State of Connecticut
Commission on Human Rights and Opportunities
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February 14, 2018

OPH/WBR No. 2012-208 Dr. Michael Aronow v. UCONN Health Center

FINAL DECISION

Dear Complainant/Respondent/Commission:

Transmitted herewith is a copy of the Presiding Referee's Final Decision in the above captioned complaint.

The decision is being sent via email to the commission, complainant's attorney and respondent's attorney.

Very Truly yours,

Kimberly D. Morris
Secretary II

cc.

Scott Madeo, Esq. – via email only
Heena Kapadia, Esq. – via email only
Colleen Valentine, Esq. – via email only
Stephen Courtney, Esq. – via email only
Joseph Jordano, Esq. – via email only

Michele C. Mount, Presiding Human Rights Referee

STATE OF CONNECTICUT
OFFICE OF PUBLIC HEARINGS

Dr. Michael Aronow,
Complainant

v.

UCONN Health Center,
Respondent

OPH/WBR No. 2012-208

February 14, 2018

FINAL DECISION

I

PROCEDURAL HISTORY

On November 14, 2012, Dr. Michael Aronow (Complainant) filed a whistleblower retaliation complaint against the University of Connecticut Health Center (Respondent), pursuant to General Statute § 4-61dd. The Complainant alleged that the Respondent subjected him to adverse personnel actions after he filed a grievance with the Health Center Appeals Committee (HCAC) on September 30, 2011, alleging that another physician violated the University's code of conduct, which, among other things, involved mismanagement, abuse of authority, and gross waste of funds.

Pursuant to General Statute § 46a-55, the Commission on Human Rights and Opportunities (Commission or CHRO) filed an appearance on November 13, 2013. The Complainant subsequently amended his complaint on January 15, 2014, to include new allegations of retaliation.

Respondent University of Connecticut Health Center ("UCHC") filed its Answer and Thirteen Special Defenses to the Complaint on March 18, 2013. The Respondent filed two Motions to Dismiss and evidentiary motions to exclude evidence prior to the public hearing. On September 20, 2013, Respondent filed its First Motion to Dismiss. On November 11, 2013, Complainant filed an opposition to

the First Motion to Dismiss. On April 24, 2014, this tribunal heard oral arguments on the Motion to Dismiss dated September 20, 2013. That motion was denied and the ruling was issued on the record.

On August 15, 2014, Jay Lieberman through his counsel made a Motion to Intervene for the limited purposes of addressing whether the Health Center Appeals Committee Report and Dr. Austin's response should be discoverable. That motion was denied as the law was clear that Respondent had a duty to disclose said documents.

Respondent filed its Second Motion to Dismiss/Strike Complainant's Consolidated Complaint (Complaint) On August 24, 2015. On September 10, 2015, Complainant filed an objection to Respondent's motion. The second Motion to Dismiss objected to Complainant's consolidated complaint and was also denied. The Complainant filed a Motion to Compel asking that the Respondent perform a forensic search of an employee's, Ann Horbatuck's (Horbatuck), hard drive. Complainant requested that an expert hired by the Complainant be present and have input on the required search terms. That Motion to Compel was granted, and several orders were issued to the Respondent to comply. However, the Respondent never performed the search as ordered by this Tribunal. The failure of Respondent to comply with this Tribunal's orders resulted in the tribunal taking a negative inference with regard to the material that was sought by the Complainant.

The Public Hearing was held on 28 dates throughout 2016 and 2017. On January 26, 2017, the last date of the Public Hearing, the undersigned bifurcated the post-hearing brief stages, ordering that the first brief only address the issue of liability, and the second brief address any remaining issues. This tribunal ordered simultaneous briefing with the opportunity for reply briefs for the sake of judicial economy pursuant to the tribunal's authority to control the proceedings.

II

SUMMARY

This whistleblower retaliation action stems from the Complainant's filing of a HCAC grievance against Dr. Jay Lieberman, the Chairman of the Orthopedic Department, (Lieberman). Additionally, a union grievance filed by the union on behalf of the Complainant against the Respondent. For background purposes, it is important to note that, there was a history of animosity between the two physicians, Lieberman and Aronow as they were on opposite sides of the faculty unionizing campaign. The Respondent's UCHC faculty ultimately voted to unionize in November 2009. The legislature did not ratified the agreement until September 3, 2011. The physicians were both highly skilled surgeons, well known nationally and internationally for research, and their clinical abilities and had reputations for possessing strong personalities.

Further, after the campaign to unionize was successful, between 2010 and 2012 there was an ongoing dispute regarding the renewal of Complainant's contract with the Respondent. Lieberman and his assistant Ann Horbatuck (Horbatuck) participated in drafting the terms of a new, less favorable, contract and discussed the terms with the Complainant. There was extensive disagreement over the terms in the contract. On September 26, 2011, the Complainant filed a union grievance regarding the new proposed contract. The focus of the union grievance centered on whether Complainant had an Individual Compensation Agreement (ICA), which was automatically renewed unless notice was given by the respondent six months prior to expiration, (it is undisputed that no termination letter was issued prior to the expiration on the contract) or whether Complainant was covered under the job security provision in the new Collective Bargaining Agreement (CBA). Meanwhile, Respondent argued that the Complainant's contract would expire in February 2012 if new terms were not accepted. The parties failed to agree on the terms of a proposed new contract. The new proposed contract was less favorable in terms of salary and non-compete clause for the Complaint then his previous contract. Complainant

was separated from UNCH on March 31, 2012, before the union arbitrator made its ruling. The Complainant was terminated despite the pending decision. This premature separation caused disruption to Complainant's patients health care and to the Complainant's career.

The Respondent's notice to patients regarding Complaint's separation caused problems for the Complainant, his patients and the Respondent. If a physician leaves UCHC, it was customary to send notices to patients giving information on the physician's new practice location and how to contact the physician. The Complainant did not know where he was going, nor if he was going at all, as he was still awaiting the Arbitrator's decision on whether he was covered by the CBA extending the date of his contract renewal. The Respondent did not comply with the Complainant's requested content, which was that his status was uncertain. When notice was sent to patients, Respondent simply stated that Complainant was leaving, with no explanations. UCHC also refused to put a forwarding email notice on Complainant's email and created a script for staff to recite when patients called to ask about the Complainant's whereabouts. The simple script was to be followed without deviation and contained no information on why Complainant was gone, or to provide them with a means to contact him. They told patients that other doctors at UNHC would see them instead of Complainant.

In May of 2012, the arbitrator of the union grievance found Complainant was not covered under the CBA because the Complainant had ICA. However, the arbiter ruled that Complainant's ICA contract automatically renewed as no notice of termination was given to the Complainant within the 6 months. Therefore, the Complainant's ICA would not expire until June of 2015. The Respondent ignored the arbitrator's decision stating that the arbitrator did not have the authority to determine that the Complainant had an ICA that automatically renewed, and the only relevant determination was that the Complainant's old contract was not covered under the CBA.

In addition to the union grievance, on September 30, 2011, Complainant filed a faculty grievance against Lieberman with Health Center Appeals Committee (HCAC). Complainant alleged that Lieberman violated the code of conduct with regard to "Honesty, Integrity, Respect, Professionalism, Conduct of Faculty, Administrators and Staff, Civility, and Harassment." Further, the Complainant alleged in the HCAC grievance that, "A pattern of incivility, vindictiveness, attempted intimidation, disrespectfulness, and harassment has been directed against me by Dr. Jay R. Lieberman for some time and has adversely affected patient care and medical student and orthopedic resident education. It has most recently culminated in a termination letter directed against me signed solely by Dr. Lieberman for which no written reason for dismissal was given."

The findings of the HCAC were hidden from the Complainant, despite its conclusion in April of 2012, until after an "Agreement of Compromise and Release," was signed on August 8, 2012 and the revocation period had past. The Complainant executed the release without ever knowing the findings of the HCAC committee or that Dean Austin unilaterally decided not to follow the HCAC's findings that Lieberman did violate the Code of Conduct and vindicated Complainant's actions. The reasons for denying the findings to the Complainant changed over time. After Respondent communicated with Lieberman's attorney, they claimed they could not release the report because it was actually a performance evaluation and not discoverable under the State's Freedom of Information Act. However, the University's own policies gave the Complainant the right to see the HCAC findings. The HCAC findings were not released until ordered by this tribunal during the public hearing process.

After Complainant's separation, he applied for privileges with the Respondent to continue to perform surgical procedures, and participate in the academic mission of the respondent. This required the Respondent to give the Complainant a community faculty appointment before it could grant the Complainant privileges. Community Faculty Appointments and the privileges that follow are routinely given to physicians after they separated from the Respondent. There is only one known case where a

physician was denied privileges, which was due to his status as felon. Complainant was denied a community faculty appointment and privileges for over a year and a half. Privileges were eventually granted for Complainant to perform surgeries however, Complainant's academic pursuits were vastly curtailed. Moreover, there was a disruption of health care for Complainant's patients and difficulties accessing the patient's records. Currently, the Complainant is performing surgeries at all of the Respondent's facilities and has some academic duties at the medical school.

III

FACTS

All jurisdictional requirements have been met. Based upon evidence and testimony adduced at public hearing, the complaint, answer and other pleadings, and an assessment of the credibility of the witnesses, the following facts relevant to this decision are found.[1]

COMPLAINANT'S EMPLOYMENT WITH UCHC

1. Michael S. Aronow, (Complainant) began working for the Respondent in 1997 as an Assistant Professor clinician in the Department of Orthopedic Surgery at the University of Connecticut School of Medicine. In 2005 he was promoted to Associate Professor-in-Residence in the Department of Orthopedic Surgery. (Tr. pp. 327-28, 346, Ex. C-250).
2. Complainant was well recognized in his field by the UCHC, state, and national organizations. Complainant was given several recognitions and awards for academics and dedication. (See Exs. C-5 C-68, C-94, C-96, C-211, C-12 C-250 R-391).
3. Since 2008, he has served on a committee evaluating podiatry ankle surgery permit applications for the Connecticut State Department of Public Health. (Exs. C-211, C-212, Tr. 1357-1358)

[1] References to an exhibit are by party designation and number. The complainant's exhibits are denoted as "C" followed by the exhibit number and the respondent's exhibits are denoted as "R" followed by the exhibit number. Those exhibits that were proffered by both the complainant and the respondent may be referred to by either designation. References to the transcript are designated as "Tr." followed by the page number

4. On September 29, 2005, the Complainant entered into a five-year employment contract with UCHC. Complainant performed procedures/surgeries at the John Dempsey Hospital ("JDH") and the Farmington Surgery Center. He also saw patients for non-operative, pre-operative and post-operative care. (Ex. C-16).
5. The HCAC is comprised of JDH, University Medical Group (UMG), and the schools of medicine and dentistry. (Ex. R-374).
6. On December 20, 2005, UCHC issued the Complainant an appointment letter as Associate Professor (in residence) approved through December 31, 2010. This was not an employment contract and pertained to the academic appointment only. (Ex. R-392, Tr. 5896-99).
7. In September 2006, Dr. Lieberman[2] (Lieberman) became Chairman of the Musculoskeletal Institute, which included the orthopedic surgery department, replacing Bruce Browner ("Browner"). (Tr. 3951-52).
8. Complainant and Lieberman had differences in opinion with respect to Lieberman's management of the orthopedic department and the orthopedic residency program, as well as, Lieberman's interpersonal actions with staff and residents. (See Tr. pp. 561-62, 578-81, 1476-1477).
9. Lieberman restructured the orthopedic training program. He made a decision to bring the medical residents back to the University while reducing the involvement of community doctors, which Complainant felt, created turmoil for physicians and patients within the greater Hartford region. (Ex. R-184, Tr. 561-62, 578-81).
10. In 2009, Complainant participated in a faculty union campaign at UCHC. The Administration, including Lieberman, was against unionization. Complainant was pro-union and expressed

[2] Lieberman took a position at the University Of Southern California Medical School in 2012 and was not present or called as a witness in the public hearing.

his pro-union position to his colleagues. The faculty ultimately voted to unionize in November of 2009. (Tr. 365-367, 1473)

11. From 2009 to 2012, Lieberman made a series of decisions that Complainant disagreed with and often negatively affected him. (See Ex-R31, R-203, Ex. R-184, Tr. 1467-68, 1472-1477, 6177).

12. There were several past complaints regarding Lieberman's conduct. (See Ex. C-36, Tr. 552-553, 3360-3378, 3496-3497, 3584, 3473-3477, 3589).

CONTRACT DISPUTE

13. In June of 2005, Complainant was given a 5-year employment contract. The contract provided that his base salary was set at the 80th percentile of the AAMC salary with annual adjustments, or $414,000 annually, whichever was higher. Complainant was required to generate relative value units ("RVUs") equal to or greater than the median of the University Health System Consortium Production Survey Report for his specialty pro-rated to Complainant's clinical full time equivalent ("FTE"). (Ex. C-16).

14. The contract also required yearly raises to be issued effective October 1st based on 80th percentile of the American Association of Medical Colleges ("AAMC") salary survey standard. (Ex. C-16).

15. At the expiration of the original contract, Complainant's yearly salary was $566,000.00, which was the same amount as Lieberman's salary. (Ex. R-147).

16. In the first 5 years, Complainant consistently exceeded his goals. Based on data gathered on all UCHC faculty he also had very high RVUs. (See also Exs. C-427, R-191, Tr. 1199-1200, 3969-3970).

17. The contract provided that, "Either party may elect not to extend this agreement by giving the other party notice there of not less than 6 months prior to the end of this agreement.

Failure to give such notice shall not however automatically extends this agreement." (Ex. C-16)

18. Complainant was not issued a termination notice in the six months prior to the June 30, 2010 end date of his 2005 contract. (Ex. C-45, C-346, Tr. 5878, 6098).
19. On September 20, 2010, Lieberman emailed John Biancamano and other administrators stating, "Mike Aronow's contract is up. He had a contract that was five years long." Biancamano responded to that email stating, "I agree." (Ex. R-21).
20. Lieberman wanted to negotiate directly with Complainant without the presences of his attorney. (Tr. 449, 1423, 1467-68)
21. Complainant maintained because there was no notice of the termination of his contract, his ICA contract renewed for another 5 years.
22. During the internal discussions with UCHC administration concerning UCHC's proposed new contract with Complainant, Lieberman initially advocated to keep Complainant on at UMG. In an email he stated, "[Complainant] does work hard and he sees a lot of patients. I would like to keep him. It would be a blow to morale and could hamper retention if he is not kept on the faculty." (Ex R-21, Tr. 4230-31)
23. In 2010, because of the pending acceptance of the CBA agreement, UCHC took the approach that it generally would not enter into new contracts with faculty members, and all existing contracts would be extended for one year with all terms and conditions remaining the same. (Ex. R-129, R-130, R-131, R-150; Tr. 1943-50; 3724-25).
24. Complainant asserted to Lieberman and Ann Horbatuck (Horbatuck), an administrator for the orthopedic department who worked for Lieberman that his contract had automatically renewed under the renewal provision in the contract. (Tr.1466-67, 6094-95).

