

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:	:
	:
MATEUSZ J. NADOLECKI,	:
	:
Petitioner,	:
	:
	: DOCKET NO. PES 07-008
To review under Section 101 of the New York State	:
Labor Law a Determination made under Article 2 of the	: <u>RESOLUTION OF DECISION</u>
New York State Labor Law, dated August 2, 2007,	:
	:
- against -	:
	:
THE COMMISSIONER OF LABOR,	:
	:
Respondent.	:
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APPEARANCES

Mateusz "Matthew" J. Nadolecki, *pro se* Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Tsvi J. Gold of Counsel, for Respondent.

WITNESSES

Kwo Lam; Thomas Varghese; Thomas Rath; Ellen Mindel; Anthony Vano; Douglas Shaw; David Merriman; Richardeen Agard; Vas Anand; Michael Fetcho; Maureen Cox.

WHEREAS:

The Petition for review in the above-captioned case was timely filed with the Industrial Board of Appeals (Board) and answered by the Commissioner of Labor (Commissioner). Upon notice to the parties a hearing was held before Devin A. Rice, Associate Counsel to the Board, and the designated hearing officer in this matter, on February 19, 20 and 25, 2009 in New York, New York. Also present was Board Chairperson Anne P. Stevason. Each party was afforded a full opportunity to present documentary evidence, to examine and cross-examine witnesses and to make statements relevant to the issues.

SUMMARY OF EVIDENCE

Petitioner's Employment at Department of Tax

Mateusz Nadolecki was appointed by the New York State Department of Taxation and Finance (Tax Department) to the probationary position of Tax Auditor Trainee 1 in the Nassau County District Office Sales Tax Unit on June 30, 2005. He was terminated from that position effective December 9, 2005 prior to the end of a two year probationary period.

During his employment at the Tax Department, Nadolecki's direct supervisor was Team Leader Thomas Varghese. Varghese reported to Section Head Greg Wiley. The District Audit Manager was Anthony Vano. Nadolecki's primary responsibility as a Tax Auditor Trainee 1 was to conduct sales tax audits, which often involved field work such as reviewing records at a tax payer's business location and observing the tax payer's business operations to determine whether they were accurately reporting taxable sales.

As Nadolecki's direct supervisor, Varghese was responsible for the daily supervision of Nadolecki's work. No employee of the Tax Department disputed that Nadolecki was skilled in the technical aspects of the Tax Auditor Trainee position; however, Varghese and Vano each testified that there were numerous deficiencies in other areas of Nadolecki's job performance. Varghese specifically testified that Nadolecki was often late to field appointments; was late and disruptive at a training session held in Albany; did not deal effectively with the problems encountered by field auditors such as heavy traffic and parking; was not professional in his dealings with taxpayers; failed on one occasion to safeguard confidential taxpayer information; and may have violated Tax Department policy by identifying himself as a Tax Department employee when making a complaint to the Nassau County Department of Health. Varghese recommended Nadolecki's termination in a Probation Period Evaluation Report that he prepared along with Greg Wiley at the end of November 2005. The decision to terminate Nadolecki was made on November 23, 2005.

Nadolecki testified that he was never late, and that Varghese approved his time and attendance records which reflect that he was never late to work. Varghese explained that Nadolecki was late to work on several occasions and he addressed those instances with Nadolecki at the times that they occurred. Varghese stated that he did not require Nadolecki to charge leave time when he was late to work because supervisors have latitude to allow for lateness and he "cuts slack to his staff." Vano confirmed that supervisors do have latitude with time and attendance requirements.

Varghese testified that the instructor for a training conducted in Albany called to tell him that Nadolecki had shown up late to the training session and then caused a disruption when the session went beyond 5:00 p.m. Nadolecki admitted that he was late to the training session because the alarm clock at the hotel was an hour behind, and also admitted that he did not believe he should have had to work past 5:00 p.m. on that day. The training course evaluation form also indicates that Nadolecki was late to one of the sessions.

