STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: PAUL F. HARRINGTON, 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 January 10, 2018, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 18-001 RESOLUTION OF DECISION

APPEARANCES

Paul F. Harrington, petitioner pro se.

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

WITNESSES

Petitioner Paul F. Harrington.

Safety and Health Investigator Jeremy Cromie, for respondent.

WHEREAS:

On January 16, 2018, petitioner Paul F. Harrington (hereinafter "Harrington") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law § 101 seeking review of a determination under Article 2 of the Labor Law dated January 10, 2018. Respondent moved to dismiss the petition for failure to state a cause of action. The Board denied the motion but directed the petitioner to file an amended petition, which he did on April 27, 2018. Respondent again moved to dismiss the petition for failure to state a cause of action. The motion was denied, and respondent was directed to file an answer to the petition. Respondent filed her answer on October 1, 2018.

Harrington filed a retaliatory discrimination complaint with the Department of Labor's Public Employee Safety and Health Bureau (hereinafter "PESH") in which he claimed that his public employer, New York State Department of Corrections and Community Supervision,

Fishkill Correctional Facility (hereinafter "DOCCS" or "Fishkill"), engaged in retaliatory discrimination in violation of Labor Law Article 2, § 27-a (10) after he made a workplace violence complaint by: (1) denying Harrington's due process right to fully participate in his employer's workplace violence incident investigation, (2) impeding the investigation into the workplace violence incident, (3) pressuring Harrington to falsify an incident report, (4) controverting his claim for workers' compensation benefits for injuries resulting from the workplace violence incident, (5) subjecting Harrington to ongoing harassment, (6) requiring Harrington to surrender his off-duty firearm, and (7) moving his reporting area or duty post in response to reporting the workplace violence incident. Respondent issued a determination that dismissed petitioner's retaliatory discrimination complaint stating that:

> "An adverse employment action under Section 27-a of the Labor Law requires a materially adverse change in the terms and conditions of employment constituting more than an inconvenience or an alteration of job responsibilities. Nothing revealed during our investigation was found to have risen to a level which constituted an adverse employment action under Section 27-a of the Labor Law and the alleged adverse actions have not been shown to have the result of retaliation by your employer."

The petition alleges that the determination was unreasonable because respondent's investigation documents contained numerous discrepancies. The amended petition further alleges that: (1) there were discrepancies in certain witness statements collected by Harrington's employer, (2) respondent performed an inadequate investigation by failing to obtain telephone records from the date of the workplace violence incident, (3) petitioner's employer failed to notify Harrington that they were controverting his workers' compensation claim, (4) Harrington was required to pay certain out of pocket costs due to injuries sustained from the workplace violence incident, (5) that Harrington timely filed his complaint with respondent, and (6) Harrington's post was moved by his employer in response to his workplace violence complaint.

Upon notice to the parties a hearing was held before Matthew D. Robinson-Loffler, Associate Counsel to the Board, and the designated hearing officer in this matter, on January 23 and February 8, 2019 in Albany, 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.

We find on the record evidence that petitioner met his burden and proved that the respondent's determination that Harrington's employer did not discriminate against him in violation of Labor Law § 27-a (10) was unreasonable. Respondent failed to rebut petitioner's proof with credible and reliable evidence, and we find its determination dismissing his complaint and declining to take further action was therefore unreasonable.

We remand this matter to the Commissioner for further proceedings in accordance with this decision and to "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" as required by Labor Law§ 27-a (10).

SUMMARY OF EVIDENCE

Introduction

Harrington was a corrections officer at Fishkill Correctional Facility in Beacon, NY, which is a correctional facility of DOCCS. Harrington had been employed by DOCCS for more than 20 years at the time that he filed a retaliatory discrimination complaint with PESH.

On May 9, 2017, Harrington complained to his supervisor that he was physically assaulted by another corrections officer while on duty. A written PESH discrimination complaint was made on August 11, 2017 in which Harrington complained that his employer took several actions against him after making a workplace violence complaint, an activity protected by the Public Employment Safety and Health Act (hereinafter "PESHA") (Labor Law § 27-a). After investigation, the respondent dismissed Harrington's complaint and declined to take further action, finding that a prima facie case of retaliation could not be established because Harrington's employer did not take any adverse action against him.

