STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
SUNY COLLEGE OF ENVIRONMENTAL SCIENCE AND FORESTRY,	:	
Petitioner,	:	DOCKET NO. PES 14-015
To Review Under Section 101 of the Labor Law: a Determination dated September 23, 2014,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

The State University of New York, Office of General Counsel (Lisa A. Alexander of counsel), for petitioner.

Pico Ben-Amotz, General Counsel, NYS Department of Labor (Amy C. Karp of counsel), for respondent.

Amy Ritter, intervenor pro se, and Costello, Cooney & Fearon, PLLC (Jim Barna of counsel) for Amy Ritter, intervenor.

WITNESSES

Joseph L. Rufo, Bonnie Charity, Cornelius (Neil) B. Murphy, Jr., John View, and Marcia Barber, for petitioner.

Amy Ritter, Michael Kochanek, Douglas Jewell, and Ann Baker, for respondent.

WHEREAS:

Petitioner SUNY College of Environmental Science and Forestry (SUNY-ESF) filed a petition in this matter on November 21, 2014, seeking review of a determination issued by respondent Commissioner of Labor against petitioner on September 23, 2014. The determination finds petitioner violated Labor Law § 27-a (10) by discriminating or retaliating against Amy Ritter for engaging in protected activities under the Public Employees Safety and Health Act (PESHA) (Labor Law § 27-a). Petitioner alleges that Ritter's termination was unrelated to her reporting of safety and health concerns. Instead, petitioner followed its business practice of terminating any employee who does not return to work at the completion of an approved medical

leave or who does not request a reasonable accommodation that would enable the employee to perform their assigned duties. Respondent Commissioner of Labor filed her answer on March 23, 2015.

On May 4, 2015, complainant Amy Ritter filed an application to intervene as a party. Respondent did not oppose the application, but petitioner filed objections on May 5, 2015, because Ritter "is not a party to this administrative review." Pursuant to Board Rule 65.7 (12 NYCRR 65.7), the Board granted Ritter's request on May 11, 2015, and limited such intervention to cross-examination of petitioner's witnesses and direct examination of respondent's witnesses.

Upon notice to the parties, a hearing was held in this matter on June 4 and 5, 2015 in Utica, New York, and July 20 and 21, 2015, in Syracuse, New York, before Michael A. Arcuri, Board Member and the designated Hearing Officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, make statements relevant to the issues, and file post-hearing legal briefs.

MOTION *IN LIMINE*

Prior to the start of the hearing, respondent made a motion *in limine* requesting the Board preclude petitioner from presenting any evidence relating to Ritter's work performance, in particular whether she was a good or bad employee. Intervenor joined in the motion. The hearing officer reserved decision on the motion. Because we decide this matter on other grounds, we find that such evidence is not relevant and grant respondent's motion.

SUMMARY OF EVIDENCE

Testimony of Amy Ritter

Amy Ritter began her employment with petitioner as Director of Physical Plant and Facilities on March 18, 2010. In December 2010, Ritter brought up safety and health concerns to Rufo's attention, her immediate supervisor, and Murphy. In February 2011, Rufo assigned Ritter and others to complete a report on the safety and health issues Ritter had previously brought to their attention. Ritter prepared and provided such report to Rufo in September 2011.

Ritter stated that in December 2011, she attended an emergency medical appointment that resulted in her having to limit her physical activity. She notified Barber and Rufo of this limitation and expressed her willingness to work from home, but Rufo did not approve her request to work from home.

After going on an approved leave pursuant to the Federal and Medical Leave Act (FMLA) in December 2011, Ritter received a letter dated April 2, 2012 in which she was terminated from her employment with petitioner effective April 13, 2012. The letter did not give her a reason for her termination.

On April 12, 2012, Ritter filed a complaint with respondent alleging that she was harassed and terminated in retaliation for participating in protected activities including filing health and safety complaints against SUNY-ESF for unsafe working conditions.

Testimony of Joseph Larry Rufo

At all times relevant to this proceeding Joseph Rufo held the position of Vice President for Administration for SUNY-ESF and, among other things, was responsible for overseeing the Physical Plant and Facilities department. Rufo reported directly to the President and was Ritter's immediate supervisor. He was involved in hiring Ritter and recommended her hiring. Ritter began employment as Director of Physical Plan and Facilities at SUNY-ESF in March 2010.

In the fall of 2010, Ritter raised some concerns related to health and safety with Rufo. In January 2011, Rufo relayed Ritter's concerns to the President of the College, Neil Murphy, and the college's executive cabinet. Murphy requested a report on the nature and scope of the compliance issues with suggestions on how to address them, and Ritter was part of a team of petitioner's employees charged with preparing such report.