25. Lieberman responded, that the contract expired in June 2010 and it did not renew. Complainant was told that he had to negotiate a new contract. (Ex. R-21, R-51, R-150; Tr. 1466-1467, 6095, 6099-6107).

26. Respondent's representatives later shifted their position and claimed that Complainant's contract remained in effect until December 31, 2010. On December 6, 2010, Dr. Cato Laurencin, Executive Vice President and Dean of the UCONN Medical School extended Complainant's faculty appointment for one year in the following letter: "As you know, your present five year contract and faculty appointment ends as of December 31, 2010. I am pleased to support Dr. Lieberman's recommendation to renew your appointment as Associate Professor (in-residence), in the Department of Orthopedic Surgery, School of Medicine (100% time), for a one (1) year appointment/contract effective January 15, 2011 through December 31, 2011. Your salary and other conditions of employment will not change." The Respondent signed the appointment letter only. (Ex. C-269).

27. Complainant's old 2005 contract was considered an ICA. The ICAs required both parties' signatures for renewal / modification. In order to be considered an ICA, the contract had to have productivity requirements based on either RVUs, net collections or some other criteria that, if met, would lead to an increase in salary. (Exs. C-76 C-77, Tr. 6335-6).

28. In Fiscal year 2011 Complainant's revenue collection, among orthopedic doctors, was $932,665.00, second only to Dr. Kevin Shea. He was also the third highest net revenue generator in orthopedic department (Exs. C-14, C-15, C-17).

29. On August 3, 2011, Complainant was presented with a contract offer dated July 26, 2011 and given eleven days to consider the offer. (Ex R-404, Tr. 1505-6).

30. The new contract for Complainant had been prepared as early as October 25, 2010; however, the offer was not conveyed to him at that time. (Ex. R-397, 409 Tr. 3746).

31. The contract offer gave Complainant until August 11, 2011 to accept the new offer. This offer was made just prior to when the unions were expected to approve the SEBAC agreement that was necessary for the legislature to approve the CBA. (Tr.1506, 2443-44).

METHODS OF MEASURING PRODUCTIVITY

32. Productivity in the new contract was measured by net revenues and was unfavorable to the Complainant when compared to his old ICA contract. 1) His Salary was reduced by $66,000; 2) the new contract was structured so that even if he exceeded all of his targets, significant reductions would still occur; 3) there were defined mandatory salary reductions if he did not meet certain targets; 4) the academic funding provision in the new contract was reduced by $5,000; 5) Respondent added language specifically stating that Complainant's job duties included compliance with the Code of Conduct and that could be subjected to disciplinary action for violation thereof; 6) the contract included a covenant not to compete provision, which precluded obtaining employment in any surrounding area, even for a termination without cause; 7) the contract offer also gave Lieberman discretion to modify the clinical designation to a higher percentage, which would make it more difficult to satisfy the two (2) times net revenue standard set by the Respondent. These terms were not included in the old contract. (Ex. R-404, Tr. 4202).

33. The terms of the new contract would also be less favorable if compared with terms of the new Collective Bargaining Agreement (CBA.) (Tr. 2510).

34. Complainant wanted to wait until the CBA was ratified by the legislature before he negotiated a new contract as he would have a better understanding of his rights and remedies and could then be in a better position to negotiate. Lieberman never articulated this to the others involved in the negotiating new contracts in the administration. Instead,

they were told that Complainant would essentially not negotiate. (Tr. 1901-1902, 1422-24, 4484-4485, 4509).

35. The Respondent stated that the objective was that clinicians were expected to generate revenue that was at least two times (2x) their salary and benefits pro-rated for the percentage of time spent performing clinical work. Under the measures of the new standards, Complainant had exceeded his RVU target; however, his net collections totaled only 1.69 times his salary, short of the 2% revenue target. Out of 212 clinical faculty members, Complainant had the fourth highest RVU total in fiscal year 2011, which ended June 30, 2011. (Ex. C-318) (See Tr. 1198-1205).

36. Primary care physicians were evaluated by RVU's because they had a larger volume of Medicaid patients. Complainant also treated many Medicaid patients and the collections for such patients were typically lower than non-Medicaid patients. (Tr. 1198, 4019-20).

37. The Complainant saw considerably more Medicaid patients than other physicians in the orthopedic group; however, this was not taken into consideration in his new contract. (Tr. 4019-20).

38. UCHC and Lieberman made concessions for other physicians based on their particular specialty or other special considerations. (Tr.5434) (See Tr. 1530-1533).

39. Lieberman allowed one of the faculty members in the orthopedic group, to be measured by RVUs because of her particular area of specialty. Accommodations were not made for Complainant based on his high volume of Medicaid Patients. Complainant was measured by net collections and not RVU's. (Ex. C-337).

40. Complainant was one of the two orthopedic foot and ankle surgeons for whom the orthopedic call-center scheduled Medicaid patients. (Ex. C-70).

41. The net revenues could be manipulated by the Respondent's arbitrary assignment of percentage of clinical time designated. Additionally, the overhead associated with new contract formula was not directly measured, but assumed to be at least two (2) times the percentage of a faculty member's salary and fringe benefits assigned to clinical activity as opposed to research, education, administration, and/ or miscellaneous. (Tr. 1944; See Tr. 1202-1205, 1217-1218, 1538-1549).

42. Other physicians[3], with the same schedule, were given a 50% clinical time designation verses Complainant's 90%. The physician with the 50% designation was made to look profitable, while Complainant's 90% designation made it such that Complainant was not achieving his set goal. (Ex. C-14, C-292 C-337, Tr. 1202-1205, 1217-1218, 5099-5100).

43. Under the new formula, Complainant's billing and collections, would appear to create a financial deficit (approximately $115,000 in deficit), and Lieberman stated that University Medical Group (UMG) would not support him having the same salary if his collections did not improve. (Ex. R-397).

44. No other doctor/faculty member had a salary cut. Moreover, the clause relating to the Code of Conduct was not included in any other orthopedic faculty members' contracts created prior to or after July 2011 (See Exs. C-16, C-17, C-20, C-31).

45. Complainant was told by Lieberman he was losing so much money that he had to take at least a $66,000.00- $101,000.00 pay cut or face termination. All other contract offers in the orthopedic department provided for *optional* not mandatory salary reduction provisions for failure to meet targets (Exs. C1-6, C-14, C-45, C-17, R-404.)

46. Dr. Lieberman notified Complainant that his appointment as Associate Professor would not be renewed beyond February 23, 2012. The date of separation. (Ex. R-192).

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[3] 50% (Arciero), 51% (Mazzocca), 80% (DeBerardino, Moss, Wolf)

47. When Complainant was given his new contract offer, the fifteen state employees unions had not yet approved the agreement between the State of Connecticut and the State Employees Bargaining Agent Coalition ("SEBAC"). This approval was necessary before the legislature would consider the CBA for final approval. (Tr. 1506, 2443-44, 5741).

48. The decision of the unions was expected to occur mid to late August 2011. (Tr. 6375).

49. On August 22, 2011, Lieberman hand-delivered a termination notice to Complainant stating that his contract would not be renewed beyond February 23, 2012 (Ex. C-268. Tr. 2592).

50. This termination notice was a tactic designed to pressure the complainant to negotiate. (Tr. 4993, 4994, 5854).

51. Lieberman did not follow Health Center policy in issuing this notice of termination, which policy requires the Dean's approval. (Tr. 1887-1888, 4196).

52. Bruce Liang ("Liang"), the then-acting Dean of the Health Center, was not notified in advance of the termination. (Ex. C-38).

COMPLAINT'S UNION GRIEVANCE

53. On September 26, 2011, the Union filed a Grievance, on Complainant's behalf under the newly established faculty Union Collective Bargaining Agreement (CBA) disputing the nonrenewal notice. (Tr. 717, 782).

54. The grievance alleged that his employment was covered by the CBA because Complainant's contract expired on June 30, 2010 and did not meet the definition of an ICA. (Id).

55. Therefore, the union's position was that Complainant was protected by the CBA's job security provision, which would have extended his contract until June 30, 2013. (Ex. R-392, Tr. 411).

56. In the weeks after the grievances were filed, the parties engaged in settlement negotiations in the union grievance regarding the contract. Complainant and Respondent were able to

agree upon all material terms at issue in the contract grievance. Liang replied to Lieberman regarding the terms, "Jay, the SOM is willing to live with any financial consequence of his presence till 9/30." (Exs. C-349, C-344).

57. Respondent made the settlement contingent upon Complainant withdrawing the Faculty grievance against Lieberman. (Exs. C-49, C-52).

58. Complainant did not withdraw the grievance and no settlement was reached. (Ex. C-349, Tr. 398).

59. Lieberman had a great deal of control in these negotiations and had a say in the decision to reject the settlement agreement. (Exs. C-50, C-344, Tr. 5926, 5951-5953).

60. At this point and time the Respondent's position was that Complainant had an ICA, which was extended by his appointment letter until December 31, 2011. (Tr.5879-5881).

61. On October 14, 2011, Complainant and Bruce Mayer ("Mayer"), the President of the Union, had a meeting with Liang as part of the Step 2 grievance process provided for in the CBA. (Ex. C-419).

62. The Health Center then took the modified position that Complainant's contract was still in effect after June 30, 2010. At this meeting, Mayer brought forth the inconsistency in Respondent's position. Respondent had not acted in conformity with the contract requirements. Specifically, Respondent had not given Complainant the October raises that would have been due in October 2010 and October 2011 had his 2005 contract remained in effect as Respondent claimed. (Exs. C-16, C-45, C-346; Tr. 1642-45).

63. Step 2 of the Union grievance process required Dr. Liang, (Liang) to write a decision after the meeting. Liang testified at the hearing that he did not write the decision but, rather, that he relied on Karen Duffy Wallace (Wallace), who had represented the Health Center at the Step 2 hearing write the decision. (Exs. C-345, C-419, Tr. 4577-4579).

64. Liang was not familiar with the Complainant's contract issues. He was unfamiliar with which employment agreements qualified as an ICA under the CBA. Understanding the definition of an ICA was central to deciding Complaint's Union grievance. (Tr. 4511-4518).

65. To justify the Respondent's current position on his contract, it elected to give retroactively the Complainant his raises that his 2005 contract required. "We don't want to give the impression the raises were a result of the grievance--just that the error was discovered there." (Ex. C-346)

66. On March 14 and 15, 2012, the Complainant's Union and UCHC attended an arbitration hearing concerning Complainant's Union Grievance filed September 26, 2011. Respondent unavailable for arbitration dates during January and February, 2012. (Ex. C-37, Tr. 729-730)

67. Respondent claimed that Complainant's five-year contract ended in December 2010, despite no language in the contract to justify that end date, and then extended for another year by virtue of another appointment letter. The Arbitrator determined that Complainant was not covered by the CBA however he also ruled that Complainant had an ICA, which was extended five years until 2015. (Ex. C-133, Tr. 24).

68. The last date of Complainant's employment had been set to end on February 23, 2012. However, the Respondent took the position that Acting Dean Bruce Liang extended Complainant's end date to March 31, 2012. Therefore, as of April 1, 2012, Complainant's employment with UCHC ended. (Ex. C-61, R-260, R-400).

69. The final decision of the union grievance arbiter was not issued until May 24, 2012. (R-374).

THE HEALTH CENTER APPEALS COMMITTEE GRIEVANCE (HCAC)

70. On September 30, 2011, the Complainant filed a faculty grievance with the Health Center Appeals Committee against Dr. Lieberman. (Ex. R-68).

71. Complainant's HCAC grievance stated, "This grievance is being brought by me against Jay R. Lieberman, M.D. for a long-standing pattern of inappropriate behavior in violation of multiple sections of the University Of Connecticut Code Of Conduct." Complainant identified the following Code of Conduct violations: Honesty, Integrity, Respect, Professionalism, Conduct of Faculty, Administrators and Staff, Civility, and Harassment. Allegations included "A pattern of incivility, vindictiveness, attempted intimidation, disrespectfulness, and harassment has been directed against me by Dr. Jay R. Lieberman for some time and has adversely affected patient care, medical student and orthopedic resident education. It has most recently culminated in a termination letter directed against me signed solely by Dr. Lieberman for which no written reason for dismissal was given." (Ex C-32a, R-68).

72. Lieberman was found to have been a disruptive physician by Health Center administrators and to have violated the Code of Conduct by the HCAC in a past grievance filed prior to Complainant's grievance. (Exs. C-36, C-114).

73. The HCAC grievance process is a University faculty academic grievance procedure in which faculty members can bring complaints to the Health Center Appeals Committee regarding promotion and tenure and other faculty-related disputes. The Appeals Committee is composed of peer faculty members from UCHC who conduct fact-finding, deliberate, and issue a report. The report is sent to the Vice president of Health Affairs. (Ex. R-68, C-258, C-262).

74. Dr. Mary Casey Jacob (Jacob) the then-Senior Associate Dean for Faculty Affairs was appointed as the liaison for Complainant's HCAC grievance. As the HCAC Liaison, Dr. Jacob facilitated the HCAC deliberations, coordinated the transmission of documents,

communicated with the grievant and other related parties, and arranged for legal advice for the HCAC, as needed. Persons with conflicts of interest were directed to recuse themselves. (Id).

75. As part of the HCAC investigation, the HCAC reviewed submitted written material and interviewed twelve people: Aronow, Lieberman, five supporters of Aronow, and five supporters of Lieberman. (Exs. C-253, R-121, Tr. 8-11).

76. Jacob was incredulous about the volume of material she received from the Complainant and was annoyed by Complainant's method of gathering evidence to support his grievance. (Tr. 2003-2004).

