., 99 Fed.Appx. 341, 343 (2d Cir.2004). "[A]n adverse employment action [has been defined] as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Internal quotation marks omitted.) Reynolds v. Dept. of the Army, 439 Fed.Appx. 150, 153 (3d Cir.2011)." Amato v. Hearst Corp., 149 Conn. App. 774, 781 (2014). "[P]etty slights, minor annoyances, and simple lack of good manners" are not actionable. Burlington Northern and Santa Fe Ry. Co. v. White, 548 U.S. 53, 68 (2006).

12. Anderson is a direct report of the Respondent's. Even assuming for argument's sake that the Respondent ordered Anderson not to immediately provide the Complainant with a copy of the declaratory ruling, a 3-day delay in providing the ruling is not a serious enough deprivation to constitute an adverse employment action.

13. The complaint does not indicate how long the Respondent monitored her email, which if true is creepy but not an adverse employment action.

14. Although the Respondent and McKenzie each deny having an affair, it is not a retaliatory act for an individual to continue a personal, sexual relationship. A continued personal, sexual relationship might give rise to a hostile work environment under certain circumstances, but that is something DRS would have to answer for, not the Respondent.

15. Although we are at the Commission's investigative stage and not our adjudicatory stage, a fact finder may consider the temporal proximity between the protected activity and the retaliatory conduct on the issue of reasonable cause. "There is no bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between [protected activity] and an allegedly retaliatory action. The trier of fact, using the evidence at its disposal and considering the unique circumstances of each case, is in the best position to make an individualized determination of whether the temporal relationship between an employee's protected activity and an adverse action is causally significant. Likewise, the trier of fact is in the best position to determine whether the employer acted with a [direct] retaliatory animus." (Citations omitted; internal quotation marks omitted.) Ayantola v. Board of Trustees of Technical Colleges, 116 Conn.App. 531, 539–40 (2009).

16. "Within the time period of one year, there is no firm rule. In some cases, time periods ranging from twelve days to eight months have been found to show the necessary temporal proximity .... In other cases, time periods ranging from two-and-a-half months to eight months have been deemed insufficient to show the necessary temporal proximity." Zboray v. Wal–Mart Stores East, L.P., 650 F.Sup.2d 174, 182 (D.Conn. 2009); Li Li v. Canberra Industries, 134 Conn. App. 448, 456–57 (2012).

17. As a rule of thumb, the closer in time the opposition and the retaliation occur the greater likelihood of establishing causation. "The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse

employment action as sufficient evidence of causality...uniformly hold that the temporal proximity must be 'very close,' O'Neal v. Ferguson Constr. Co., 237 F.3d 1248, 1253 (C.A.10 2001). See, e.g., Richmond v. ONEOK, Inc., 120 F.3d 205, 209 (C.A.10 1997)(3–month period insufficient); Hughes v. Derwinski, 967 F.2d 1168, 1174–1175 (C.A.7 1992)(4–month period insufficient)." Clark County School District v. Breeden, 532 U.S. 268, 273-74 (2001). The Second Circuit has likewise insisted on tight temporal proximity, but has "not nail[ed] down the elusive outer limit." Gorman-Bakos v. Cornell Co-op Extension of Schenectady County, 252 F.3d 545, 555 (2d Cir. 2001)(citing cases); Sulehria v. City of New York, 670 F. Supp. 2d 288, 315-16 (S.D.N.Y. 2009)(citing cases where the passage of 5, 9 and 13 months was too distant to support an inference of retaliation).

18. The Complainant is herself an attorney. She was represented by counsel from the onset of the Commission proceedings. Because of the delay in filing the complaint, the number of acts the Commission can consider as retaliatory was considerably narrowed. Even if the most likely suspect, the DRS reorganization, were timely, the reorganization itself is near (but maybe not over) proximity's outer edge. The acts occurring in September and October 2016 on the other hand are at or beyond that edge.

19. The Complainant does not have standing to speak on behalf of other DRS employees.

20. The lack of a timely adverse employment action requires administrative dismissal of the complaint.

DETERMINATION

☐ After reviewing all of the evidence in the Commission's file, the investigator concludes that there is **reasonable cause** for believing that a discriminatory practice has been or is being committed as alleged in the complaint.

☒ After reviewing all of the evidence in the Commission's file, the investigator concludes that there is **no reasonable cause** for believing that a discriminatory practice has been or is being committed as alleged in the complaint.

Dated and entered this 10th day of April, 2018.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

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