Petitioner's Evidence

Testimony of Paul F. Harrington

Harrington testified that he has been a corrections officer at Fishkill for more than 20 years. His duties at Fishkill "consisted mostly of me being mobile, moving throughout the building and outside of the building," overseeing a group of inmate porters responsible for cleaning various areas of the facility, escorting a nurse who carried and distributed narcotics to inmates, and as an emergency responder for any incident that might have occurred in his area. Beginning in March 2017, Harrington's post was located in building 21-A in a space which was also used by another officer, Officer Nelson (hereinafter "Nelson"), in the afternoons. Harrington testified that this post had been in building 21-A for more than two decades but that shortly after his arrival, Nelson began a campaign of harassment including leaving vulgar letters, tipping over Harrington's locker, writing names on Harrington's locker, and removing state property for which Harrington was responsible, in attempt to get Harrington "off the bid."

On May 9, 2017, Harrington testified that he was involved in a physical altercation with Nelson. Harrington entered a five-page memorandum, dated May 9, 2017, detailing the incident. The memorandum states, in relevant part, that:

> "At approximately 2:30 p.m., I was reporting to my post in 21-A building after lineup. As I entered building 21 at walkway delta in the hallway, I observed Officer Nelson walking towards me when he yelled to the walkway delta officer 'did Sylvester leave yet?' I thought he was talking to me when I looked back over my shoulder all of the sudden I was thrown against the wall when Officer Nelson rammed me with his left shoulder. . . . I asked officer at Delta if he saw it and he said yes."

Harrington testified that he reported this incident to his supervisor, Sergeant Osbourne (hereinafter "Osbourne"), at 2:45 p.m. Harrington testified that Osbourne told him that Nelson was

a friend of Osbourne's and that Harrington had an opportunity to characterize his injury in a way that did not involve Nelson. Harrington testified that Osbourne's memorandum documenting this conversation states that it occurred at 3:25 p.m., which Harrington states is incorrect as evidenced by a copy of a watch commander's logbook that Fishkill provided PESH which contains an edit to the time the incident was reported and a redaction to the last two lines of the specific entry.

After reporting the incident to Osbourne, Harrington reported to his duty post. He felt that Osbourne had placed him in the position of either not reporting the incident or filing a false accident report, which caused him stress. Harrington testified that by approximately 6:30 p.m., he could no longer work due to increased pain and advised Osbourne that he was going to Fishkill's medical unit for treatment. At the medical unit, Harrington learned that his blood pressure was elevated, and he experienced an anxiety attack and he "passed out" while there. Harrington was then transmitted to a local hospital and was discharged that same night. Harrington testified that while he was in the hospital, he was instructed by his watch commander, Lieutenant Sheehan, that he needed to return to Fishkill to file an incident report. Harrington testified that he interpreted this instruction as a direct order from a superior, so he proceeded to Fishkill and wrote the May 9, 2017 memorandum, despite being under the influence of medication administered at the hospital.

On May 10, 2017, Harrington received a telephone call at his home requesting that he report to the facility where he was advised that he needed to relinquish his off-duty firearm. Harrington did so and testified that he was advised that the surrender of the weapon was standard procedure in this scenario. Harrington also testified that he was advised by a union representative that day that his post was being moved. Harrington testified that his post was not physically moved, in that they didn't physically move a desk, chair or the office itself, but that they moved his reporting area and that he was now required to report to the basement of a different building at Fishkill.

After May 9, 2017, Harrington did not work at Fishkill due to the injuries he sustained on May 9, 2017 so he filed a workers' compensation insurance claim. Approximately one week after his injury, Harrington was advised by one of his medical providers that his employer was contesting his workers' compensation claim and denying the May 9, 2017 incident occurred at work. This required Harrington to pay for certain expenses out of pocket, which were not reimbursed until December of 2017. Harrington also testified that he never received a written report regarding his employer's investigation into the incident as is required by DOCCS policies. Harrington further testified that he was still attempting to retrieve his confiscated off-duty weapon.

On October 15, 2018, Harrington was granted a 75% disability retirement. Despite retiring, Harrington has still not received his retirement badge which Harrington cites as an example of the continuing harassment he has been subjected to as a result of filing his workplace violence complaint.