77. Lieberman sought out advice from Jacob as to how he should respond to the HCAC grievance against him. Jacob advised that he not submit the same amount as Complainant did, as it was irritating people. (R-121, Tr. 1840-43, 2125).

78. Jacobs was not encouraging to people who wanted to testify on Complainant's behalf and against Lieberman. When witness asked if their testimony would be confidential, Jacobs expressly informed them that anything they said could be produced by a Freedom of Information Act request. (FOI). (Ex. C-42. Tr. 2123).

79. Jacob did not forward several letters in support of the Complainant to the HCAC committee until Complainant pointed out they were missing, including a final statement by the Complainant. (Ex C-255, Tr. 435-436).

80. Jacob told Nichols that Complainant's March 25, 2012 response to Lieberman's March 23, 2012 submission should not be considered, or forwarded, to the other members of the HCAC because it would be appropriate to give Lieberman the last word. (Ex. R-83).

81. Grievance Bylaws and Rules require the liaison to recues him/ herself in the case of a conflict. (Ex. C-258).

82. Lieberman, Horbatuck, and Jacobs felt Complainant's HCAC grievance was tied to his unsuccessful contract renewal process. Lieberman and others were upset that Complainant was trying to vigorously support his grievance. (See 1802-1804, 5512).

83. Lieberman also had a disruptive physician Complainant filed against him and Lieberman and was counseled. He was also warned that if that type of behavior occurred again he would be disciplined further. (Ex. C-36)

84. Jacob made negative statements to the decision makers regarding the Complainant throughout the grievance process. This included Austin, who functioned as the final decision maker in the HCAC grievance. (Ex. C-115, Ex. C-116, Tr. 1809-1811).

85. There is no provision in the Grievance Bylaws or Rules allowing an extension past thirty days for the response to the HCAC report. However, Austin was given the option of extending the deadline. (Ex. C-119).

86. Austin consulted with Lieberman's attorney to confirm that they consented to the extension, but no one contacted or asked Complainant as to his position on the extension. (Exs. C-125, C-376; Tr. 1816-1818, 339-440).

87. Nissen, the current Liaison for HCAC testified that she would have allowed an extension for the Executive Vice President for Academic Affairs (EVP) response but only after consultation with both the grievant and the object of the grievance. (Tr. 3522, 3588, 3610).

VIOLATION OF UNIVERSITY POLICIES

88. The HCAC found that Lieberman was reported as direct, aggressive and occasionally verbally abusive to operating and department staff; interfered with the residency program; and did not comply with certain regulations, and polices with respect to the process of ensuring unbiased anonymous evaluation of the Orthopedics residency program. Lieberman failed to

meet the basic tenants of the code of conduct, and acted in a bullying manner to residents and staff, therefore violated the code of conduct (Ex. C-114)

89. The Grievance Rules provides that it is the responsibility of the Liaison (Jacobs) is to give to the appellant/grievant and the person(s) named in the grievance/appeal copies of the recommendations of the hearing body (HCAC) and the decision of the VP or Provost or President. (Ex. C-258).

90. On April 20, 2012, Jacob emailed the Complainant informing him, "The HCAC provide[d] its report to me. I provided it to Austin today. You will receive a copy of the report with Dr. Austin's recommendation when he provides it to me. I am hopeful that will occur next week." (Ex. C-121).

91. Complainant was never given the HCAC's findings. On April 29, 2012, it was decided that. Complainant would not be getting a copy of the report, which recommended a ruling that Lieberman broke the Code of Conduct. Jacob wrote in an email "would this be the time to tell him he [Complainant] is not getting the report." No one in this time period informed Complainant that he would not be getting a copy of the HCAC report or of Austin's response. (Ex. C-368, Tr. 3015-17).

92. On May 1, 2012, Dr. Torti (Torti) replaced Liang as Dean of the UConn School of Medicine and Dr. Philip Austin ("Austin") as Executive Vice President for Academic Affairs. Ex. (C-119).

93. The Grievance Bylaws state in relevant part that, "Within thirty days of receipt of the Hearing Committee's report, the .... Executive Vice President for Academic Affairs (EVP) shall inform the Hearing Committee in writing, of his or her response to its recommendations, with copies to the grievant; the person(s) against whom the grievance is lodged, and the HCAC." (Ex. C-262).

94. On April 26, Jacob wrote an email regarding the delegation of making the decision from Torti to Austin. (Ex. R-71).

95. The Grievance Bylaws do not allow for the HCAC report to be disclosed to the grievant or the object of the grievance until after the EVP renders a decision thereon and the Bylaws require the Liaison to transmit the report, not the EVP. However, Austin sent Lieberman a copy of the HCAC report prior to his decision and bypassed the Liaison in the transmission process. (Ex. C-125, C-262).

96. On May 9, 2017, Austin wrote to Lieberman and stated the following: Enclosed please find the report of the Health Center's Appeals Committee....I would like to invite you to meet with me to afford you an opportunity to respond to the report. In addition, please feel free to submit a written response to the report before we meet. Further, you are welcome to bring to the meeting a representative of your choosing. Please confirm that you have no objection to extending the time for decision in this matter for an additional thirty '30' days until June 30, 2012. (Ex. C-125)

97. On May 20, 2012, Austin met with Respondent's counsel, Lieberman and Lieberman's attorney Jeffery Mirman (Mirman) in Austin's office. (Ex. C-131, Tr. 1096-97, 1103, 3176).

98. Lieberman submitted an extensive position statement prior to the meeting with Austin. (Exs. C-128, C-129, C-130).

99. At the May 20, 2012, meeting, Lieberman and Mirman were permitted to discuss the grievance, the process and the remedies they sought by way of the Austin. (Ex. C-129, C-130, Tr. 1104-1109, 3168-3171).

100. After this meeting, Austin interviewed witnesses most of whom were favorable to Lieberman. (Ex. C-131).

101. Austin requested a 30-day extension to reply to the findings and consulted Lieberman. Lieberman had no objection; however, the Complainant was never contacted. (Ex. C-136)

102. The Grievance Rules expressly permit the grievant and the object of the grievance to request an additional extension of thirty days to appeal the EVP's decision, no extension provision is provided for with respect to the thirty-day deadline for release of the EVP's decision letter and the HCAC's findings and recommendations. (Ex. C-258).

103. In addition to meeting with Lieberman, Austin met with the Health Center Appeals Committee, Ann Horbatuck, Dr. Kikki Nissen, Dr. Frank Nichols, Dr. Robert Arciero, Dr. Augustus Mazzocca, Dr. Craig Rodner, and Ms. Virginia Cooper. (Ex. C-143, 3143-45, Tr. 3169, 3179-99, 3283-3285; 3292-3294).

104. Austin's unauthorized investigation was one-sided. Dr. Austin met with Lieberman but refused to meet with complaint. Austin was influenced by two other physicians close to Lieberman to discredit the findings of the HCAC. (C-144, C-376; Tr. 3143-45; 3153; 3177-79; 3256; 3307-08; 3331-33).

105. The Grievance Bylaws and Rules do not permit the Executive Vice President for Academic Affairs (or his or her delegate) to perform an additional investigation. The EVP's role is limited to reviewing the HCAC report and the information that the HCAC used to complete it, and then responding to the HCAC's recommendations. In contrast, the Grievance Bylaws and Rules authorize investigations by the HCAC only. (Exs. C-258, C-262).

106. On April 29, 2012, Respondent had already decided that Complainant would not be getting a copy of the report; Jacob sent an email asking "would this be the time to tell him he is not getting the report?" No one in this time period informed Complainant that he would not be getting a copy of the HCAC report. (Ex. C-368, Tr. 3015)

107. On May 29, 2012, nine days after the Grievance Bylaws thirty-day mandated deadline for release of the HCAC report, and four days after the arbitration decision, Jacob notified Complainant that since he was no longer an employee of UCHC, he no longer had standing as a grievant. Therefore, he was no longer entitled to a copy of the HCAC decision. (Ex. C-136).

108. Respondent, testified at some point in May 2012, Lieberman, through his counsel, had raised the applicability of General Statute §10a-154a, which exempted teacher reviews from being produced pursuant to an FOI request, however no documentary evidence was submitted. (Tr. 1083, 1086-1087, 1173-1174).

109. The Respondent was inconsistent as to why the HCAC findings were being withheld from the Complainant. In the beginning he was told it was not entitled to the report because he lost his rights as grievant, and then later he was told it was because Lieberman asserted that the report was exempted from disclosure under the FOI provisions of the General Statute §10-154a. (See Ex. C-127, C-136, Tr. 1086-1088).

110. The Union President, Mayer, expressed his concerns regarding withholding of the information from Complainant in a September 4, 2012, letter to Dean Torti: "The failure to follow established procedures, especially in the context of the contested nonrenewal of Aronow's appointment, raises legitimate concerns that UCHC Administration has retaliated against Aronow for pursuing his HCAC grievance... Furthermore, the decision by UCHC Administration to withhold its decision has significant implications for Aronow's future employment. He will always be held accountable for the nonrenewal of his appointment at UCHC, yet he will not be able to provide any evidence to show the circumstances under which he left the institution. "

Complainant filed a Freedom of Information ("FOI") request for the two documents on August 23, 2012. (Ex. C-159).

111. On November 8, 2012, the Chair of the HCAC, Frank Nichols, and another HCAC member, John Carson, brought their concerns to the Oversight Committee of the Health Center regarding the Respondent's administration's decision to conceal the HCAC report from Complainant against precedent and the Grievance Bylaws and Rules. Members of the Oversight Committee, after reviewing cases from other Universities, were concerned that the General Statute §10-154a was being interpreted too broadly and that the statute did not prevent the report from being released. They expressed the opinion that to conceal the HCAC decision from Complainant by withholding this, he would not be able to effectively exercise his right to appeal, which would render the grievance procedure nonexistent. (Ex. C-78).

112. On August 14, 2012, Dr. Austin issued his final decision rejecting the HCAC's recommendation, stating that he could not "conclude that Dr. Lieberman violated the University Code of Conduct. As with many department heads, Dr. Lieberman is charged with balancing strongly competing interests and personalities, which may result in some, people being offended thereby. I also understand that Dr. Lieberman might have handled some situations over the years in a more collegial and patient manner. That does not, however, translate into a violation of the Code of Conduct." (R-67).

113. More than four months later, on January 11, 2013, Austin sent Complainant a letter, not copying the Oversight Committee or the HCAC member, which had two sentences, as follows: "I have recently been advised that you were not informed of my decision last summer to deny your Health Center grievance. If that is the case, this is to notify you that your grievance was denied." (Ex. C-202).

FREEDOM OF INFORMATION REQUEST

114. The Hearing Officer at the FOI hearing, after conducting an in-camera inspection of the HCAC report and Austin's response, concluded that the reports were not part of a "performance evaluation" as claimed by Respondent and were subject to disclosure. (Ex. C-276).

115. The Complainant had to negotiate an exit agreement without the benefit of knowing the outcome of his grievance or seeing the HCAC findings.

116. Pursuant to this tribunal's ruling of January 7, 2015, on one of several Complainant's Motions to Compel The Respondent was order to produce the findings of the HCAC pursuant to, General Statute §4-61dd, General Statute § 4-177c and General Statute § 1-213(2)(b). The Respondent Produced the document for an in camera inspection on or about February 7, 2015 and was admitted into evidence under a protective order.

COMPLAINANT'S SEPARATION FROM UCHC

117. Respondent delayed the union arbitration date until mid-March 2012. The Respondent could not do any of the available arbitration dates during January and February 2012. (Tr. 398, 728, 5769-70).

118. The UCHC-AAUP grievance was scheduled for arbitration on March 14 and 15, 2012 and the Arbitrator's decision was expected at least 30-60 days later or in around mid-May. (Tr. 398-401).

119. On February 22, 2012, Complainant sent a letter to Liang, the acting Dean of the UConn School of Medicine, and copied two members of the Board of Directors, its Chair Sanford Cloud, Jr. ("Cloud") and the University President Susan Herbst, requesting that the termination date be extended until the Arbitrator rendered a decision. (Ex. C-80, Tr. 403).

120. Complainant explained that his abrupt removal would significantly and adversely affect hundreds of patients, resident education, academic work, and the net revenue of UCHC. (Ex. C-80, Tr.403, 405-407).

121. Mayer also strongly suggested that Respondent let the Complainant remain until the arbitration decision. (Exs. C-53, C-106, C-108).

122. It was established practice at UCHC to toll the notification period and maintain the status quo for faculty until the parties resolved a grievance or contract dispute. (Tr. 473, 774, 2271).

123. Respondent chose not to toll Complainant's separation in accordance with its customary practice due to its alleged unavailability to participate in Arbitration earlier. (Ex. C-37, C-109 Tr. 729-733).

124. Liang testified that he made the decision not to further extend and that the reason was because of the disruption Complainant's HCAC grievance caused to the orthopedic department. However, no other faculty member supported this position. (See Ex. R-47, Tr. 4387-4388, 4543-4544, 4647-4648, 5179-5180).

125. Horbatuck asked Complainant to advise her by January 4, 2012 where he was going so that she can "state it in the letter" to patients. Complainant responded, "Unless Drs. Liang, Austin and Lieberman know with certainty how the arbitrator is going to rule on the UCHC-AAUP Grievance, then you don't know whether my last day is March 31, 2012; June 30, 2013; or sometime in between." (Exs. R-46, R-47).

126. Prior to the arbitrator's decision, on February 29, 2012, a letter signed by Lieberman was sent to Complainant's patients reporting that Complainant would be leaving the orthopedic department without any further information. (Ex. C-64).

127. Horbatuck created a script for staff that they were required to follow. The script prevented staff from giving any information regarding Complaint's departure. Patients had no information about whether Complainant would be available to continue their care after March 31, 2012. The script was to be followed without deviation. (Ex. C-65, Tr. 3814-3820; 851-856).

128. Complainant's employment with UCHC ended on March 31, 2012, both his Union Grievance and his HCAC grievance continued. (Ex. R-374; R-382).

129. During the arbitration proceeding on March 14 and 15, 2012, Jacob, Lieberman, Horbatuck and other colleagues of the Complainant sat at the Health Center table at the arbitration. Jacob's presence belied her role as a neutral faculty liaison. (Tr. 434).

130. Jacob wrote in an email that, "Once Mike is no longer an employee; he has no legal right to have an office, have access to our computer systems or patient information, or be on the property for any reason unless he is a patient." (Ex. C-359).