Varghese also testified a senior auditor had informed him that Nadolecki was two hours late to a field audit in Brooklyn on one occasion. Nadolecki admitted that he was late to the appointment, but denied that he was two hours late. Nadolecki explained that he was late

to the appointment because he did not know how to parallel park and it took him an hour to find a parking spot located at the beginning or end of a row of cars.

Varghese testified that on one occasion Nadolecki became so upset by the bad traffic he encountered returning from a field audit, that he had to go to the emergency room. Varghese and Vano each testified that when they learned of this incident they were concerned about Nadolecki's health as well as his ability to effectively perform in a position that required frequent driving. Nadolecki explained that he was not used to driving in heavy traffic and that he needed treatment after he had been subjected to aggressive drivers on the Belt Parkway in Brooklyn.

Varghese testified that a Jewish accountant contacted him to complain that Nadolecki had scheduled a field audit on a Jewish holiday and then refused to reschedule the audit. Nadolecki denied this; however, there is evidence in the record that on September 26, 2005 Nadolecki sent a request to the accountant in question for an audit appointment to take place on October 18, 2005, which was during the Jewish holiday of Succot. Furthermore, Nadolecki's own notes related to that audit indicate that on September 20, 2005, the accountant complained that Nadolecki had attempted to schedule an audit appointment on October 4, 2005, which was the Jewish holiday of Rosh HaShanah.

Varghese testified that on one occasion Nadolecki violated Tax Department rules by circumventing a power of attorney to get information directly from a represented taxpayer. Nadolecki stated that he had the power of attorney's permission to obtain a document directly from the taxpayer and that his contact with the taxpayer was for that limited purpose. Nadolecki did not believe he had violated any Tax Department rules under the circumstances.

Varghese also testified that Nadolecki lost a power adaptor for a Tax Department laptop computer when the computer was left in the trunk of Nadolecki's car over a weekend. Varghese testified that he was concerned that Nadolecki had shown poor judgment by leaving a Tax Department computer containing confidential taxpayer information in an unsecured location. Nadolecki testified that he believes the power cord was stolen from the trunk of his car at a car wash.

The Health Complaint

On November 10, 2005, Nadolecki and Varghese conducted a field audit in the basement of a diner in Great Neck, New York. Nadolecki testified that there was standing water covering 75% of the floor in the area where the records were kept, and that there was no ventilation. Nadolecki testified that he started to feel ill after about fifteen minutes of working and that Varghese noticed and said "you look disoriented." Nadolecki testified that when he told Varghese that he did not feel well, Varghese seemed angry and replied "If you don't want to be here, go home." Nadolecki felt intimidated and believed that if he went home, he would not pass probation.

Nadolecki testified that at around 2:30 p.m., Varghese decided to leave. Nadolecki was supposed to continue working in the basement until 4:30 p.m. Before Varghese left, there was a discussion with the tax payers's accountant about scheduling another audit appointment. At that point, Nadolecki stated that he would not do any more audits in that

basement because it was making him sick. Nadolecki testified that Varghese assured the accountant that the conditions were fine and that Nadolecki would return to the basement to continue the audit. Nadolecki told Varghese that he would refuse to return to work in the basement.

At 3:00 p.m., Nadolecki went to his car to take a break. After his break, Nadolecki called the office to report that he was going to the hospital, and then he packed up and went to the emergency room. Nadolecki testified that he was having a very hard time breathing and had a temperature of 102 degrees, low blood pressure and tachycardia. Nadolecki testified that he had an allergic reaction to mold that he was exposed to while working at the diner. Records of the Nassau County Department of Health and a decision of the Workers' Compensation Board corroborate Nadolecki's testimony in this respect.

On November 14, 2005, Nadolecki filed a complaint by telephone with the Nassau County Department of Health regarding the conditions at the diner. The operator asked him what he was doing at the diner and who he worked for. Nadolecki identified himself to the operator as an employee of the Tax Department. Approximately one week later Nadolecki was notified by the Department of Health that numerous deficiencies had been found at the diner. Nadolecki also filed a Workers Compensation claim for mold exposure based on this incident.