Respondent's Evidence

Testimony of Safety and Health Investigator and Discrimination Investigator Jeremy Cromie

Jeremey Cromie (hereinafter "Cromie") has been a Safety and Health Investigator and a Discrimination Investigator in respondent's Division of Safety and Health Public Employee Safety and Health Bureau (hereinafter "PESH") for 2½ years. Cromie testified that once he is assigned to

a case, Cromie will normally speak with the complainant and have the complainant complete an intake form. After that, the complainant completes a standard questionnaire. Cromie will then send a letter to the employer requesting that they address the allegations. Cromie testified that he shares the employer's response with the complainant. The ultimate determination, however, is made by his supervisor in conjunction with respondent's counsel's office.

When investigating retaliation claims, Cromie testified that he first looks for some type of loss or other adverse action which could include a job loss, duty loss, overtime, some type of monetary issues or loss of promotion, or the presence of chilling effects. Cromie testified that protected activities include filing or making workplace violence complaints or safety and health complaints with PESH or with an employer directly. Cromie also testified that the presence of an adverse action is the only thing that a claimant needs to show to establish a claim of discrimination.

Cromie took Harrington's discrimination complaint and completed a complaint intake form on August 11, 2017. Cromie testified that the complaint identified the assault, that Fishkill contested Harrington's workers' compensation claim, that Fishkill allegedly falsified reports, and that Fishkill confiscated his firearm as adverse actions against Harrington. Cromie met with Harrington on September 6, 2017. After Harrington completed the questionnaire, Cromie's supervisor drafted a letter outlining Harrington's allegations and sent it to the employer.

Cromie received a written response from Harrington's employer, dated November 2, 2017, which included 10 exhibits in support of the Fishkill's position.[1] The response states, in relevant part, that:

> "Mr. Harrington alleged that he was harassed and assaulted by another Correction Officer on May 9, 2017. That allegation was advanced to the Department's Office of Special Investigations, (OSI), who conducted an investigation. The investigation did not substantiate the allegation that Correction Officer Paul Harrington was a victim of work place violence.
>
> Mr. Harrington filed a similar report with New York State Police, and the New York State Police also did not find any corroborating evidence or probable cause to arrest anyone based upon Mr. Harrington's report.

With respect to the issue of Harrington's post, Fishkill responded "neither employee was moved from his post."

After receiving the employer response, Cromie testified that PESH made the following determinations: that both Nelson and Harrington were required to surrender their firearm, that the post was not moved for either Nelson or Harrington, that Harrington did not report to work again and therefore did not actually have his post moved, and that the employer's handling of Harrington's workplace violence complaint was adequate and reasonable.

[1] The tenth exhibit was not included in the exhibit introduced at hearing as it was petitioner's personnel file.

When asked how inconsistencies or conflicting accounts of an event are resolved in the course of an investigation, Cromie testified that those situations would warrant further investigation which may include the collection of witness statements, interviews, and site visits. Cromie testified that those steps were not taken in this case.

GOVERNING LAW

A. Standard of Review

Petitioner's burden of proof in this case was to establish by a preponderance of evidence that the Commissioner's determination dismissing his complaint and declining to take further action was "invalid or unreasonable" (Labor Law § 101 [3]; State Administrative Procedure Act § 306 [1]; Board Rules of Practice and Procedure (hereinafter "Board Rules") [12 NYCRR] § 65.30). The hearing before the Board is *de novo* (Board Rules [12 NYCRR] § 66.1 [c]).

B. PESHA's Prohibition of Employer Discrimination for Engaging in Protected Activities

In 1980 the Legislature adopted the Public Employment Safety and Health Act, finding that "it is a basic right of all employees to work in an environment that is as free from hazards and risks to their safety as is practicable" and providing employees working in the public sector with the same or greater workplace protections as those provided workers in the private sector by the Occupational Safety and Health Act ("OSHA") (29 USC § 651 et seq.) (L 1980, ch 729 § 1; Governor's Mem approving L 1980, ch 729, 1980 NY Legis Ann at 285). Under PESHA, every public employer must provide employees with workplaces that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm to its employees and which will provide reasonable and adequate protections to the lives, safety, and health of its employees" (general duty clause) and "comply with safety and health standards" promulgated under the statute (Labor Law §§ 27-a [3] [a] [1] and [2]).