131. IT security head, Thomas Murphy, proposed options for an auto response to emails sent the Complainant's that would provide a forwarding address. Respondent refused to allow for forwarding info. (Ex. C-364).

132. Horbatuck did not present any options for dealing with Complainant's email. (Ex. C-80, Tr. 406-408).

133. Any emails sent to Complainant after March 31, 2012 were never delivered to him. They would not be sent to him even if he were reinstated. (Ex. C-105).

134. Complainant's insurance was canceled and it would take months for insurance clearance /Medicare reactivation to occur. (Tr. 1594-1595).

135. Mayer expressed his concerns that these actions were punitive in nature. (Exs. C-106, C-107).

136. The Respondent was intent on separating Complainant regardless of the Arbitration outcome. (See Tr. 3100, 3101).

ARBITRATION DECISION

137. On May 24, 2012, Arbitrator Joseph Celantano issued his arbitration decision and award on Complainant's Union Grievance. (R-374, Tr. 24-25).

138. The Arbitrator ruled that Complaint had an ICA with UCHC and was not covered by the CBA. However because his five-year ICA contract had automatically renewed due to the lack of any termination notice his current contract was good until June of 2015. (Ex. C-133).

139. The Health Center refused to reinstate Complainant. (Ex. C-138).

140. On June 5, 2012, Mayer sent a letter to Wallace requesting that, in accordance with the Arbitrator's decision, Complaint should be reinstated to his position. UCHC administration still refused to follow the decision of the Arbitrator. (Ex C-139, R-248).

141. On June 11, 2012 UCHC-AAUP notified Wallace of its decision to grieve UCHC's decision not to follow the Arbitrator's decision. (Ex. C-142, R-253; Tr. 741-744, 3032).

142. Respondent's reasoning for not reinstating Complainant, pursuant to the Arbitrator's decision was that the Arbitrator was not empowered to reach a determination on whether Complainant's June 2005 employment contract had been breached. (Id).

143. Jacob thought that Complainant should be reinstated pursuant to the Arbiter's decision. (Tr. 2381-2382).

144. On June 5, 2012, Dr. Frank Torti ("Torti"), who had then replaced Liang as Dean, announced that Lieberman was taking a position with University of Southern California. (Ex C-140).

145. On July 11, 2012, Dr. Torti issued a formal announcement that Dr. Mazzocca would be the Interim Director of the New England Musculoskeletal Institute and Interim Chair of the Department of Orthopedic Surgery. (R-143).

146. On August 5, 2013, Torti announced that Mazzocca had been named the new permanent Chair of the Department of Orthopedic Surgery. (Tr. 5037).

147. Mazzocca was Lieberman's mentee and had been one of Lieberman's witnesses in the HCAC grievance proceedings. (See Exs. C-253, R-121, Tr. 8-11).

148. On the afternoon of August 13, 2012, Jacob revealed to Complainant that she felt that the HCAC report and Austin's written response thereto were a "performance evaluation" of Lieberman and that she could not release a copy of them to Complainant. Performance evaluations of teachers are generally exempt from disclosure unless the person gives permission in writing under the Freedom of Information general Statutes (FOI) §10a-154a. (Ex. C-152).

149. On August 14, 2012, one day after the revocation period of the Release expired; Austin signed a letter clarifying his decision to exonerate Lieberman, despite the HCAC report and recommendations to the contrary. Austin did not give decision to the Complainant. (Exs. C-144 C-158).

150. The Complainant believed that after he signed the Agreement the Respondent would act in good faith and give him an appointment as was customary.

SETTLEMENT AGREEMENT

151. Complainant reached a settlement agreement and executed a final written "Agreement of Compromise and Release (Release). (Ex. R-138).

152. On August 6, 2012, without benefit of knowing the contents of the HCAC report, or Austin's decision, UCHC and Complainant reached a settlement agreement[4] and executed a "Agreement of Compromise and Release" that resolved the outstanding issues with Complainant including, Complainant's Union Grievance and his separation from full-time employment with UCHC. The agreement did not include the HCAC grievance. (Ex. R-138).

153. The Release has a clause that allowed revocation by Complainant up to August 13, 2012. (Ex. R-138).

154. The Release did not preclude Complainant's ability to obtain a future CFA or patient care privileges at UCHC, or terminate the HCAC grievance he had filed against Lieberman. (Id).

155. As of August 6, Complainant was led to believe that Austin was still working on his response to the HCAC report; he was unaware that Austin completed the report in June 2011. (Ex. C-143, See Ex. C-143, C-144, C-262).

156. Complainant was paid $283,000, and agreed that in addition to executing the general release, that he would withdraw, with prejudice, both his Superior Court case concerning the arbitration decision, and his second Union grievance seeking reinstatement. (Ex. R-138).

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[4] The release provide that Complainant, "fully releases and forever discharges the State of Connecticut, the University of Connecticut, the University of Connecticut Health Center, the University of Connecticut School of Medicine, all agencies of the State of Connecticut and all related entities, and their predecessors, successors, assigns, heirs, officers, directors, trustees, agents and employees, in both their official and individual capacities, from and on account of any and all claims, demands, causes of action or charges of whatsoever nature, known or unknown, suspected or unsuspected including those for attorneys fees, which may have arisen prior to the date hereof or with respect to and/or arising from his employment at the University of Connecticut School of Medicine including but not limited to any claim based upon any violation of. any provision of the United States or Connecticut Constitutions, any federal, state or local law, civil rights law or other employee relations statute, union contract, executive order, law or ordinance, any policies, rules or regulations of the University of Connecticut, the University of Connecticut Health Center, the University of Connecticut School of Medicine or other obligation arising out of contract, tort, public policy, law or equity and specifically those arising from the non-renewal of his employment contract by the University of Connecticut School of Medicine in 2012. Wherever in this instrument any party shall be designated or referred to by name or general reference, such designation is intended to and shall have the same effect as if the words "heirs, executors, administrators, personal or legal representatives, successors, and assigns" had been inserted after each and every such designation and all the terms, covenants and conditions herein contained shall be for and shall inure to the benefit of any such party and shall bind the respective parties hereto, and their heirs, executors, administrators, personal or legal representatives, successors, and assigns, respectively."

157. There were two versions of Austin's final decision, unsigned and dated June 21, 2011, and an identical version, dated August 14, 2012, without a signature. Complainant did not know that Austin had denied his Faculty grievance. Additionally, Complainant did not know that Respondent concealed the HCAC report and Austin's response at the time of signing. (Exs. C-144, C-153, Tr. 2778).

158. Complainant did not have a way to inform his patients of his new practice. Respondent had the patients' contact information. A condition of the agreement was that Respondent was supposed to notify the Complainant's patients for the past five years where he was going. Not all of his patients received the notice. (Tr.1640. 3013-3036).

APPEAL OF AUSTIN'S DECISION

159. Jacob also gave Austin's response to Lieberman, along with the HCAC report. In the transmittal email, Jacob informed Lieberman of his right to appeal and the thirty-day deadline to appeal. Jacob did not send Complainant a copy of the documents or remind Complainant of his appeal rights, as she did with Lieberman. (Exs. C-156, C-157).

160. Jacob testified, "I was not allowed to release the results to him, so he wouldn't even know what he wanted to appeal or not." (Tr. 1827).

161. On August 26, 2012 Complainant filed an appeal to the Board of Trustees of UCHC. In the appeal, Complainant requested that, UCHC should release the HCAC report and Dr. Austin's final decision because it is not protected by Conn. Gen. Stat. §10a-154a and that Dr. Jacob should have recused herself from the liaison role in connection with Complainant's personal faculty HCAC grievance because she had a conflict of interest and/or erred in performing the role of liaison. (Ex. C-160, C-162, C-163).

162. September 4, 2012, Mayer sent a letter to Torti taking the position that CBA was violated due to the Health Center's refusal to follow its Grievance Rules and Bylaws with

respect to the Faculty grievance. The letter stated that, "The failure to follow established procedures, especially in the context of the contested nonrenewal of Complainant's appointment, raises legitimate concerns that UCHC Administration has retaliated against Compliant for pursuing his HCAC grievance... Furthermore, the decision by UCHC Administration to withhold its decision has significant implications for Complainant future employment. He will always be held accountable for the nonrenewal of his appointment at UCHC, yet he will not be able to provide any evidence to show the circumstances under which he left the institution." (Exs. C-170, C-171, Tr. 794-754).

163. The CBA mandated that the Respondent follow its procedures and policies, including the Grievance Bylaws and Rules. (Ex. R-392a).

164. On September 28, 2012 Scott Wetstone (Wetstone), who also served as the UCHC FOI Officer, wrote to Complaint that as liaison to the Board of Trustees for the purposes of the appeal, he would begin reviewing the appeal documents. (Ex. C-185).

165. Sanford Cloud (Cloud) was the Chairperson of the Board of directors at the time of the appeal. (Ex. C-80).

166. On October 2, 2012, Wetstone responded to Mayer's September 4, 2012 letter to Torti with respect to Bylaws deviations in the HCAC grievance process, but did not specifically address Mayer's concerns. (Exs. C-170, C-17, C-187).

167. On November 8, 2014, the Complainant submitted an Amended Appeal. Complainant also amended the remedies that he was seeking through the HCAC process. Specifically, in his Board of Director's Appeal, Complainant sought one remedy, "That there be no subsequent retaliation by Dr. Lieberman's successor, Dr. Augustus Mazzocca, nor other Health Center administrators with respect to potential operating room time, medical

student education, and resident coverage now that Dr. Aronow has become employed elsewhere in the Hartford area." (Ex. C-299).

168. On December 24, 2014, Wetstone conveyed a mediation offer that required Complainant to forego his appeal rights under the Grievance Bylaws. In return, a mediator would attempt to ensure that Complainant would be treated fairly and in a manner compliant with all UConn Health policies. (Ex. C-301).

169. Complainant rejected the offer feeling that the UCHC policies should be followed as a normal course of action, without having to forego his appeal rights. (Ex. C-302).

170. On February 25, 2015 Cloud rendered the decision on Complainant's appeal stating that, "In reviewing Dr. Aronow's appeal packet, I take note of his requested remedy: That there be no subsequent retaliation by Dr. Lieberman's successor, Dr. Augustus Mazzocca, nor other Health Center administrators with respect to potential operating room time, medical student education, and resident coverage now that Dr. Aronow has become employed elsewhere in the Hartford area. It is the policy of the University of Connecticut, including UConn Health, not to engage in or tolerate unlawful retaliation. Inasmuch as Complainant requested remedy is a statement of longstanding institutional policy, I am closing his appeal. Simply, his remedy does not seek or require corrective action, it goes without saying that the Board of Directors does not encourage, approve, or tolerate retaliation." (C-171).

FINANCIAL CONSEQUENCES TO RESPONDENT

171. Complainant was one of the highest performing surgeons at JDH. (See Ex. C-251).

172. Respondent's surgical caseload had declined and its operating rooms were "nowhere near fully booked." (Ex. C-186).

173. During compensation negotiations between the Union and Respondent, in response to Torti's statements regarding UHCH losing money, Mayer stated to Tortit that, "if I hear

administration complain one more time about how much money we are losing because of the loss of two orthopedic surgeons, my head will explode. You know that Mike Aronow would still be doing the majority of his surgeries here at UCHC if he were only granted clinical privileges. That is money you could save today with the stroke of a pen. And going back further, if (before your watch) administration didn't persist in the ridiculous argument that Mike's salary was so high that he was losing money for the health center, it is likely that both Mike [complainant] and Jay [Lieberman] would still be here. (Ex. C-198, Tr. 754-5).

174. Torti responded with the mea culpa, "It is the mark of true intelligence, to learn from past experiences. I hope we can all move forward but learn as well." (Ex. C-198).

175. In 2012 and 2013, Respondent was actively attempting to recruit orthopedic and other surgeons in the Hartford area to operate at UCHC rather than other medical facilities in the area. (Ex. C-210).

176. Operating rooms and hospital beds that the Complainant previously used often went unfilled, generating significant fixed financial costs to the Respondent without the associated revenue that Complaint's patients would bring in excess of the variable financial costs added. (Ex. C-186, Tr. 1574-1576).

177. The orthopedic department went from a fiscal year deficit of under $210,000 in 2010 to a fiscal year deficit of over $3.888 million in 2014. (Ex. C-412).

DENIAL COMMUNITY FACULTY APPOINTMENT AND PRIVILEGES

178. A physician may not admit or provide medical or health-related services to patients at UCHC unless privileges have been granted in accordance with the medical staff bylaws, and privileges may not be granted unless the physician has a community faculty appointment (CFA). (Exs. C-169, C-263, Tr.352-54).

179. The Dean of the School of Medicine or his or her delegate approves faculty appointments at the UConn School of Medicine. (Ex. C-252).

180. On June 5, 2012, Torti, as the new dean, announced Lieberman was taking a position with University of Southern California. (Ex. C-140).

181. Before Lieberman's departure, he was given time to obtain another position and allowed him to continue with his faculty appointment. After Lieberman began his new job in California in September 2012, he continued to maintain a research lab in Respondent's facilities until spring, 2013 and his had a CFA until December 2013. Complainant's research was disrupted and his request for a CFA with privileges was denied. (Exs. C-19, pp. 12-13. C-155).

182. A clinician who is not employed by UCHC, the University, or any affiliated institution, may obtain a CFA if he or she contributes to the academic mission of the School of Medicine. (Ex. C252).

183. Before the revocation period of the release, on August 8, 2012, Complainant wrote to Torti regarding his desire for privileges and the reasons for his request but did not receive a written response. (Exs. C1-49, C-149, Tr. 482-483).

184. On August 10, 2012, Complainant sent an email to the Chief of the Medical Staff at UCHC, Dr. Richard Simon (Simon), advising him that he was joining Orthopedic Associates of Hartford, that he was converting his courtesy privileges at Hartford Hospital to active, and that he sought to convert the UCHC Active Staff privileges to Affiliated Staff and follow through with his already submitted reappointment application for continued privileges after August 31, 2012, but as Affiliated Staff." Simon responded that since Complainant did not have a faculty appointment, he could not be awarded the privileges, but to keep him updated should that change. (Exs. C-150, Ex. C-151).

185. On August 23, 2012, after the revocation period expired, Complainant met in person with Torti to discuss his desire for a CFA with privileges. Torti advised Complainant that he would not consider granting him an appointment and privileges until a permanent Department Chair was named to replace Lieberman and the reason was that "people were upset. " (Ex. C-271; Tr. 482, 483, 4707-08, 4742-4, 482, 483).