Varghese testified that Nadolecki had arrived 20 minutes late to the diner on November 10, and that he had appeared disoriented at the time he arrived. Varghese stated that between 10:00 a.m. and 2:45 p.m. he made several offers to Nadolecki to leave the premises, but Nadolecki refused.

Varghese testified that it was inappropriate for Nadolecki to have identified himself to the Department of Health as a Tax Department employee because this may have violated Tax Department confidentiality rules by giving the impression that a tax proceeding existed. Varghese was also concerned that Nadolecki did not seek guidance from management concerning the proper way to report the incident. Neither Varghese nor Vano testified that Nadolecki had in fact violated the confidentiality rules.

Varghese testified that he first became aware of Nadolecki's complaint to the Department of Health on November 21, 2005.

Termination

By letter dated December 5, 2005, the Department of Taxation advised Nadolecki that he was terminated effective December 9, 2005. Varghese testified that in a very short time span many instances occurred leading to the decision to terminate Nadolecki -- he circumvented a power of attorney, did not properly secure taxpayer information, was frequently late to work, exercised poor judgment, and was unable to communicate in a clear manner -- and that the decision to terminate Nadolecki was made on November 23, 2005. Varghese was unequivocal that Nadolecki was not terminated for filing a complaint with the Nassau County Department of Health. Vano also testified that Nadolecki's health complaint was not a factor in his termination, although Varghese and Vano each testified that they felt

Nadolecki exercised poor judgment by identifying himself as a Tax Department employee when he made his complaint to the Department of Health.

Varghese's handwritten notes indicate that he was concerned that Nadolecki was not able to deal with situations commonly encountered by auditors in the field, and that there was a pattern of Nadolecki making complaints related to such situations. Varghese testified that he was concerned that Nadolecki was casting the Department of Tax in an unfavorable light by complaining to his supervisors and to tax payers and their representatives about every unfamiliar situation that he came across. Varghese felt that Nadolecki could not handle a position requiring field work.

The Probationary Period Evaluation Report prepared by Varghese and Wiley at the end of November 2005 recommended Nadolecki's termination. The Report noted deficiencies in public relations, utilization of work time, judgment, dependability, and procedural efficiency. Nadolecki was provided a signed copy of the Evaluation Report which was dated December 5, 2005.

Nadolecki noted that in October 2005, he had received a satisfactory progress report at the conclusion of his first three months of employment that did not identify any areas of concern or note any deficiencies. Varghese testified that the progress report was an internal document used for training purposes only and was not meant to be used to evaluate Nadolecki's job performance. Varghese testified that he was generous when he completed the progress report because at that time he had hoped that Nadolecki's performance would improve. Varghese further testified that Nadolecki's performance was deficient in several areas and that he addressed those areas informally with Nadolecki at the time when they occurred.

PESH Complaint

On January 5, 2006, Nadolecki filed a complaint with the Federal Occupational Health and Safety Administration (OSHA) alleging that he was terminated in retaliation for filing a health complaint in violation of the Public Employee Safety and Health Act (PESHA). This complaint was forwarded to the New York State Department of Labor (DOL) on January 9, 2006. Nadolecki alleged in his complaint that he was terminated for refusing to work in a hazardous environment.

DOL's investigation

DOL Safety and Health Inspector Kwo Lam testified that Nadolecki's case was assigned to him by his then supervisor David Cain on March 7, 2006. Cain originally understood Nadolecki's complaint to be that he was terminated for refusing to work. Because PESHA generally does not protect an employee from refusing to work, Cain administratively closed Nadolecki's case on March 10, 2006. However, DOL received additional documentation from Nadolecki on May 26, 2006 which led Lam to conclude that Nadolecki's claim was that he was terminated for making a complaint to the Nassau County Department of Health. Lam testified that the closing letter of March 10, 2006 did not prevent him from continuing the investigation because DOL can close a case and reopen it, and that in fact he continued to look into the matter after he received additional information from Nadolecki.

