STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAMELA ORCUTT, Petitioner, To review under Section 101 of the New York State Labor Law a Determination made under Article 2 of the New York State Labor Law, dated March 23, 2016, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 16-007 RESOLUTION OF DECISION

APPEARANCES

Pamela Orcutt, petitioner pro se.

Pico Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Steven J. Pepe* of counsel), for respondent.

WITNESSES

Pamela Orcutt, Jason Shell, Robert J. Roof, Thomas Cavanagh, Steven Stepniak, and David A. Fatig, for petitioner.

Patrick Martin and Senior Industrial Hygienist Charles Riley, for respondent.

WHEREAS:

On April 18, 2016, petitioner Pamela Orcutt filed a petition with the Board to review a determination of respondent Commissioner of Labor, dated March 23, 2016, finding no merit to a claim she had filed with respondent alleging that her former employer, the City of Buffalo, had violated the Public Employees Safety and Health Act (PESHA), Labor Law § 27-a (10), by terminating her in retaliation for making safety and health complaints. Respondent filed her answer on July 22, 2016. Upon notice to the parties a hearing was held before J. Christopher Meagher, member of the Board, and the designated hearing officer in this matter, on December 2, 2016, March 3, 2017, and June 16, 2017, in Buffalo, New York. 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.

Labor Law § 27-a (10), entitled "discrimination against employees," provides in relevant part that:

> "(a) No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this section.
>
> "(b) 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, the commissioner shall cause such investigation to be made as he deems appropriate, and shall, if requested withhold the name of the complainant from the employer. 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 any such action the supreme court shall have jurisdiction, for cause shown, to restrain violations of this subdivision and order all appropriate relief, including rehiring or reinstatement of the employee to his former position with all back pay."

Petitioner Pamela Orcutt filed a complaint with respondent March 25, 2014, alleging her former employer, the city of Buffalo, had terminated her in violation of Labor Law § 27-a (10). Orcutt alleges in her complaint that she was terminated in retaliation for raising various health and safety concerns related to her work as a temporary laborer for the Division of Water. She alleged, among other things, that she had raised concerns about the use of certain cleaning agents, about an uncovered sump pump, that cleaning bathrooms exposed her to harmful bacteria, that she refused to drive during unsafe conditions, and that she was exposed to unabated asbestos. There is no allegation by respondent that the complaint was untimely.

The determination under review, issued to Orcutt by respondent's counsel's office on March 23, 2016, states:

> "The New York State Department of Labor ('Department') is in receipt of your discrimination complaint in which you alleged that you were subjected to discrimination by your employer, the City of Buffalo ('Respondent'), after making safety and health related complaints. Your complaint has been investigated by the Department's Division of Safety and Health, Public Employee Safety and Health Bureau (PESH), and the findings have been reviewed by this Office. The investigation disclosed the following:

> "You were initially hired by Respondent in November, 2011, provisionally as a Meter Reader. In July, 2013, upon failing the civil service exam for the Meter Reader position, the Respondent hired you as a Temporary Laborer. On March 11, 2014, you refused to deliver the mail claiming there were whiteout conditions and it was unsafe to do so. That same day you were instructed to clean and mop the foreman's bathroom but refused to do that task. You were absent without permission from March 19, 2014 through March 21, 2014. On March 21, 2014, you were terminated from your position and on March 25, 2014 you filed a safety and health complaint with PESH. A review of your case has revealed that a prima facie case of discrimination was not present.
>
> "The Department's investigation was able to establish that you engaged in a protected activity relating to refusing to deliver mail in unsafe conditions, and that your employer was aware of such activity. However, your complaint must be dismissed because the Department's investigation did not find a causal connection between any protected activity under Section 27-a, and your termination, and the reasons cited by the Respondent were found to be legitimate. Your employer cited to insubordination and failure to show up for work March 19, 2014 through March 21, 2014.
>
> "In light of the foregoing, it is the Department's determination that you were not subject to discrimination in violation of the PESH Act. Accordingly, the Department of Labor will take no further action concerning this matter."

We find respondent's determination is invalid and unreasonable because it fails to consider all the allegations of discrimination alleged by petitioner and investigated by respondent, and as such, the determination is revoked (Labor Law § 101 [3]). As recognized by respondent's correspondence with the city of Buffalo notifying them of Orcutt's complaint, and as contained in respondent's Report of Investigation, Orcutt's allegations of discrimination were not limited to one instance of protected activity – refusal to deliver mail in unsafe conditions – as found in respondent's determination. Orcutt alleged an ongoing pattern of discrimination related to her concerns over various safety and health issues she believed existed at the plant where she was assigned to work. Orcutt alleged she was concerned about using a certain degreasing product because another employee had nearly passed out after using it, that she was assigned to work in an area containing unabated asbestos with only a dust mask, that she discovered an uncovered sump pump that was not protected by guard rails and reported it to her supervisor, that she was concerned that cleaning a bathroom she was directed to clean would expose her to bacteria while recovering from an immune system disorder, and that she was directed to deliver mail during unsafe driving conditions.

Respondent's Report of Investigation shows that all Orcutt's allegations were thoroughly investigated. Senior Industrial Hygienist Charles Riley investigated Orcutt's complaint. His investigation consisted of interviews and information collected from Orcutt, her supervisors, and co-workers. Respondent provided no explanation for not considering and making findings on

each of Orcutt's allegations when issuing its determination that her complaint had no merit. Because no determination was made of whether Orcutt was terminated for a protected activity other than the refusal to drive in unsafe conditions, we find the determination is invalid and unreasonable and revoke it.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The determination under review is revoked; and

2. The petition is granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Molly Doherty, Member

Absent
Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
at New York, New York on
June 6, 2018.

each of Orcutt's allegations when issuing its determination that her complaint had no merit. Because no determination was made of whether Orcutt was terminated for a protected activity other than the refusal to drive in unsafe conditions, we find the determination is invalid and unreasonable and revoke it.

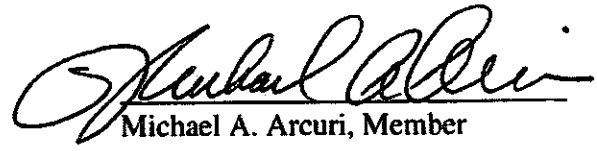
NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The determination under review is revoked; and

2. The petition is granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member



Michael A. Arcuri, Member

Molly Doherty, Member

Absent

Gloribelle J. Perez, Member

Dated and signed by a Member
of the Industrial Board of Appeals
at Utica, New York on
June 6, 2018.