186. Dr. Torti testified that he had been the final decision-maker on the issue of whether to grant Complainant an immediate faculty appointment. Dr. Torti explained that the enormous amount of bitterness, anxiousness, bad feelings, and staff taking sides in the Department of Orthopedic Surgery poisoned the entire Department and adversely affected patient care. Dr. Torti stated that he believed that there needed to be a "cooling off" period before Complainant came back to UCHC in any capacity, and "more importantly, it wasn't fair to a new chair" to make such an appointment before the new Chair started given the circumstances. Dr. Torti stated that his intention was to ensure that there was an opportunity for healing and a fresh start for the Complainant. (Tr. 4707-08, 4742-43, 4859-62).

187. On August 23, 2012, Complainant sent an email to outgoing Chair Lieberman and interim Chair August Mazzocca formally requesting that

Dr. Lieberman or Dr. Mazzocca recommend his appointment as a community faculty member. (Ex C-271).

188. Complainant was highly regarded by many staff members and peers. In 2003, he received the Harry R. Gossling, M.D. Orthopedic Residency Educator of the Year Award and in 2012 received the Richard A. Garibaldi, M.D. Doctors' Day Award chosen by staff and peers. The award was "based on [recipients] dedication to excellence in all facets of clinical care and their commitment to collaboration across disciplines. (Exs. C-94, C96, C-146).

189. Prior to his filing of the HCAC grievance. Horbatuck and Lieberman referred to Complainant as a "good citizen." (Tr. 3714, 3743, 4228).

190. The new interim chair, Mazzocca was still "uncomfortable" approving Complainant's request. Mazzocca was Lieberman's mentee. (Tr. 560-562).

191. Horbatuck was normally not involved in assigning hospital privileges or faculty appointments; nonetheless, she made exceptions with respect to denying Complainant's request. (Tr. 3896, 4302-4304).

192. Horbatuck contacted Lieberman and Mazzocca regarding Complainant's request for a CFA. She confirmed that Complainant did not have a CFA and would not be given one until a permanent chair considered the request. (Ex. C-390).

193. All four of Complainant's current partners at Orthopedic Associates of Hartford that were former full-time faculty of Respondent, have current CFAs. (Ex. C-403, Tr. 1603, 1604).

194. As of September 4, 2012, there were 149 individuals with CFAs that were appointed by an interim chair subsequent to August 12, 2005. (Ex. C-173a, Tr. 494, 1600-1601).

195. The Respondent's FOIA Officer Wetstone stated that he was not aware of any instance whereby UCHC had denied a request for Privileges with the exception of one situation where the physician had committed a felony. (Exs. C-217, C-218, See also Ex C-228, Tr. 3636-3637, 3658).

196. It was routine for Interim Chairs to hire surgeons and grant requests for CFAs. (Ex C-206, Tr. 2299, 5173-5174).

197. Mazocca also hired fulltime faculty members of the orthopedic department, with Torti's approval, as an interim Chair. (Exs. R-147, C-206, Tr. 4801, 4802).

198. Jambor had been teaching and working with orthopedic residents at St. Francis for seven years without a CFA. (Ex. C-206).

199. Mazzocca and Torti argued that Jambor needed a CFA in order to teach residents at St. Francis. (Ex. C-219, Tr. 1607, 6168-6171).

200. Complainant was also working with and teaching residents on trauma cases at Hartford Hospital but was denied privileges (Ex. C-219, Tr. 1607, 6168-6171).

201. Mazzocca was named permanent Chair around August 10, 2013, almost eleven months after Complainant began his new practice. (Ex. C-245, 5012-5013).

202. It was three months later when Complainant was given a CFA on November 14, 2013. (Ex. C-288).

203. Complainant learned of his appointment for the first time when Respondent filed a memorandum supporting Respondent's Motion to Dismiss and stating therein that a CFA had been given to Complainant. (Exs. R-379, R-401, C-147, Tr.1357; See OPH File, Respondent's November 26, 2013 Reply to Complainant's Opposition to Motion to Dismiss, Exhibit H).

204. Complainant was without a Faculty Appointment of any kind with the University of Connecticut Medical School from April 1, 2012 until November 14, 2013 (Ex. C-61; R-387).

205. During the time period between April 1, 2012 and September 9, 2012, Complainant was not seeing patients. (Tr. 1/19/16, pp. 464-465, 473).

206. Respondent delayed granting privileges to Complainant after he received the CFA in November. (Ex. C-287)

207. Complainant received privileges in February 2014, almost two months after he received the CFA. (Ex. C-289).

208. Complainant received electronic access to patient records on February 27, 2014. (Ex. C-241).

209. Complainant was not able to operate at JDH until April 2014. (Tr. 1623).

DISRUPTION TO PATIENT CARE

210. February 29, 2012, the Respondent sent a letter to the Complainant's patients that advised them that the Complainant was simply "leaving" at the end of March. (Ex. C-64).

211. The Complainant asked that the patient letter tell "the truth", i.e., that his job status was uncertain and that he could be working for the Respondent after March 31. That request was "rejected." (Ex. C-64, Tr. 400)

212. Patients were left in the dark as to what happened to Complainant after they were notified that Complainant was gone. They were given contradicting explanations as to his whereabouts, including that he went on Sabbatical, or he was teaching at a southern hospital. (Exs. C-111, C-113, Tr. 605-607, 613 614).

213. When the patient inquired further and asked how far "south," the physician at HCAC who replied to patient stated that he did not know the details. (Tr. 605-607, 613-614).

214. The patient, who was told the Complainant moved south, later learned he was still practicing in Hartford and was shocked by the information. (Tr. 608-610).

ACCESS TO PATIENT RECORDS

215. When Complainant did not have a CFA, he did not have electronic access to patient records, which was disruptive to his patient's care. (C-181, C-256, C-273, C-274).

216. Due to the difficulty, some patients had in obtaining their records. Complainant was forced to delay procedures and that those patients cancelled appointments. (Exs. C-273, C-274).

217. Patient's inability to get their records and not knowing where the Complainant was practicing caused Complainant to see few patients. (Tr. 1685-1687).

218. Complainant contacted Torti regarding his difficulty obtaining patient records and Torit replied he had contacted the records department about the problem. (Exs. C-184, C196).

219. Respondent went beyond the thirty-day statutory deadline for production of medical records from a health institution. (Ex. C-11, C-184, C-196, C-425, Tr. 505-511, 1339-1334, 5688, 5690-5698).

220. A CFA would have permitted Complainant electronic access to his patient's records, without the need for patients to go to UCHC, fill out forms, and wait for UCHC to copy them. (Tr. 1622).

221. Patient records that were eventually disclosed were often incomplete and did not contain radiographic records. (Tr. 5674-5675, 1622).

222. Patient records and radiographic studies are stored in different departments and the records department does not consult with those departments in compiling a patient's records. Respondent's medical request form does not inform patients that despite having check boxes for multiple types of information including "outpatient clinic notes", "radiology films", and "entire record", that there are medical records in multiple departments and that the form only applies to the records that are in the medical records department. (Exs. R-407, C-195).

223. Patients on chronic pain management for intractable foot and ankle pain had their care abruptly disrupted. These patients were sent back to their primary care physicians. (Exs. C-66, C-111).

224. Patients' surgery schedules were disrupted. (Exs. C-367, C-256).

ACADEMIC CONSEQUENCES

225. Complainant was heavily involved in the teaching mission of the Health Center. (Ex. C-250).

226. Complainant organized the clinician preceptors for the student dissections, taught the first-year medical anatomy of the extremities course, taught students and orthopedic

resident preceptors, and introduced the spine, the foot, and the case conferences into the course curriculum. (Ex. C-3).

227. The instructors continued to use complainant's past contributions to the syllabus to teach the class after the complainant left UCHC. (Ex. C-333).

228. While Complainant worked for Respondent he organized and helped teach the core curriculum for teaching orthopedic residents foot and ankle. (Ex. C-74, Tr. 1251, 1269).

229. Complainant taught orthopedic residents in the operating room and office, and was involved in teaching third- and fourth-year medical students during their orthopedic surgery rotations. (Tr. 323-333).

230. After August, 2012, Respondent's representatives and, in particular, Mazzocca and Horbatuck, acted to limit Complainant's interaction with and teaching of medical students and residents. Complainant participated in the teaching of medical student anatomy in 2011 and 2012, but not 2013 and 2014. (Ex. C-13).

231. In 2013, Dr. Tess Balach (Balach) informed Complainant that Mazzocca and his assistant, Erika Ivanov, were making the preceptor assignments that year. When Complainant contacted Ivanov on October 2, 2013, Ivanov did not respond until twenty days later stating that the sign ups were done differently and were "taken care of." (Ex. C-230).

232. There was an effort to prevent Complainant from contributing to the teaching mission of the school. Ivanov contacted two individuals, whose responsibilities did not include medical student education assignments to be preceptors. Ivanov stated, "My feeling is he will find someone within the school and ask if he can cover a session. They may not be aware of the situation." (Exs. C-226, C-279, C-281, C-405, C-406, Tr. 4411- 4412, 4416-4417, 4425-27).

233. While awaiting Ivanov's response, Complainant obtained the dissection schedule from Steven Potashner, the former section head, and emailed James Watras (Watras), the course section head, with his available dates. Watras responded by sending Complainant the course dissection manual. (Ex. C-231).

234. Watras subsequently emailed several course faculty including John Harrison (Harrison) stating, Complainant was a fantastic preceptor, but I don't think he still has an affiliation with UCHC." Harrison responded that Complainant could not teach because he no longer had a faculty appointment. (Ex. C-282).

235. Watras prepared a draft letter to Complainant stating he could not teach because he did not have a faculty appointment to which Harrison responded on November 3, 2013, "Hold off on contacting Dr. Aronow until we have a chance to discuss. I had called Dr. Mazzocca on Friday and he returned my call this morning. This situation is complicated for a number of reasons beyond the faculty appointment issue." (Ex. C-284).

236. On November 5, 2013, Harrison and Watras modified the draft letter, omitting mentioning the faculty appointment that Mazzocca and Torti denied Complainant. "This year we have had outstanding and complete coverage for all of the HB2 anatomy labs by the orthopedic faculty and residents. As a result, an administrative decision has been made not to utilize preceptors from outside of the university to teach the anatomy of the extremities. We are therefore unable to accept your kind and generous offer to teach in the labs." (Ex. C-286).

237. It was the feeling of many physicians at UCHC that the more faculty members there are the more helpful it is for the students. (Tr. 4373).

238. It had been a common practice in the past for UCHC to use community based faculty to teach. (Ex. 172).

239. When setting up the lecture schedule, Sathe, who took over some of Complainants emailed other non-UCHC orthopedic foot and ankle surgeons in the area such as Christina Kabbash, Raymond Sullivan, and Ross Benthien, to check their availability for teaching, but excluded Complainant, his former senior partner. When Complainant asked why, Sathe responded, "No specific reason. Will ask Gus [Mazzocca] and let you know." (Exs. C-225, C-239).

240. Respondent also prevented Complainant from participating in resident interview process. Throughout his tenure at the Health Center, he was actively involved in every step of the resident selection process including Chairing the selection process from 2001 to 2011. (Ex. C-250, Tr. 332).

241. Historically the Health Center administrators permitted non-full-time faculty to participate in the resident selection process, after August, 2012, Complainants attempts to be involved in the resident selection process was denied. Other non-full-time faculty (i.e. Christina Kabbash, Carl Nissen, Raymond Sullivan) were permitted to continue to interview residents between 2012 and 2014. (Exs. C-220, C-248, C-249, Tr. 2012, 2013, 2014).

IV

LAW AND ANALYSIS

Connecticut General Statutes §4-61dd provides protection to state employees who report "corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency or any quasi-public agency, as defined in section 1-120, or ... violation of state or federal laws or regulations." *General Statute*

§4-61dd(a). Relevant sections of General Statute 4-61dd further provide that:

"(a) Any person having knowledge of any matter involving corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department or agency, any quasi-public agency, as defined in section 1-120, or any Probate Court or any person having knowledge of any matter involving corruption, violation of state or federal laws or regulations, gross waste of funds, abuse of authority or danger to the public safety occurring in any large state contract, may transmit all facts and information in such person's possession concerning such matter to the Auditors of Public Accounts. The Auditors of Public Accounts shall review such matter and report their findings and any recommendations to the Attorney General. Upon receiving such a report, the Attorney General shall make such investigation as the Attorney General deems proper regarding such report and any other information that may be reasonably derived from such report. Prior to conducting an investigation of any information that may be reasonably derived from such report, the Attorney General shall consult with the Auditors of Public Accounts concerning the relationship of such additional information to the report that has been issued pursuant to this subsection. Any such subsequent investigation deemed appropriate by the Attorney General shall only be conducted with the concurrence and assistance of the Auditors of Public Accounts. At the request of the Attorney General or on their own initiative, the auditors shall assist in the investigation.

(e) (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; (iv) an employee of the Probate Court where such employee is employed; or (v) 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."

General Statute § 4-61dd.

Additionally, the Whistleblower statute provides that when the adverse personnel action occurs "not later than two years after the employee first transmits facts and information concerning a matter in accordance with subsection §461dd(a).... there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section. General Statute §461dd(d)(4). General Statute § 4-61dd is a remedial statute and is to be interpreted broadly to

effectuate their purpose". Commissioner of Mental Health and Addiction Services v. Saeedi, 71 A.3d 619, 633, 143 Conn.App. 839, 860 (Conn.App., 2013).

By using such broadly defined words as "abuse" and "mismanagement", the legislature intended to protect employees who disclose a wide array of transgressions under CONN. GEN. STAT. § 4-61dd. Principles of statutory construction support this conclusion, as CONN. GEN. STAT. § 4-61dd is a remedial statute; *Saeedi,* 143 Conn. App. at 851-52; and "a remedial statute...is to be construed liberally in favor of those whom it is intended to protect, namely, victims of prohibited... [retaliation]." *Thames Talent,* 265 Conn. 265 Conn. 127, 137 (2003).