Lam testified that during the course of his investigation he met with Nadolecki several times and also spoke with him numerous times by telephone. Additionally, Lam interviewed Nadolecki's supervisors from the Tax Department and reviewed a transcript of a hearing before the Worker's Compensation Board of Nadolecki's allegation that he was terminated by the Tax Department in retaliation for filing a Worker's Compensation claim¹. Lam did not interview any of Nadolecki's co-workers because he believed that the Tax Department provided enough information to make a determination that there was no discrimination. Specifically, Lam explained that when investigating discrimination cases, he looks to see if the four elements of a *prima facie* case are present – protected activity, employer knowledge, adverse action, and nexus between the adverse action and the protected activity. In this case, based on the information received from Nadolecki, the Tax Department, the Nassau County Department of Health, and a Taxpayer Representative, Lam determined that Nadolecki's health complaint was not the main reason the Tax Department terminated him. Lam further testified that he did not believe any part of the Tax Department's decision making process leading up to Nadolecki's termination was based on Nadolecki's health complaint. Finally, Lam testified that he considered whether the reasons offered by the Tax Department for terminating Nadolecki were fabricated to justify his termination and concluded that they were not.

In February 2007, Nadolecki's case came to the attention of Division of Safety and Health Director Maureen Cox when she was contacted by OSHA regarding several PESH discrimination cases, including Nadolecki's. Cox testified that Nadolecki had filed a Case Against State Plan Administration (CASPA) against DOL alleging that he had not been notified of his right to appeal DOL's March 10, 2006 determination to close his case. As Safety and Health Director, Cox was responsible for preparing a response to the CASPA to submit to OSHA. She reviewed Nadolecki's case file and was concerned that it did not contain a case contact sheet, a nexus sheet, or a phone log, and that a case closing letter had been sent without notifying Nadolecki of his right to appeal to the Board. Lam testified that the case contact sheet, nexus sheet and phone log were maintained electronically, and no hard copy was printed and placed in the file. Cox further testified that she was concerned after reviewing the file that there was no documentation that an investigation had ever taken place. Because of these concerns with the manner in which the investigation was documented, Cox instructed Upstate Program Manager David Merriman to reopen Nadolecki's case.

David Merriman testified that he was Kwo Lam's supervisor from April 2006 to August 2007. He was instructed by Maureen Cox to reopen the investigation and asked Senior Industrial Hygienist Douglas Shaw to take "another look" at the file because the case had not been well documented. The matter was officially assigned to Shaw on May 7, 2007; however, Shaw testified that he had been asked by Merriman as early as March 2007 to review Nadolecki's file.

¹ DOL investigators reviewed a transcript of a Workers' Compensation Board hearing held on July 27 and October 16, 2006. The hearing was on Nadolecki's allegation that he was terminated for filing a claim with the Worker's Compensation Board related to the mold exposure incident of November 10, 2005. The testimony of Tax Department supervisors before the Workers' Compensation Board was consistent with their testimony before the Industrial Board of Appeals. The Workers' Compensation Law Judge in a decision issued November 21, 2006 ruled against Nadolecki, stating that "A review of the record shows that there were a multitude of events upon which the employer could rely in exercising the discretion available to an employer to terminate the employment of a probationary employee." Nadolecki appealed the Judge's decision which was upheld by a Panel of the Workers' Compensation Board in a decision dated October 19, 2007.

Shaw testified that he reviewed Nadolecki's file and concluded that the case needed no further investigation. Shaw concluded that there was no relationship between the protected activity and Nadolecki's termination. Shaw based his conclusion on the Tax Department's written response to Nadolecki's allegations and the transcript of a Workers' Compensation Board hearing. Shaw testified that the testimony of Nadolecki's supervisors before the Worker's Compensation Board indicated that Nadolecki's performance during the probationary period was unsatisfactory. Shaw testified that he believed Nadolecki was terminated for poor performance and unacceptable behavior. Shaw did not think that Nadolecki's complaint to the Nassau County Department of Health was a factor in his termination other than the Tax Department's concern that he identified himself as a Tax Department employee when making the complaint.

Shaw testified that aside from reviewing the file, he took no additional steps to investigate the case after it was assigned to him, because the case had already been sent to counsel's office. Shaw understood that counsel's office would make the determination whether to have him investigate further or close the case.