To effectuate the goal of ensuring a safe and healthy work environment, PESHA encourages employees and their representatives to report workplace safety violations (Labor Law § 27-a [5] [a]) and makes it unlawful for an employer to discharge, discipline, or discriminate against any employee "because such employee has filed any complaint" or "because of the exercise by such employee on behalf of himself or others of any right afforded by this section." (Labor Law § 27-a [10] [a]). Employees who believe they have been unlawfully discharged or discriminated against in violation of PESHA may file a complaint with the Commissioner within 30 days of the violation (Labor Law § 27-a [10] [b]). If upon investigation "the commissioner determines that the provisions of this subdivision have been violated, [she] 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." (*id.*). If the Commissioner dismisses the complaint and declines to do so, the employee may seek review of that determination before the Board within 60 days of the determination (Labor Law § 27-a [6] [c]). The Board's role in a case alleging discrimination under the statute is not to determine as a final matter that the public employer violated PESHA, but to review whether the Commissioner's determination that the employer did not and there was no basis to request the Attorney General to bring an action on the employee's behalf was valid and reasonable (Labor Law §§ 27-a [6] [c], 101 [3]; Labor Law § 27-a [10] [b]; *Matter of Cory Wright*, Docket No. PES 16-013, at p. 16 [September 11, 2019]).

Where the Board finds that the employee has met his burden of proof to show the Commissioner's determination was invalid or unreasonable, it may remand the matter to the Commissioner "to 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" as required by the statute (*Matter of Cory Wright*, Docket No. PES 16-013, at p. 21; *Matter of Adam Crown*, Docket No. PES 10-009, at p. 13 [October 11, 2011]; *Matter of Brian Colella*, Docket No. PES 05-004, at p. 5 [August 22, 2007]).

C. Burden of Proof to Establish Employer Retaliation Under PESHA

To prevail on a claim of unlawful retaliation under Labor Law § 27-a (10), petitioner must establish that he was discharged or discriminated against under the burden-shifting framework set forth by the Supreme Court in *McDonnell Douglas Corp. v Green* (411 US 792, 802-804 [1973]; *Kwan v Andalex Group, LLC*, 737 F3d 834, 843 [2d Cir 2013] [federal and state discrimination claims are reviewed under the burden-shifting framework of *McDonnell Douglas*); *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6 [May 3, 2017] [*McDonnell Douglas* burden shifting applies to PESHA retaliation cases before the Board]).

Under the first step of the framework, petitioner must establish a prima facie case of retaliation by showing: (1) participation in a protected activity; (2) the employer's knowledge of that activity; (3) an adverse employment action; and (4) a causal connection between the protected activity and the adverse employment action (*Kwan*, 737 F3d at 844). The employee's "burden of proof as to this first step 'has been characterized as minimal and de minimis.'" (*id.* at 844 quoting *Jute v Hamilton Sunstrand Corp.*, 420 F3d 166, 173 [2d Cir 2005]) (internal quotation marks omitted). The showing by the employee thereby raises a rebuttable "presumption" of retaliation (*Texas Dept. of Community Affairs v Burdine*, 450 US 248, 254 [1981]).

Once the employee has met the "minimal" burden of establishing a prima facie case, the burden shifts to the employer to rebut the presumption by coming forward with evidence showing a legitimate, non-retaliatory reason for the adverse employment action (*Kwan*, 737 F3d at 845; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6). The employer must make this showing through the introduction of "admissible evidence" and the explanation must be legally sufficient to justify a judgment for the employer (*Burdine*, 450 US at 255-256).

If the employer does so, the presumption of retaliation no longer exists and the employee must come forward with evidence that the employer's "proffered, non-retaliatory reason is a mere pretext for retaliation" (*Kwan*, 737 F3d at 845). "[R]ejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination" (*St. Mary's Honor Center v Hicks*, 509 US 502, 511 [1993]).

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Board makes the following findings of fact and conclusions of law pursuant to the provisions of Board Rules (12 NYCRR) § 65.39.

A. There is No Dispute that Petitioner Engaged in Activities Protected by PESHA and Fishkill had Knowledge of those Protected Activates.

It is undisputed that Harrington engaged in a protected activity by complaining orally to his supervisor at Fishkill on May 9, 2017 and also by filing a written complaint with Fishkill on May 9, 2017 about a workplace violence incident that occurred that same day, as well as other conduct that occurred prior to May 9, 2017. Petitioner thereby satisfied the first two prongs of a prima facie case - protected activity and the employer's knowledge of that protected activity.