To prevail on his retaliation claim, the Complainant first must prove each of the following three prima facie essential elements: (1) that he is a whistle-blower engaged in protected activity pursuant to Conn. Gen. Stat. §4-61dd, (2) that he was subjected to an adverse personnel action, and (3) that there is a causal connection between the protected whistleblower activity and the adverse personnel action. *Eagen v. Comm'n on Human Rights & Opportunities,* 135 Conn. App. 563, 577 (2012). Once the Complainant has made a prima facie showing of retaliatory adverse personnel action, the Respondent "is obligated to produce evidence that, if taken as true, would permit the conclusion that there was a nonretaliatory reason for the" adverse personnel actions. *Arnone v. Town of Enfield*, 79 Conn. App. 501, 507 (2003). If the Respondent provides a "legitimate and nonretaliatory reason" for the adverse personnel actions, the Complainant "must offer some significantly probative evidence showing that the [Respondent's] proffered reason is pretextual and that a retaliatory intention" was the true cause. *Id.*

A

Effect of Settlement Agreement

The settlement agreement (Agreement) between Complainant and Respondent was signed on August 6, 2012. The Agreement was in settlement of Complainant's Union Grievance and his separation

from full-time employment with UCHC. The agreement did not include the HCAC grievance. The Complainant also signed a general release (release), which provided that he released:

> "any and all claims, demands, causes of action or charges of whatsoever nature, known or unknown, suspected or unsuspected including those for attorneys fees, which may have arisen prior to the date hereof or with respect to and/or arising from his employment at the University of Connecticut School of Medicine including but not limited to any claim based upon any violation of. any provision of the United States or Connecticut Constitutions, any federal, state or local law, civil rights law or other employee relations statute, union contract, executive order, law or ordinance, any policies, rules or regulations of the University of Connecticut, the University of Connecticut Health Center, the University of Connecticut School of Medicine or other obligation arising out of contract, tort, public policy, law or equity and specifically those arising from the non-renewal of his employment contract by the University of Connecticut School of Medicine in 2012."

Analysis of the release in this case is assisted by an understanding of how releases operate in general. "A release is an agreement to give up or discharge a claim ... It terminates litigation or a dispute and [is] meant to be a final expression of settlement ... Accordingly, [r]eleases and settlements ... represent a surrender of a cause of action ..." (Citations omitted; internal quotation marks omitted.) *Viera v. Cohen*, 283 Conn. 412, 427–28, 927 A.2d 843 (2007).

1. Future Claims

"Except in very rare instances, the settlement and release of a claim does not cover claims based on events that have not yet occurred ... [A] dispute that had not emerged, or a question which had not arisen at all, cannot be considered as bound and concluded by the anticipatory words of a general release ... [A] release, no matter how broad its terms, will not be construed to include claims not within the contemplation of the parties ... and, where the language of the release is directed to claims then in existence, it will not be extended to cover claims that may arise in the future." (Citation omitted; internal quotation marks omitted.) *Muldoon v. Homestead Insulation Co.,* supra, 231 Conn. at 481–82. In cases where parties have previously settled litigation and released existing claims, our courts have consistently permitted the bringing of future claims that arise after the execution of the release. *See,*

e.g., id., at 479–83 (claimant who had previously settled and released workers' compensation claims based on exposure to asbestos from 1947 to 1974 was entitled to file a subsequent claim for exposure to asbestos from 1975 to 1984, because it was a new injury and not a recurrence or exacerbation of the old injury); *Sakon v. Manager*, 113 Conn.App. 802, 804–05, 969 A.2d 781 (2009) (although parties had settled a property dispute and signed a release in 1992, it did not prevent the defendant from opposing the plaintiffs' zoning application in 2004 regarding the same property that was the subject of the 1992 release)." *Murphy v. Day Publ'g Co.*, No. CV126013939, 2013 WL 3215172, at 5–6 (Conn. Super. Ct. June 5, 2013).

The Agreement was for settlement of the Union grievances and did not contemplate claims arising from the HCAC grievance. Further, the release was for claims, "which may have arisen prior to the date hereof," (Said date being August 6, 2012.) The release contained the language, "arising out of contract, tort, public policy, law or equity and specifically those arising from the non-renewal of his employment contract by the University Of Connecticut School Of Medicine in 2012." In this case the retaliation was based on the Complainant's filing of the HCAC grievance, which was not part of the Agreement, failing to grant Complainant privileges, withholding a community a faculty appointment, hampering his ability to treat to his patients, harming his reputation and curtailing other academic pursuits are all acts that occurred after the execution of the agreement and release.

2. Fraud

If Complainant's release contemplated future retaliation, arguendo, Complainant also argued that this release was obtained by fraud. For the purposes of determining whether the release prevents any actions against UCHC it is necessary to examine the circumstances surrounding obtaining a settlement agreement and release. "[A] settlement contract or agreement, like any other, may be attacked on the grounds that it was procured by fraud, duress or other lawful means." *First Nat'l Bank v. Pepper*, 454 F.2d 626, 632 (2d Cir.1972). The evidence presented shows that the HCAC grievance

findings and Austin's full decision with respect to the final disposition of the grievance were withheld from the Complainant prior to the agreement. The Respondent did not disclose information, which would have been valuable for the Complainant to have before signing an agreement.

Respondent argues that *Pacelli Bros. Transp. v. Pacelli,* 189 Conn. 401, 411 (1983), holds that where the parties entered into a settlement agreement and the plaintiff later brought suit claiming misrepresentations and fraud in the inducement of the settlement agreement, while simultaneously seeking to retain the benefits obtained through the settlement agreement, the plaintiff was barred from recovery. In Zuiewski v. Vaccaro, No. CV106011684S, 2012 WL 5860476, at 9 (Conn. Super. Ct. Oct. 31, 2012), the court distinguished *Pacelli.* The damages claimed in *Zuiewski* were more tangible and objectively ascertainable than in the cases cited by the defendant. Further, as in *Beverly Hill Concepts, Inc. v. Schatz & Schatz, Ribcoff & Kotkin,* 247 Conn. 48 (1998) the primary problem was that the plaintiffs could not offer a reliable method of proving the amount of damages. Also, there was no evidence given as to what amount the plaintiff in Pacelli case would have accepted. Here there is testimony by the Complainant that he would have never signed agreement if it barred him from having a CFA. In the present case we are not looking at monetary damages for back pay, which the settlement dollars represented. Complainant's damages in this case are related to his future ability to obtain a CFA and the right to protection from retaliation based on his whistleblower actions. The damages in this case accrue from the date of August 12, 2012, which result from not having a CFA. They are distinct and separate from the issue of back pay.

The Respondent claimed that the Freedom of Information Act prevented the release of document, that fact does not aid their defense. The findings were released at least a month prior to any discussions with Lieberman's attorney, whom the respondent admitted was the one who raised the issue that the HCAC findings were non-discoverable under an exception to the FOI statute for faculty

evaluations.[5] The Respondent decided in April the Complainant wasn't going to receive the findings. Respondent can't later bootstrap their argument that it was reasonable to withhold the findings of the HCAC when they determined a month earlier they were already going to withhold them. The documented evidence clearly shows the FOI arguments came later, which provoked concerns from Respondents own oversight committee and the union representative about being retaliatory.

The whole point of developing rules and procedures are to define the party's rights with regard to the process. The process provided that the grievant had a right to obtain a copy of the findings and the result. The first excuse given by the Respondent, that Complainant lost his rights as a grievant because he was no longer an employee, is illogical and would lead to absurd results. It would create a situation when an employee who filed a grievance would never have knowledge of HCAC investigation outcome or determination of the grievance. It could lead to employees being terminated after filing a grievance with no redress, such as an appeal; further it avoids having any accountability under the process. A grievant is a still the party who filed the grievance, even after termination of employment.

This tribunal ordered the production of the HCAC findings on January 7, 2015 granting Complainant's Motions to Compel. The Respondent was ordered to produce the findings of the HCAC pursuant to, General Statute §4-6(dd), General Statute § 4-177c, and General Statute § 1-213(2)(b).[6] The Respondent Produced the document for an in camera inspection on or about February 7, 2015 and was admitted into evidence under a protective order. This tribune order the Respondent to produce the document several times under its clear and undisputed authority and the Respondent continued to drag its heels.

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[5] CITE FOI Statute §1-210???

[6] (b) Nothing in the Freedom of Information Act shall be deemed in any manner to:
(1) Affect the status of judicial records as they existed prior to October 1, 1975, *nor to limit the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state;* (emphasis added)
Conn. Gen. Stat. Ann. § 1-213 (West)

The withholding of information is akin to misrepresentation. "A number of [Complainant's] proffers are more in the nature of failure to disclose or fraudulent concealment rather than affirmative misstatements. In order to sustain a claim for fraudulent concealment against the [Respondent], the [Respondent] must have a duty to speak, i.e., to disclose the material information." See *Brass v. Am. Film Tech., Inc.*, 987 F.2d 142, 152 (2d Cir.1993). "The intentional withholding of information for the purpose of inducing action has been regarded, however, as equivalent to a fraudulent misrepresentation." *Pacelli Bros. Transp. v. Pacelli,* 189 Conn. 401, 407, 456 A.2d 325, 328–29 (1983), citing 1 Restatement (Second), Contracts § 161; *Haddad v. Clark,* 132 Conn. 229, 233, 43 A.2d 221 (1945); see *Duksa v. Middletown,* 173 Conn. 124, 127-28, 376 A.2d 1099 (1977); *Ceferatti v. Boisvert,* 137 Conn. 280, 283, 77 A.2d 82 (1950). "Fraud, indeed, as known to equity jurisprudence, 'properly includes all acts, omissions and concealments, by which an undue and unconscientious advantage is taken of another....' " (citations omitted.) *Pacelli Bros. Transp. v. Pacelli,* 189 Conn. 401, 410, 456 A.2d 325, 330 (1983). The Respondent had a duty to disclose the HCAC report and Austin's findings based on the Respondent's own by-laws and policies. Had the Complainant known the contents of the HCAC findings it is reasonable to conclude that Complainant may have chosen to continue his legal actions, appeal Austin's decision and not sign the Agreement. However, the Respondent knew that Complainant was unemployed, his patients' care was interrupted, and the continued uncertainty would increase the pressure on the Complainant to sign the release.

Considering the above facts, for the purpose of deciding whether the release bars the instant action only, the release is invalid based on the intentional omissions by the Respondent to induce the Complainant to release his rights and actions based on his employment. In addition, as the Complainant's allegations pertain to future claims, not contemplated by the parties. The invalidity of the release is a further reason to dismiss the Respondent's argument that the Agreement precludes the instant action.

E-mail exhibits show a concerted effort to conceal and change the findings of the HCAC grievance, which would have validated Complainant's claims against Lieberman. It is also interesting to note that during this same time Lieberman was also negotiating his exit from UCHC. Lieberman's departure was announced on June 5, 2012, and the final draft of Austin's decision was signed on June 21, 2012.

Respondent argues that acts arising prior to August 8, 2012, were released and are time barred. The focus of the retaliatory behavior has always been on the actions that occurred after August 8, 2012. Nevertheless, the acts prior to Agreement's execution are potent proof that an air of retaliatory animus permeated the Respondent's corridors stemming back to the contract renewal negotiations. It is crucial to understand the prior acts and circumstances surrounding all of the Respondent's post separation decisions and actions to illustrate retaliatory intent.

B

Prima Facie Case

The evidence in this case is well documented and plentiful. Further, there is a presumption of retaliation based on the two year temporal proximity of the whistle blowing to the retaliation pursuant to General Statute §4-61dd. To understand the cumulative effect of the documentary evidence its Nevertheless, it is necessary to put into context by analysis of the facts as applied to the relevant law. Moreover, the credibility of the testimony will illuminate any ambiguous meanings in the documents.

To prevail on his retaliation claim, the Complainant first must prove each of the following three prima facie essential elements: (1) that he is a whistle-blower engaged in protected activity pursuant to Conn. Gen. Stat. §4-61dd, (2) that he was subjected to an adverse personnel action, and (3) that there is a causal connection between the protected whistleblower activity and the adverse personnel action.

Eagen v. Comm'n on Human Rights & Opportunities, 135 Conn. App. 563, 577 (2012).[7] The complainant's "burden of proof at the prima facie stage is de minimis." *LaFond v. General Physics Services Corp., 50 F.3d 165, 173 (2d Cir. 1995).*50 F.3d 173.

1. Qualifying Disclosure

Complainant was an employee of the Respondent, which is a state agency. Complainant filed a grievance against Lieberman, another physician with UCHC, on September 30, 2011 for "a long-standing pattern of inappropriate behavior in violation of multiple sections of the University Of Connecticut Code Of Conduct." Respondent argues that the statute is ambiguous as to what exactly are qualifying disclosures under the statue:

> "The process of statutory interpretation involves the determination of the meaning of the statutory language as applied to the facts of the case, including the question of whether the language does so apply.... In seeking to determine [the] meaning [of a statute], General Statutes § 1–2z directs us first to consider the text of 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.... When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, to the legislative policy it was designed to implement, and to its relationship to existing legislation and common law principles governing the same general subject matter.... The test to determine ambiguity is whether the statute, when read in context, is susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Stec v. Raymark Industries, Inc.,* 299 Conn. 346, 358, 10 A.3d 1 (2010)." *Comm'r of Mental Health & Addiction Servs. v. Saeedi,* 143 Conn. App. 839, 858–59, 71 A.3d 619, 632 (2013). "

The terms mismanagement and abuse of authority are not clearly defined in the statute. In analyzing General Statute §31-51m,[8] which protects private whistleblowers, the court in *State v.*

A whistleblower retaliation suit brought pursuant to Conn. Gen. Stat. §4-61dd is comparable to a suit brought pursuant to Conn. Gen. Stat. §31-51m and q, which protect employees from retaliation for having reported "a violation or a suspected violation of any state or federal law or regulation or any municipal ordinance or regulation to a public body." *Eagen,* 135 Conn. App. at 577 n.5.

Marrero, 66 Conn.App. 709, 721-22, 785 A.2d 1198 (2001), reasoned that "The terms, 'unethical, mismanagement and abuse of authority,' are not defined by the statute. The dictionary defines the word 'unethical' within the term 'unethical practices' as 'having to do with ethics or morality; of or conforming to moral standards.' The word 'mismanagement' means 'to manage or administer badly or dishonestly.' The word authority within the term abuse of authority is defined as 'the power or right to give commands, enforce obedience, take action or make final decisions.' The word abuse is defined as 'to use wrongly; misuse' and 'to hurt by treating badly, mistreat.' ... Our appellate courts have held that [t]he standard technique to assess the common understanding of a statutory term is to turn to a dictionary of common usage. *Id.* See also *State v. Brown,* 259 Conn. 799, 792 A .2d 86 (2002), *Charron v. Town of Griswold,* No. KNLCV065000849S, 2009 WL 5511272, at 10 (Conn. Super. Ct. Dec. 14, 2009).