Shaw testified that the case was closed by Counsel's office on July 27, 2007 when Senior Attorney Tsvi J. Gold sent a letter to Nadolecki officially closing the case for lack of merit. The July 27 letter did not contain a statement that Nadolecki could appeal DOL's determination to the Board, so Shaw sent a second, corrected letter dated August 2, 2007, that included a statement of Nadolecki's appeal rights.

DISCUSSION

The Board's role in this matter is not to determine whether the Department of Tax and Finance discriminated against the petitioner, but rather whether the Commissioner of Labor's determination that the petitioner was not discriminated against was reasonable (*see* Labor Law §§ 27-a(6)(c) and 101). Additionally, the petitioner bears the burden of proof in proceedings before the Board (Labor Law § 101; Board Rules 65.30). That the record contains some evidence which may give rise to another conclusion is not sufficient in this matter for us to find that the Commissioner's determination was unreasonable or that her investigation was not appropriate.

Labor Law § 27-a (10) (a) provides that no person shall discharge, discipline or in any manner discriminate against an employee who has filed a PESH complaint. Labor Law § 27-a (10) (b) sets forth the only statutory process available to an employee who believes that he or she has been discriminated against in retaliation for filing a PESH complaint:

“Any employee who believes that he has been discharged, disciplined, or otherwise discriminated against by any person in violation of this subdivision may, within thirty days after such violation occurs, file a complaint with the commissioner alleging such discrimination. Upon receipt of such complaint, he commissioner shall cause such investigation to be made as he deems appropriate If upon such investigation, the commissioner determines that the provisions of this subdivision

have been violated, he shall request the attorney general to bring an action in the supreme court against the person or persons alleged to have violated the provisions of this subdivision. . . .”

In *Matter of Brian Colella*, Docket No. PES 05-004 (August 22, 2007), we held that the petitioner in a PESH discrimination case met his burden of proof where the only reasonable conclusion based on the evidence presented was that the employee had been discriminated against. That is not the case here.

Nadolecki alleges in his petition, in sum, that DOL failed to properly investigate his complaint under Labor Law § 27-a (10) that he was terminated by the Tax Department for complaining to the Nassau County Department of Health about the mold exposure he experienced while performing a tax audit there on November 10, 2005. Nadolecki cites numerous examples of alleged failures by DOL to follow the investigation protocols set forth in the PESH Field Operations Manual (FOM), including *inter alia*, failure to mail a discrimination complaint questionnaire, failure to meet with Nadolecki to assist in completion of the questionnaire, failure to mail a copy of a determination letter dated March 10, 2006, failure to mail Nadolecki a copy of a determination letter dated November 7, 2006, failure to conduct an investigation, and retaliation against Nadolecki for filing a Complaint Against State Plan Administration (CASPA) against DOL. Nadolecki, the petitioner in this proceeding, bears the burden of proving that DOL’s investigation was unreasonable (*see* Labor Law § 101).

Nadolecki subpoenaed four witnesses – Ellen Mindel, Vas Anand, Michael Fetcho, and Richardeen Agard – who were unable to provide any testimony relevant to whether Nadolecki was terminated by the Tax Department for filing a health complaint. Nadolecki’s co-workers Agard, Anand, and Fetcho did not know why Nadolecki had been terminated. Ellen Mindel, the Equal Employment Opportunity Officer at the Tax Department likewise did not have relevant information concerning Nadolecki’s termination. Nadolecki also subpoenaed his supervisors – Thomas Varghese and Anthony Vano, who each testified that Nadolecki was terminated for nondiscriminatory reason related to job performance and poor judgment.

Nadolecki did not prove that DOL failed to conduct an investigation or that he was retaliated against by DOL for filing a CASPA. Lam and Shaw each testified that the procedures set forth in the FOM were not mandatory, and that although Nadolecki’s case may have appeared in the computer system to have been administratively closed prior to the final determination letter of August 2, 2007, DOL was, in fact, still investigating Nadolecki’s allegations.