Rufo testified that Ritter went on medical leave in January 2012 and requested to continue to perform her job responsibilities from home. Rufo was aware that Ritter's request to work from home was denied and that her employment was eventually terminated. Rufo testified that he did not participate in the decision to terminate Ritter or deny her request to work from home during the leave, although he did not think that she could have performed her job functions from home. Rufo further testified that Marcia Barber, petitioner's Director of Human Resources, explained to him petitioner's policy of terminating employees on medical leave at the expiration of the approved leave unless that employee requests an accommodation and such is approved, and that he did not believe that either decision was based on her having raised safety and health complaints relating to petitioner's facilities.

Testimony of Cornelius (Neil) B. Murphy, Jr.

Murphy was the President of SUNY-ESF and held that title during all times relevant to this matter. He testified that he recalls Ritter bringing forward certain concerns she had regarding health and safety issues in January 2011. In response, he directed Rufo to ask Ritter for a full compliance report addressing all the potential lapses in compliance and environmental, health and safety issues covering the main campus and all satellite locations.

Murphy received a comprehensive report in October 2011 and directed Rufo to immediately address four areas of concern that were outlined in the report. After those issues were addressed, Murphy was not aware of additional health and safety concerns raised by Ritter.

Murphy testified that he prepared Ritter's letter of termination in accordance with petitioner's policy for any employee unable to return to work after expiration of an approved medical leave, with or without a reasonable accommodation. He further testified that the college needed to fill the position but that the college complied with the section of the Americans with Disabilities Act that would permit Ritter certain accommodation that would allow her to return to work and appropriately fill the job requirements, but that Ritter never made a request for a 'reasonable accommodation.'

Murphy testified that SUNY-ESF did not take any action against Ritter as retaliation for her making safety and health complaints. He would have been disappointed if she was aware of such issues and did not raise them.

Testimony of Marcia Barber

Marcia Barber was the Human Resources Director for SUNY-ESF during all times relevant to this matter. Barber testified that Ritter applied for FMLA leave in December 2011, and petitioner granted Ritter's request. Ritter's approved medical leave started on December 22, 2011. Barber testified that petitioner's employees who are on the same type of medical leave as the one Ritter applied for and received, are not allowed to work from home. Instead, they may request a reasonable accommodation. Barber's unit notified Ritter of such by letter on January 10, 2012. Barber's unit did not receive any such request from Ritter at any time during Ritter's FMLA period. Following petitioner's policy, and having received no request for a reasonable accommodation that would have allowed Ritter to return to work, Barber advised Murphy to terminate Ritter. On April 2, 2012, petitioner sent a letter to Ritter advising Ritter of her termination of employment based on her failure to return to work at the end of her approved leave with or without a reasonable accommodation. Barber testified that Ritter was treated the same way as any other SUNY-ESF employee in the same situation.

Testimony of Bonnie Charity

Bonnie Charity is a former employee of SUNY-ESF, now retired. She worked in the library and served in various positions including chair of the safety and health committee for the Civil Service Employees Association (CSEA) Public Employee Union during Ritter's employment at SUNY-ESF. Charity testified that she had been involved with health and safety issues at SUNY-ESF since 1999 and during that time worked frequently with management on health and safety issues. She testified that she herself had made safety and health complaints to management and respondent and was never retaliated against by the petitioner who instead thanked her for helping to keep the campus safe.

Respondent's Determination

John W. Scott, Hearing Officer, of respondent's Administrative Adjudication Unit, issued the determination under review to claimant on September 23, 2014, with a copy to petitioner. The determination states that:

"The discrimination claim that you filed against your employer, SUNY ESF, has been investigated by the New York State Department of Labor, Bureau of Public Safety and Health (PESH), and its findings have been reviewed by this office.

"Upon review of the PESH investigative report, the investigative summaries, and the documentary evidence obtained in the course of the investigation, it is the Department's determination that SUNY ESF has behaved in a discriminatory and/or retaliatory manner against you for having engaged in PESH Act protected activities in violation of Labor Law § 27-a (10). As a consequence, this matter is being referred to the New York State Office of Attorney General for action.

"Pursuant to Labor Law § 101, SUNY ESF may petition the Industrial Board of Appeals for a review of this determination. Such petition must be filed within 60 days from the date hereof."

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The PESHA, Labor Law § 27-a [10] [a], provides that no person shall discharge, discipline or in any manner discriminate against an employee for filing a public safety and health complaint. Labor Law § 27-a [10] [b] sets forth the statutory enforcement process:

> "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 . . . 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."

The Board's jurisdiction is not to determine whether petitioner violated the PESHA, but to review whether respondent's determination that it did was reasonable and can support respondent's referral of the matter to the Attorney General to bring an action in Supreme Court against petitioner.