Courts will also look to legislative intent by examining the statute in the context of societal problems the legislature sought to address. *Conway v. Wilton*, 238 Conn. 653, 665 (1996). "Statements made on the floor of the legislature are a strong indication of legislative intent." *Pereira v. State Bd. Of Educ.,* 304 Conn. 1, 26 n.18 (2012); *Hatt v. Burlington Coat Factory*, 263 Conn. 279, 308 (2003). A review of the legislative history of General Statute §4-61dd reveals the statute was designed to encourage state employees to report a broad range of misconduct. Senator Leonhardt noted this when the law was originally enacted, "I think it's very important that state employees who come across malfeasance or inefficiencies or incompetence be encouraged to report these wrong-doings to their superiors and so that they won't have the threat of losing their jobs as a result of bringing to light wastes of the taxpayer's money and in that respect I think this legislation will increase efficiency in state government." 22 S. Proc, Pt. 17, 1979 Sess., p. 5648. Statutory changes to the statute over the years have tended to expand protections in the statute. One such statutory change, §47 (b) (1) of P.A. 05-287 amended § 4-

[8] The whistleblower retaliation statute, for Protection of an employee who discloses employer's illegal activities or unethical practices, or reports a suspected incident of child abuse or neglect.

61dd to provide a statutory prohibition against state agencies retaliating against employees who made internal whistleblower complaints. "This created a new right for employees to be free of retaliation for internal whistleblower complaints and, conversely, imposed a new obligation on state agencies not to retaliate for internal whistleblower complaints, thereby creating new and increased liability on the agency if it does retaliate." *Sandra Lueder v. Shyam Lodha and Southern Connecticut State University,* 2006 WL 2965505, at 4. Further, as stated previously, General Statute § 4-61dd is a remedial statute, which is to be construed broadly.

Respondent's asserted that, "Complainant's HCAC grievance is nothing more than a personal complaint about the Complainant's interpersonal conflict with his supervisor and his own personal employment situation, which is not a matter of public concern. Therefore, Complainant's grievance is not protected whistleblowing activity pursuant to Conn. Gen. Stat. §4-61dd." That argument is overly simplistic and does not consider the wider implications. The management of, and the patient care at, a taxpayer funded hospital and medical school is very definitely a matter of public concern. The Complainant's reporting of abusive behavior, mismanagement, financial concerns, ethical concerns and negative effects on patient care are patently qualifying whistleblower allegations.

Further, Respondent argues that in *Antonette Harmon, Complainant v. State of Connecticut, Judicial Branc,* the tribunal, narrows the scope of qualifying disclosures due to its dismissal of a claim of discrimination, not whistle blowing. This reliance is misplaced, *Harmon's* holding was to "(1) avoid overlapping jurisdictions of the Chief Human Rights Referee under the whistle blowing statute with the Commission on Human Rights and Opportunities in its important role of enforcing our antidiscrimination laws; (2) to more efficiently leverage existing state resources; (3) to encourage timely resolution of employment discrimination claims; and (4) avoid inconsistent outcomes, the Harmon case was more properly handled as discrimination complaint." *Antonette Harmon, Complainant v. State of Connecticut,*

Judicial Branch, Respondent, 2016 WL 8223960, at 10. The grave man in the Harmon case was that another, more specific remedial statutory scheme excited to protect the Complainant.9

The Respondent's attempt to compare federal whistleblower protections[10] (WPA) is also inapposite. As there are dozens of federal statutes providing whistleblower with various prerequisites, none of them are on point in the instant case and not comparable to our state law. (See example *Serrao v. Merit Systems Protection Bd.,* 95 F.3d 1569, 1577 (C.A.Fed. 1996).[11] Moreover, because the facts of

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[9] "An appropriate forum, the Commission on Human Rights and Opportunities, exists for filing a charge of retaliation that occurs in response to an individual complaint of employment discrimination. As noted, the legislature has charged the Commission on Human Rights and Opportunities with the enforcement authority to handle noncompliance with the Connecticut Fair Employment Practices Act through a comprehensive set of statutory and regulatory procedures and has provided the resources for investigating and adjudicating claimed violations of our antidiscrimination, including notice, a merit assessment review, mediation conferences, fact-finding, a complete investigation including the ability to subpoena witnesses or documents, settlement discussions, and finally adjudication as a contested case either upon certification to the Office of Public Hearings following a finding of reasonable cause or transmittal through the early legal intervention process. General Statutes §§ 46a-51, et seq. Complainant's individual allegation concerning discriminatory treatment by her supervisor may be, and is, the subject of a pending § 46a-60 (a) (4) employment discrimination complaint but it is not whistleblowing under the state's Whistleblower Act. " *Harmon, Complainant v. State of Connecticut, Judicial Branch, Respondent*, 2016 WL 8223960. Antonette Harmon, Complainant v. State of Connecticut, Judicial Branch, Respondent, 2016 WL 8223960, at 9.

[10] as codified in 5 U.S.C. § 2302(b)(8)

[11] The Serrao case involves the jurisdictional limits of the Merit Systems Protection Board under federal law, something that is not presented here. The employee in Serrao sought to appeal to the Merit Systems Protection Board under 5 U.S,C, § 1214(a)(3) which provides that:[E]xcept in a case in which an employee ... has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee shall seek corrective action from the Special Counsel before seeking corrective action from the Board. Only after the Office of Special Counsel has notified the employee that it has terminated its investigation or has failed to commit to pursuing corrective action within 120 days may that person file an IRA appeal with the Board under section 1221(a). The court explained that in order to establish the Board's jurisdiction over his appeal, the employee had to show by a preponderance of at: (1) he engaged in whistleblowing activity by making a disclosure protected by 5 U.S.C. § 2302(b)(8); (2) the agency took or threatened to take a "personnel action" against him; (3) he sought corrective action from Office of Special Counsel; and (4) he exhausted corrective action proceedings before Office of Special Counsel ("OSC"). Serrao 95 F.3d at 1574. The court held that the plaintiff did not satisfy the final element because he did not seek corrective action from the Office of Special Counsel with respect to reprisal for having made disclosures protected by 5 U.S.C. § 2302(b)(8), which protects employees from whistleblowing. The court found that the employee had reported to OSC what he believed were acts of retaliation (reprimands and a marginal performance rating) for having filed a grievance against his supervisor, something that falls under § 2302(b)(9)(A)(ii), over which the Board did not have jurisdiction. Section 2302(b)(9)(A) refers to "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation...." On the other hand, Section 2302(b)(8) refers to protection from whistleblowing. The employee in Serrao attempted to argue that because his grievance based on adverse personnel actions for filing a grievance included statements about events from two years earlier that were also protected under 5 U.S.C. §2302(b)(8), he had raised matters before the OSC that fell under 5 U.S.C. § 2302(b)(8) and that he could then appeal to the Board. The Court did not agree: "We are not prepared to hold that this requirement is met when... an employee expressly seeks corrective action from OSC for

the cases interpreting the WPA upon which Respondent relies are significantly different from the facts of this case, those cases are not applicable here. In *White v. Department of_Air Force*, 391 F.3d 1377, 1381 (Fed.Cir, 2004),[12] one of the cases upon which Respondent relies, the court held that speech about a management decision regarding a "debatable" policy cannot meet the definition of gross management under the WPA.

As stated above, Complainant identified the following Code of Conduct violations: Honesty, Integrity, Respect, Professionalism, Conduct of Faculty, Administrators and Staff, Civility, and Harassment. Allegations included that Lieberman's behavior adversely affected patient care and medical student and orthopedic resident education. These allegations fall squarely within the broad remedial intent of General Statute §4-61dd (the statute) which provides protection to state employees who report "corruption, unethical practices, violation of state laws or regulations, mismanagement, gross waste of funds, abuse of authority or danger to the public safety occurring in any state department." Adversely effecting patient care and the teaching mission of UCHC are of great public concerns. The allegations of mismanagement and harassment are abuse of authority in a tax payer funded hospital and medical school. The complainant's grievance allegations are qualifying protected disclosures under the statute and satisfy the first element of the prima facie case.

2. Adverse Personnel Action

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reprisal for the exercise of grievance rights (a matter not within the Board's jurisdiction) and, in so doing, includes a statement that his supervisor believes him to be the anonymous source of allegations that led to an investigation that took place more than two years before the OSC complaint was filed." Serrao, 95 F.3d at 1577, 1578. The court held that "Serrao was not the subject of a personnel action appealable to the Board. Accordingly, the only way he could bring his appeal to the Board was by first seeking corrective action from OSC for reprisal for having made disclosures protected under 5 U.S.C, § 2302(b)(8), as required by 5 U.S.C. §14(a)(3)
Serrao, 95 F,3d 1569, 1578.

[12] *White* concerned an Air Force implemented quality program. The court found that industry experts as well as higher education institutions subject to the quality program disagreed on the merits of the program. The plaintiff employee was in the camp that did not favor the program, Because of the plaintiff's negative statements about the policy to management and to the educational institutions affected by the policy, the Air Force "lost confidence" in his ability to support the program and reassigned him to a non-educational Administrative Officer position, without reduction in pay, *White*, 391 F.3d at 1379. The plaintiff employee's counsel conceded at oral argument that reasonable people could have disagreed about the program and that under the "debatable" standard, his client could not prevail. *White,* 391 F.3d at 1383, 1384

"To satisfy the second element of his prima facie case, the complainant must show that he suffered or was threatened with an adverse personnel action by a regulated entity subsequent to his whistle blowing. § 4-61dd (b) (1). The standard articulated in *Burlington Northern & Sante Fe Railway Co. v. White*, 548 U.S. 53, 68, 16 S.Ct. 2405, 165 L.Ed.2d 345 (2006) is used to determine liability. The complainant must show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from being a whistleblower." *Connecticut Dep't of Mental Health & Addiction Servs. v. Saeedi,* No. CV116008678S, 2012 WL 695512, at 13 (Conn. Super. Ct. Feb. 7, 2012) aff'd in part, rev'd in part sub nom. *Comm'r of Mental Health & Addiction Servs. v. Saeedi*, 143 Conn. App. 839, 71 A.3d 619 (2013). (The withholding of a former employee's personal belongings after termination was a retaliatory act). "Most often, retaliation is a distinct and independent act of discrimination, motivated by a discrete intention to punish a person who has rocked the boat ...." (Internal quotation marks omitted.) *Jackson v. Water Pollution Control Authority*, 278 Conn. 692, 708 (2006).

"[R]etaliation claims have a more relaxed standard than substantive anti-discrimination claims, and are not limited to conduct ... such as hiring, firing, change in benefits, or reassignment... Again, the plaintiff must show that his employer's actions well might have dissuaded a reasonable worker from making or supporting a charge of discrimination [Whistleblowing]." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford,* 537 F. Sup.2d 332, 355-56 (D. Conn. 2008); *Tosado v. State of Connecticut,* Judicial Branch, Superior Court, judicial district of Fairfield at Bridgeport, Docket number FBT-CV-03-0402149-S (March 15, 2007) (2007 WL 969392, 5-6). In *Wood v. Dalton*, 2000 WL 1174988, at *1 (D.D.C. July 7, 2000), the court found that, it would certainly appear that a unique deviation from a standard procedure is probative of an intention to retaliate. An accumulation of differences in the manner in which the defendant was treated, although petty in themselves, may nevertheless permit the inference that these differences were so irrational and unjustified that the

inference can be drawn that they were done in retaliation for filing a Title VII claim." Wood v. Dalton, No. CIV. A. 99-1 (JMF), 2000 WL 1174988, at *1 (D.D.C. July 7, 2000).

Objectively, UCHC's behavior and the adverse consequences such as Complainant's experiences are more than enough to deter a reasonable employee from whistle blowing. Further, the actions such as denying Complainant's CFA, were against their own (hence the taxpayers) financial interest, and against past practices and policies. Further, the Complainant suffered harm to his reputation due his unexplained departure and his patients' care was interrupted. These actions are would have dissuaded a reasonable person from whistleblowing.

3. Causation

The third element of a prima facie case requires the complainant to introduce sufficient evidence to establish an inference of a causal connection between the personnel action threatened or taken and his whistle blowing. *LaFond v. General Physics Services Corp.*, supra 50 F.3d 173. The Whistleblower statute further provides, that when the adverse personnel action occurs "not later than two years after the employee first transmits facts and information concerning a matter in accordance with subsection §461dd(a).... there shall be a rebuttable presumption that the personnel action is in retaliation for the action taken by the employee under subsection (a) of this section. §461dd(d)(4). When the statute was amended in 2002 to include the rebuttable presumption, a legislator commented that the purpose of the amendment was "to protect people who have found some wrong doing in a state agency, a quasi-public agency or a large state contracting entity. And then they get in trouble for it, they get fired for it, they get punished for it. That's something that we have to stop." (Emphasis added.) 45 H.R. Proc., Pt. 9, 2002 Sess., p. 2877-78. "Statements of legislators often provide strong indication of legislative intent." *Hatt v. Burlington Coat Factory,* 263 Conn. 279, 308 (2003). If the personnel action occurred within [two years] of the complainant's whistleblowing to the auditors or to the attorney general, then, because of the statutory rebuttable presumption, the respondents' burden is one of both

production and persuasion. "The presumptions created by those statutes may be rebutted by sufficient and persuasive evidence to the contrary. ... These rebuttable presumptions apply only to the question of causation ...." (Internal citations omitted.) *Malchik v. Division of Criminal Justice*, 266 Conn. 728, 738 (2003).

"A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact. That burden is met when it is more probable than not that the fact presumed is not true. *Salmeri v. Dept. of Public Safety*, 70 Conn. App. 321, 339, cert. denied, 261 Conn. 919 (2002). The evidence presented by the respondents must be sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function." (Internal quotations omitted.) *Shawn Irwin v. Theresa Lantz and Dan Callahan, Shawn Irwin v. Theresa Lantz, Dan Callahan and Department of Correction,* 2008 WL 2311544, at 7–8.