B. Petitioner Suffered an Adverse Action

The matter before us stems from respondent's determination that petitioner did not suffer an adverse action from his employer after complaining about workplace violence. Petitioner alleges that Fishkill did take adverse action against him by denying his right to full participation in the workplace violence investigation; obstructing the investigation into the workplace violence incident by submitting false and/or altered statements; failing to assure Harrington protection from continued harassment upon his return to duty; denying the incident occurred at work that gave rise to Harrington's workers' compensation insurance claim; confiscating his off-duty firearm; and relocating his duty post. Respondent, while not actually disputing that Fishkill engaged in any such acts, found in its determination that those acts did not rise to the level of adverse action because they did not materially change the terms or conditions of Harrington's employment but were merely an inconvenience to him or a change in his job responsibilities.

Adverse action requires material action that is harmful enough to discourage a reasonable employee from filing a complaint (*Burlington N. & S. F. R. v White*, 548 US 53, 67-70 [2006]; *see also Rivera v Rochester Genesee Regional Transp. Auth.*, 743 F3d 11, 25 [2d Cir 2012]; *Matter of Robert Shapiro*, Docket No. PES 09-001, at p. 9, [June 4, 2012]). In *Burlington*, the Supreme Court upheld the jury's verdict in favor of White by affirming the determination that changing job responsibilities may be materially adverse enough to constitute adverse action where the female employee's job responsibilities were changed from being a forklift operator to a track laborer, a dirtier and less prestigious job (*Burlington*, at pp. 70-71). While the standard requires that such challenged actions rise above 'trivial harms' … [a]lleged acts of retaliation must be evaluated both separately and in the aggregate, as even trivial acts may take on greater significance when they are viewed as part of a larger course of conduct…." (*Rivera v Rochester Genesee Regional Transp. Auth.*, 743 F3d at 25 quoting *Tepperwien v Entergy Nuclear Operations, Inc.*, 663 F3d 556, 568 [2d Cir 2011]).

We find respondent's determination that Harrington did not suffer adverse action is unreasonable as there is no evidence in the record that respondent considered whether moving Harrington's post may discourage a reasonable employee from complaining about workplace violence or otherwise engage in protected activity at Fishkill (*Burlington*, at pp. 67-71; *Rivera v Rochester Genesee Regional Transp. Auth.*, 743 F3d at 25; *Matter of Robert Shapiro*, Docket No. PES 09-001, at p. 9). Harrington testified that that in response to filing a complaint regarding an assault allegedly committed by a coworker, his employer immediately moved his post to the basement of a different building after it had been in its original location for around 20 years. "While an intra-office reassignment may not ordinarily constitute a material adverse action, there may be circumstances in which relocations rise to such a level." (*Erasmus v Deutsche Bank Ams. Holding Corp.*, 2015 US Dist LEXIS 160351, at *32-33 [SD NY Nov. 30, 2015, 15 Civ. 1398 (PAE)]

discussing *Pellei v. Intl. Planned Parenthood Fedn.*, 1999 WL 787753, *12-13, 1999 US Dist LEXIS 15338, *35-36, [SD NY Sept. 30, 1999, No. 96 Civ. 7014 (WHP)] [plaintiff's relocation to a "small, poorly lit, isolated cubicle" was a sufficiently material adverse employment action to sustain claim]. The credible and unrefuted evidence from Harrington was that his post was moved and respondent did not consider whether this action by Fishkill might have discouraged a reasonable employee from filing complaints. Fishkill's mere general denial that neither Harrington's nor Nelson's post were moved are insufficient to refute Harrington's consistent detailed testimony about how and where his post was moved. From the record evidence, it appears respondent simply accepted Fishkill's general denial that they moved Harrington's post without sufficiently investigating if it actually was moved and how such a move might constitute adverse action, despite Cromie's testimony that such situations would warrant further investigation but were not undertaken in this case.

Petitioner's allegation of adverse action, when considered in the context of the tenure of the post's location — 20 years — and an alleged assault and a harassment campaign by a co-worker are sufficient to meet petitioner's "minimal" burden of establishing the adverse action prong. As only one adverse action is necessary to make out a prima facie retaliation claim for our purposes, we do not address the validity of the remaining alleged adverse actions presented by petitioner.