The civil prosecution of a PESH retaliation case in Supreme Court would require evidence that: (1) petitioner engaged in a protected activity; (2) the employer was aware of the protected activity; (3) she suffered an adverse employment action; and (4) there was a causal nexus between the protected activity and the adverse employment action. *See, e.g., Matter of Adam Crown*, Docket No. PES 10-009 [Oct. 11, 2011]; *Matter of Paul Danko*, Docket No. PES 09-002 [Mar. 24, 2010] (applying standards of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 [1972]); *Dept of Correctional Services v. Div. of Human Rights*, 238 AD2d 704 [3d Dept. 1997] (applying federal standards to New York discrimination cases). In the present case, respondent determined that a prima facie case of retaliation was established. The only issue is whether, as petitioner asserts, SUNY-ESF established that it had legitimate non-discriminatory, non-pretextual reason for its action.

Petitioner bears the burden of proof in proceedings before the Board. (*See* Labor Law § 101 and Board Rules § 65.30). If the Board finds that Petitioner has met this burden, it shall revoke, amend or modify the determination. (Labor Law § 101[3]). We find based on the record before us that respondent's determination that petitioner discriminated or retaliated against claimant in violation of Labor Law § 27-a (10) is unreasonable and must be revoked.

There is no dispute that claimant engaged in a protected activity by raising safety and health concerns, that petitioner was aware she had made such complaints, and that she was terminated, which was an adverse employment action. With respect to the nexus between the

protected activity and the adverse action, causation may be established "indirectly by showing that the protected activity was followed closely by discriminatory treatment, . . . or directly through evidence of retaliatory animus directed against a plaintiff by the defendant" (*De Cintio v Westchester County Medical Ctr.*, 821 F2d 111, 115 [2d Cir 1987]). Respondent argues, and we agree, that claimant having presented safety and health concerns at various times starting in the fall of 2010 and culminating with a report in the fall of 2011, and her termination in April 2012, establishes the required nexus.

A prima facie case having been established by respondent, the burden shifts to petitioner to articulate a legitimate non-discriminatory reason for the adverse action (*McDonnell Douglas*, 411 US at 802). Petitioner produced credible evidence that it terminated Ritter for a legitimate, non-discriminatory reason. We credit petitioner's evidence that Ritter was terminated because she did not return to work after her approved FMLA leave ended. Additionally, petitioner offered credible evidence that it encourages employees to report safety and health issues and promotes a culture of health and safety compliance. Petitioner presented credible evidence that employees raising health and safety concerns are not retaliated against. Charity, a former SUNY-ESF employee and CSEA Union official, testified that during the time Ritter worked for the college and prior thereto, other SUNY-ESF employees had made numerous reports of health and safety non-compliance to the college with no retaliation taken against those employees by the college. Charity herself had in the past raised health and safety complaints, including a PESH complaint, and had never been retaliated against by petitioner, but rather thanked for her efforts.

Petitioner also presented credible evidence that it has a well-established policy regarding FMLA approved leave. That is, to request an employee return to work upon the end date of the approved leave, or request additional leave or a reasonable accommodation for petitioner's consideration. It is undisputed that Ritter did not communicate with petitioner after she left on her approved leave. Petitioner's director of human resources, Barber, testified that Ritter's case was no different than any other SUNY-ESF employee who had requested and received approved leave. Respondent did not rebut petitioner's policy with respect to FMLA or offer any evidence that petitioner used its policy to terminate her as a pretext for retaliating against her for making health and safety complaints (*McDonnell Douglas* 411 US at 804).

Ritter's departure on medical leave was, according to her own testimony, due to her need to limit her physical activity as recommended to her. Having availed herself of the approved leave, Ritter had to follow petitioner's related policy. Failing to do so resulted in petitioner terminating her employment solely for that reason. On the record before us, we find that petitioner has met its burden in proving they had a non-discriminatory reason to terminate Ritter. Petitioner's termination of Ritter's employment had nothing to do with Ritter engaging in protected activity and rather reflected petitioner's policy for all employees returning to work after FMLA leave has expired. We find petitioner met its burden to prove respondent's determination was unreasonable. The determination that petitioner discharged claimant in violation of Labor Law Section § 27-a (10) (a) is revoked.

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NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Determination of the Commissioner of Labor is in all respects revoked and the petition is granted.

Vilda Vera Mayuga, Chairperson

J. Christopher Meagher, Member

Michael A. Arcuri, Member

Absent
Molly Doherty, Member

Gloribelle J. Perez, Member

Dated and signed by the Members
of the Industrial Board of Appeals
at New York, New York
on January 25, 2017.