The qualifying disclosure took place on September 30, 2011, when Complainant filed his HCAC grievance. The Complainant first learned of the denial/delay of his CFA in or around September 2012 approximately a year after the protected activity. Complainant filed his whistleblower action comfortably within the two year period that triggers the presumption. The rebuttal presumption satisfies the element of causation and the third prong of Complainant's prima facie case. This would be true even if Complainant learned on the date of his separation, March 31, 2012, that he wasn't going to get a CFA, which he did not. Further, there is no mention of a CFA or privileges in the Settlement Agreement.

"As the Supreme Court noted, one cannot secure the objective of the anti-retaliation provision "by focusing only upon employer actions and harm that concern employment and the workplace .... An

employer can effectively retaliate against an employee by taking actions not directly related to his employment or by causing him harm *outside* the workplace.... A provision limited to employment-related actions would not deter the many forms that effective retaliation can take. Hence, such a limited construction would fail to fully achieve the anti-retaliation provision's primary purpose, namely, [m]aintaining unfettered access to statutory remedial mechanisms." (Citations omitted; internal quotation marks omitted.) *Id.,* 63-64. The purpose and the language of the anti-retaliation provision indicate "that the anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment." Id., 64. "Interpreting the anti-retaliation provision to provide broad protection from retaliation helps ensure the cooperation upon which accomplishments of the Act's primary objective depends." *Mehdi M. Saeedi v. Department of Mental Health and Addiction Services,* et al., 2010 WL 5517188, at 43. The Complainant additionally argues that "[t]he actions the Respondent took against the [Complainant] and his patients were so irrational and unjustified that the inference can be drawn that they were done in retaliation for filing his faculty grievance." This tribunal agrees.

C

MacDonnell Douglas Burden Shifting Analysis

"The three-step burden shifting analytical framework established under *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 802-803 (1973), is typically used in evaluating whistleblower retaliation cases brought under § 4-61dd. *Ford v. Blue Cross & Blue Shield of Connecticut, Inc.,* supra 216 Conn. 53-54; The three shifting evidentiary burdens are: (1) the complainant's burden in the presentation of his prima facie case; (2) the respondent's burden in the presentation of his non-retaliatory explanation for the adverse personnel action; and (3) the complainant's ultimate burden of proving that the respondent retaliated against him because of his whistle blowing." *O'Sullivan v. Depart. of Mental Health and*

Addiction Services, supra, 2; Irwin v. Lantz, supra, 11-12. The requirements of proof under McDonnell Douglas are appropriately adjusted when applying this analysis to § 4-61dd cases. *Id.*

Nevertheless, if "[t]he fact finder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination, and ... upon such rejection, [n]o additional proof of discrimination is required...." (Citation omitted; internal quotation marks omitted.) *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). *Jackson v. Water Pollution Control Auth. of City of Bridgeport,* 278 Conn. 692, 705-06, 900 A.2d 498, 508 (2006).

"The evidence presented by a respondent must be sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function." (Internal quotations marks omitted.) *Daniel Schwartz v. Attorney Michael Eagen*, 2010 WL 750974, at 11. For the respondents to be successful they must overcome the presumption by the preponderance of the evidence that there is legitimate business reason for the adverse action. " *Nsonsa Kisala, Complainant v. Department of Public Health, T. Malecky, B. Wallen, M. Carey, L. Davis & J. Mullen, Respondents,* 2016 WL 1719122, at 10.

Unlike the *McDonnell Douglas* analysis that is applied when the complainant's evidence is limited to indirect evidence of pretext, the analytical framework differs when the complainant has established his prima facie case either through overt evidence of retaliatory animus motivating the respondent's actions or through the statutory rebuttable presumption. If the complainant "can provide direct evidence of retaliatory animus, he need not provide indirect evidence of a causal connection by showing that the protected activity closely followed the adverse action. Indeed, the *McDonnell*

Douglas test itself is inappropriate in cases where there is direct evidence that retaliation played a part in the employment decision..... Instead, the court would apply the test set forth in *Price Waterhouse v. Hopkins* ... whereby the relevant inquiry is whether retaliation was a substantial or motivating factor in the decision making process. In showing retaliation to be a substantial or motivating factor, plaintiffs need not show the retaliation to be the determinative or deciding factor, or that defendants' decision would have been different, absent this factor..... The burden then shifts to the employer to show that it would have subjected the employee to the same adverse conduct even if retaliation had not been considered in its decision." (Citations omitted; internal quotation marks omitted.) *Farrar v. Stratford*, supra, 537 F. Sup.2d 354-55; *Miko v. Commission on Human Rights & Opportunities*, 220 Conn. 192, 204-05 (1991); *Irwin v. Lantz*, supra, 16-17.

The adverse personnel action occurred within two years of the filing of the HCAC grievance. This presumption satisfied the fourth prong of Complainant's prima facie case. Under other types of statutory rebuttable presumptions, the respondent's burden is one of both production and persuasion. "A [statutory] presumption is equivalent to prima facie proof that something is true. It may be rebutted by sufficient and persuasive contrary evidence. A presumption in favor of one party shifts the burden of persuasion to the proponent of the invalidity of the presumed fact. That burden is met when it is more probable than not that the fact presumed is not true." *Salmeri v. Dept. of Public Safety*, 70 Conn. App. 321, 339, cert. denied, 261 Conn. 919 (2002).

The evidence presented by a respondent must be "sufficiently credible to meet that burden of persuasion before the statutory presumption can be said to have been successfully rebutted. Insubstantial or suspect evidence cannot perform the same function. (Internal quotations omitted.) Id., 339-40; *Irwin v. Lantz*, supra, 17-18." (Internal quotations omitted.) *Daniel Schwartz v. Attorney Michael Eagen*, 2010 WL 750974, at 10–11.

In this case there is substantial documentary evidence of retaliatory animus. Moreover, there was a concerted effort by the Respondent to discredit the Complainant's actions prior to his separation. Documentary evidence reinforced by testimony at the hearing regarding the Respondent's displeasure with Complainant's grievance and their efforts to prevent him from obtaining privileges. The Respondent proffered two non-retaliatory explanations or "legitimate business reasons" for delaying Complainant's community faculty appointment, which prevented a grant of privileges. First, that they did not want to grant any privileges until a permanent Chairperson was appointed. Second, because they needed a cooling off period due to Complainant's filing of the grievance.

The first reason does not stand up to scrutiny, as testimony and documentary evidence show that there were many community faculty appointments granted by temporary chairpersons. Mazzaco who was the interim director recommended Clinton Jambor for a community faculty appointment at the same time as Complainant was being denied an appointment. The respondent admitted in Torti's testimony that there was no difference in Jambor's and Complainant's requests, other than Complainant's filing of the grievance. It is evident that the explanation provided to Complainant was not true as Jambor was appointed by a then acting Chairperson. There is substantial evidence that past interim Chairpersons hired physicians as well as routinely granting community faculty appointments.

The respondent tried to differentiate Jambor's appointment. The explanation provided by Mazzocca and Torti that Jambor required the CFA to teach and work with orthopedic residents at St. Francis Hospital was not consistent or credible as Complainant was also working at St. Francis Hospital working with residents. During Torti's direct examination, he testified that Jambor's and Compalinant's requests for a CFA presented "entirely different situations". On cross examination, however, Torti was admitted that he did not understand the basis for the appointment of Jambor and that he appointed Jambor because Dr. Mozzacca recommended him.

The explanation that a cooling off period was necessary seems illogical. It would only be necessary for cooling off period because the respondent was upset that the Complainant filed a HCAC grievance, the qualifying disclosure, and would not release claims stemming from that grievance. At the time of the CFA request the Complainant had been gone for five-and-a-half and Lieberman was practicing elsewhere. Complainant's use of his CFA would not involve interactions with the orthopedics department. He would largely be in Farmington Surgery Center and John Dempsey Hospital operating rooms performing procedures. Moreover, the Complainant was never publically accused of any misconduct while, Lieberman was found to have been a disruptive physician by Health Center administrators and to have violated the Code of Conduct in the past and had difficulties with many staff members. The Complainant was well liked by staff and peers as evidenced by his Garibaldi award. Moreover, Mazzacca testified that his presence was not a disruption and the cooling period if applied evenly with a non retaliatory purpose the cooling off period would have applied equally to Lieberman. This was not the case. Torti approved an appointment for Lieberman in August, 2012, and permitted him to continue with his research and maintain a lab at the Health Center.

The above finding of facts, are based predominately on documentary evidence. The plethora of documents provided in this case is a meticulous recreation of the events that occurred from 2010 to 2014, the relevant period for analysis. Through documents and testimony it was clear that the Respondent did not want to give the Complainant privileges. They insisted that there be a cooling down period after the separation of the parties due to Complaint's HCAC grievance. The respondent showed resentment, animosity and contempt for the Complainant's grievance that reported Lieberman's mismanagement, abuse of authority and breach of the code of conduct in the orthopedic department.

Additionally, Respondent argued that Complaint's behavior was so disruptive as to negate his protection under General Statute §4-61dd. There is scant evidence to support this claim. Reliance on unspecified upset is insufficient to strip Complaint of any rights broadly conferred by the remedial

purposes of General Statute §4-61dd. Respondent argued that Complainant sent a letter to faculty on December 19, 2012, explaining the circumstances of his separation and denial of his CFA. There is no evidence to show how this letter was disruptive. Further, Complainant only revived his Appeal of Austin's decision after he finally had access to the HCAC findings. Respondent did not like Complainant exercising his rights under their own bylaws.

The respondent's repeatedly testified that Complainant's CFA had to wait until a permanent Chair was appointed. When it was clear that Respondent's explanation was riddled with holes, the cooling off period became front and center as the legitimate reason for preventing the granting of the CFA. The disruption argument doesn't hold water nor was it based on the facts or law.

Respondent's defense to feeling inconvenienced and agitated by Complainant's methods to substantiate his grievance. They considered Complainant's actions overbearing and disruptive, but the disruption was subjective to allies of Lieberman not to the running of the medical facilities or school. The fact remains they had a duty to have a neutral liaison and to have a fair and impartial process; that did not occur. The resentment spilled over into retaliatory animus with regard to the process granting of privileges.

Moreover, as to whether the Complainant made a qualifying whistleblower disclosure, the whistleblower only need a good faith belief in the allegations. A plaintiff may prevail on a claim for retaliation even when the underlying conduct complained of was not in fact unlawful "so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated [the] law." *Sarno v. Douglas Elliman–Gibbons & Ives, Inc.,* 183 F.3d 155, 159 (2d Cir.1999) (internal quotation marks omitted). *Treglia v. Town of Manlius,* 313 F.3d 713, 719 (2d Cir. 2002)

The concerted effort by the Respondent to prevent the Complainant from seeing the HCAC findings and delaying the disclosure of Austin's final decision, illustrates Respondent's effort to protect

Lieberman at the expense of the Complainant. Complainant rocked the boat by exposing the actions of Lieberman and Respondents did not like that one bit, (nor presumably did Lieberman). They objected to his methods of proving his allegations and defending himself, to the detriment of his reputation, his relationship with other colleagues, and his ability to see patients at Respondent's facility. This is not just the subjective feelings of one physician complaining about Lieberman's mistreatment of him, but also concerns about the staff retention, hiring, financial matters, and patient care.

No other physician, other than a felon, was ever prevented from obtaining privileges immediately after their employment separation if requested. It is not merely an assessment of the witnesses' credibility that shows the proffered reasons are a pretext; it is documented by close to one-thousand (1,000) exhibits. Many of these documents provide direct evidence of Respondent's hostility towards complainant. There is documentary evidence from the union representative to the Respondent that its actions were perceived as retaliatory.

There is ample evidence to show Respondent harbored impermissible retaliatory animus. There was no credible evidence presented that could overcome the presumption of retaliation created by the statute's temporal proximately of the whistle blowing to the adverse action. The documentary evidence painstaking illustrates that Complainant was disfavored and held in contempt by the Respondent for pursuing his HCAC grievance. Based on testimony presented, documentary evidence, credibility of the conflicting statements and stories the respondent could not prove by the preponderance of the evidence that it had a viable legitimate business reason for the delay of the Complainant's CFA.

Nonetheless, even if the Respondent, arguendo, only had the burden of production and not persuasion, the Complainant successfully by a preponderance of the evidence rebutted Respondent's reasons and proved them to be pre-texts. The analysis under McDonnell would yield the same result. There was substantial evidence that illustrated the initial denial of a CFA, required for privileges, was withheld in an environment wrought with retaliatory animus. Several emails referred to the

Complainant being different from other physicians who left UCHC. One email stated, "[Complainant's] situation is complicated for a number of reasons beyond the faculty appointment issue."

It was apparent that Complainant was treated differently than other physicians who were granted a CFA and privileges in the past, as well as the concurrent request of Jambor. This difference in treatment was as a result of his disclosures and allegations about Lieberman. In the history of granting CFAs there was only one time when a CFA was denied or delayed, which was because the applicant was a felon. Lieberman who was found to have violated the Respondent's code of conduct prior to the Complainant's allegations and the damning report of the HCAC should have logically vindicated Complainant. However, as a result of the unauthorized one-sided investigation conducted by Austin, Lieberman was given cover, allowed time to apply for another position, given a CFA and to continue his research at UCHC, while Complainant was ostracized. The Complainant by the preponderance of the evidence rebutted any of the reasons Respondent gave for denying him a CFA.

V

CONCLUSION

The complainant established a prima facie case that the respondent violated General Statutes § 4-61dd. The Respondent could not meet its burden of persuasion with regard to its purported legitimate business reason. Additionally, if the Complainant retained the burden of proof after Respondent articulated a legitimate reason, Complainant establish by a preponderance of the evidence that the 18 month delay of his community faculty appointment and ability to obtain full privileges was the result of impermissible retaliation. Further, the Complainant established by a preponderance of the evidence that the respondent's failure to follow its past practice of giving former employees privileges promptly when they left Respondent's employment was the result of retaliatory animus.

Therefore, the Respondent violated General Statute §4-61dd and is liable for damages to the Complainant. The damages portion of the public hearing will be scheduled on a telephone conference call on **March 13, 2018 at 1:30 p.m.** Specific instructions for the conference call to follow.

It is so ordered this 14th day of February 2018.

Michele C. Mount,
Presiding Human Rights Referee

cc.
Heena Kapadia, Esq. – via email only
Joseph Jordano, Esq. – via email only
Coleen Valentine, Esq. – via email only
Stephen Courtney, Esq. – via email only
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