C. The Adverse Action Taken Against Petitioner Was Caused by His Protected Activities

The remaining element of the prima facie case is whether there was a causal connection between petitioner's protected activities and the adverse action. Causation may be established indirectly by circumstantial evidence "showing that the protected activity was closely followed in time by the adverse action" (*Kwan v Andalex Group, LLC*, 737 F3d 834 at 845) (citations omitted).

Here, some of the alleged adverse actions occurred one day after the petitioner's protected activity (*id.*) [finding a three week period between complaint and adverse action sufficient to establish temporal proximity and causation] citing *Gorzynski v Jet Blue Airways Corp.*, 596 F3d 93, 110 [2d Cir 2010] ["Though this Court has not drawn a bright line defining, for the purposes of a prima facie case, the outer limits beyond which a temporal relationship is too attenuated to establish causation, we have previously held that five months is not too long to find the causal relationship."]). We find that the temporal proximity of the adverse action taken against Harrington in relation to his protected activities satisfied petitioner's "minimal" burden to establish causation and a prima facie case.

D. Respondent Failed to Prove that the Employer Had Legitimate, Nondiscriminatory Reasons for the Adverse Action

Once the employee meets his burden to establish a prima facie case, the burden shifts to the employer to produce legitimate, nondiscriminatory reasons for the adverse action (*Burdine*, 450 US at 255). These reasons must be shown through the introduction of "admissible evidence" that frames the factual issue with sufficient clarity so that the employee will have "a full and fair opportunity to demonstrate pretext." (*id.* at 255-256). The burden then shifts back to the employee to demonstrate pretext, which he may do by submitting additional evidence or by relying on his initial evidence "combined with effective cross-examination" of the employer that will suffice to discredit the employer's explanation (*id.* at 255 n 10).

Respondent failed to demonstrate that the employer had legitimate, nondiscriminatory reasons for the challenged actions in this case. The evidence respondent offered to show legitimate, nondiscriminatory reasons for moving Harrington's post was hearsay evidence of little probative value because it is the only evidence offered to refute petitioner's firsthand knowledge of events. Additionally, petitioner did not have a full and fair opportunity to prove pretext because respondent's only evidence of legitimate, non-discriminatory reasons for their actions was in the form of written statements rife with vague and conclusory statements of opinion and multiple hearsay. Petitioner was not able to show pretext through cross-examination of the DOCCS witnesses that respondent relied on because they were not called as witnesses in the hearing before the Board. The Board was not able to perform its duty of assessing their credibility through testimony so it could properly weigh that evidence. Although hearsay may be admissible in administrative hearings in many contexts, in this case such evidence was insufficient to meet the respondent's burden under the legal framework applicable to the issue that must be decided (*id.* at 255-256; *Kwan*, 737 F3d at 843; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6; *Matter of Cory Wright*, Docket No. PES 16-013, at p. 20). As such, the presumption of discrimination from petitioner's prima facie case stands un-rebutted and the burden does not shift back to petitioner to prove pretext.

We find on the record evidence that petitioner met his burden of proof to establish a prima facie case that his employer discriminated against him in violation of Labor Law § 27-a (10). Respondent failed to meet its burden to prove that the employer had legitimate, non-discriminatory reasons for its actions, and petitioner thereby met his burden of proof to establish retaliation under the statute. Respondent failed to rebut petitioner's proof with credible and reliable evidence and we find its determination dismissing his complaint and declining to take further action was therefore unreasonable.

The matter is remanded to the Commissioner for further proceedings in accordance with this decision and to "request the attorney general to bring an action in supreme court against the person or persons alleged to have violated the provisions of this section" as required by the statute (Labor Law §§ 27-a [10] [b], 101 [3]; *Matter of Cory Wright*, Docket No. PES 16-013, at p. 16; *Matter of Colella*, PES 05-004, at p. 5; *Matter of Crown*, PES 10-009, at p. 13).

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. The petition for review is hereby granted; and

2. This matter is remanded to the Commissioner for further proceedings in accordance with this decision and to "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" as required by Labor Law§ 27-a (10).

Dated and signed by the Members
of the Industrial Board of Appeals
on June 24, 2020.

Molly Doherty, Chairperson
New York, New York

Michael A. Arcuri, Member
Utica, New York

Gloribelle J. Perez, Member
New York, New York

Patricia Kakalec, Member
Brooklyn, New York

Najah Farley, Member
Brooklyn, New York