The Commissioner presented evidence that a reasonable determination was reached. DOL Safety and Health Inspectors reviewed materials submitted by Nadolecki, met with him, interviewed his supervisors, reviewed documents related to his discharge including the transcripts of a two day hearing before the Workers’ Compensation Board involving similar claims of retaliation that included the testimony of Nadolecki’s supervisors and co-workers, and concluded after such investigation that the complaint did not have sufficient merit for referral to the Attorney General’s office for possible prosecution.

The civil prosecution of a PESH retaliation case in supreme court requires evidence that (1) Nadolecki engaged in a protected activity; (2) the Tax Department was aware of the protected activity; (3) Nadolecki suffered an adverse employment action; and (4) there was a nexus between the protected activity and the adverse employment action (*see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [1972]; *Dept of Correctional Services v. Division of Human Rights*, 238 AD2d 704 [3d Dept. 1997] [federal standards followed in New York discrimination cases]).

The evidence demonstrated, and the Commissioner does not appear to dispute, that Nadolecki engaged in a protected activity when he filed a complaint with the Nassau County Department of Health concerning possible mold exposure while conducting an on-site audit; that the Tax Department was aware of that complaint; and that his termination was an adverse action. However, the Commissioner in reaching her determination that Nadolecki's claim had no merit, found that there was no nexus between his termination and his complaint to the Health Department. We do not find such determination unreasonable.

PESH Inspector Lam testified that he spoke to Nadolecki's supervisors from the Tax Department, that he reviewed documents related to Nadolecki's employment, and that he read the hearing transcript of Nadolecki's retaliation claim before the Workers' Compensation Board which included the sworn testimony of Nadolecki's supervisors and co-workers, and determined that Nadolecki was not terminated for filing a complaint with the Nassau County Department of Health. PESH Senior Industrial Hygienist Shaw after reviewing the case file at the request of the Director of the Division of Safety and Health because of the concerns raised by the CASPA, reached the same conclusion. Finally, DOL's counsel's office reviewed Nadolecki's case and determined that there was not sufficient evidence to refer the matter to the Attorney General for further action.

Even if the Tax Department had considered the health complaint made by Nadolecki when it terminated him, there is sufficient evidence in the record to suggest he would have been terminated anyway (*see Price Waterhouse v. Hopkins*, 490 U.S. 228 [1989]). The evidence shows that the Tax Department may have terminated Nadolecki for numerous reasons unrelated to his health complaint, including poor performance and unacceptable behavior. Specifically, there is evidence in the record that Nadolecki was frequently late to field appointments, was late and disruptive at a training session in Albany, was at least an hour late to a field audit in Brooklyn because he did not know how to parallel park, could not handle driving in heavy traffic, refused to accommodate a Jewish taxpayer representative's request to not schedule an audit appointment on a religious holiday, failed to secure a laptop computer that contained confidential taxpayer information, and circumvented a power or attorney. The Workers' Compensation Board transcript contains additional examples of reasons Nadolecki may have been terminated other than for filing a health complaint. Accordingly, we cannot say that as a matter of law the Commissioner's determination was unreasonable.

Finally, we find no merit to Nadolecki's allegation that DOL retaliated against him because he had filed a CASPA. OSHA substantiated the complaints of Nadolecki and others that DOL did not notify PESH discrimination complainant that they could appeal DOL's determination to the Board. DOL addressed these procedural issues as requested by OSHA. There is no evidence in the record to substantiate Nadolecki's allegation that DOL retaliated

against him in any way for filing a CASPA complaint against DOL, and we note that at that time DOL failed to provide notice of appeals rights to all discrimination complainants.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

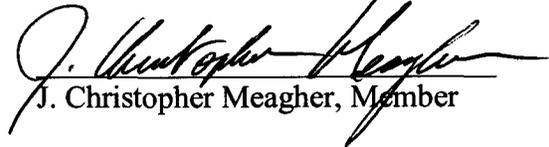
1. The Petition for review is hereby denied.



Anne P. Stevason, Chairman

Absent

Susan Sullivan-Bisceglia, Member



J. Christopher Meagher, Member

Absent

Mark G. Pearce, Member



Jean Grumet, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
May 20, 2009.