STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ROBERT J. WOLFF, Petitioner, To Review Under Section 101 of the Labor Law: A Determination Made Under Article 2 of the Labor Law, dated May 1, 2015, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 15-005 RESOLUTION OF DECISION

APPEARANCES

Robert J. Wolff, petitioner pro se.

Pico P. Ben-Amotz, General Counsel, NYS Department of Labor, Albany (*Fredy Kaplan* and *Amy Karp* of counsel), for respondent.

WITNESSES

Petitioner Robert J. Wolff, for petitioner.

Safety and Health Investigator Douglas Dubner, for respondent.

WHEREAS:

On May 7, 2015, petitioner Robert J. Wolff (hereinafter "Wolff") 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 issued by respondent Commissioner of Labor (hereinafter "Commissioner" or "DOL") on May 1, 2015. The Commissioner filed her answer on June 30, 2015.

Hearings were held on January 19, 2016, December 6, 2016, May 19, 2017, and November 3, 2017 in White Plains, New York before Administrative Law Judge Jean Grumet, the designated hearing officer in this proceeding. Each party was afforded a full opportunity to present documentary evidence, examine and cross-examine witnesses, and make statements relevant to the issues.

The determination under review dismissed petitioner's complaint that his employer, Mount Pleasant Town Water & Sewer Dept. (hereinafter "Mount Pleasant"), had discriminated against

him in violation of the provisions of Labor Law § 27-a (10) by eliminating Wolff's employment position after Wolff complained about safety issues against Mt. Pleasant. Wolff asserted that his complaint should not have been dismissed because Mt. Pleasant eliminated his position in retaliation for safety complaints that he made.

In the petition and at the hearing, petitioner also made a motion requesting that the Board reconsider a decision that it issued in *Matter of Robert J. Wolff*, Docket No. PES 07-002 (January 29, 2009) dismissing the petition because petitioner failed to appear at the hearing. For the reasons set forth below, the Board denies the motion for reconsideration.

Based on the record evidence, we find that petitioner did not meet his burden of proof to establish that the Commissioner's determination dismissing his complaint was unreasonable because there was insufficient evidence in the record to show that there was a causal connection between petitioner making safety and health complaints and the termination of his employment, which happened more than 11 months after he made the complaints

I. SUMMARY OF EVIDENCE

A. Testimony and Documentary Evidence of Petitioner Robert J. Wolff

Wolff was hired by Mount Pleasant to work with the water department on a part-time temporary basis in May 2004. In January 2005, he began employment with Mount Pleasant as a laborer in a permanent part-time position.

Wolff filed complaints in the instant matter with the New York State Department of Labor's (hereinafter "DOL") Public Employee Safety and Health Bureau (hereinafter "PESH") for safety and health violations on July 6, 2010. Some of those complaints resulted in the issuance of notices of violation to Mount Pleasant. Wolff testified that the most serious of the complaints that he filed on July 6, 2010 was for the Town's failure to provide fall protection equipment to Wolff when he was sent to perform work by himself on a steep, rocky hill in an area with no cell phone reception. After inspections on July 28, 2010 and August 2, 2010, PESH issued a violation on November 1, 2010 to Mount Pleasant for failing to properly document the workplace hazards at that site and for failing to require employees working at that site to use necessary personal protective equipment. Additional violations were issued on November 1, 2010 for that work site for Mount Pleasant's failure to assess the need for personal protective equipment to protect employees from falling tree limbs and sharp branches. Wolff also filed complaints on July 6, 2010 about blocked access to an eye wash station in a garage. After an inspection on August 12, 2010, PESH issued a violation on December 7, 2010 based on Wolff's complaint for blocked aisles and passageways in the garage, including the passageway leading to an eye wash station. Wolff filed additional complaints on July 6, 2010 that were inspected but did not result in the issuance of violations.

On June 30, 2011, Mount Pleasant informed Wolff in a letter that due to budgetary reasons, the Town was considering eliminating multiple positions, including Wolff's position, which would be eliminated effective July 30, 2011. On July 26, 2011, Wolff filed a discrimination complaint with PESH stating that Mount Pleasant's action to eliminate his position was done in retaliation for the PESH safety and health complaints that he filed on July 6, 2010.

At the hearing, Wolff also testified that Mount Pleasant assigned him to complete assignments alone that would typically be assigned to two people working together. One such example was an assignment that required him to use a truck that has a heavy hydraulic lift that should be lifted by two people. Because Wolff had to lift it alone, he injured himself and sought medical treatment. Wolff did not offer documentation evidencing the injury or medical treatment. There is a supervisor's investigation report about this incident that was admitted into evidence. That report is unsigned and says "5/23" for the date. Wolff did not testify about who completed this report or who received the report. Wolff's PESH discrimination questionnaire that he completed also references the truck with the heavy hydraulic lift as a safety and health issue that he complained about. Wolff signed an affidavit on July 18, 2013 that which references the incident with the truck and the heavy hydraulic lift. The affidavit states that the incident occurred on May 23, 2011. Wolff testified that Mount Pleasant assigned him to do other jobs alone that typically would be assigned to at least two people, such as being assigned to paint fire hydrants on a busy road where large trucks were passing and being directed to drive himself to the emergency room after hitting his head while working alone. Wolff did not testify about when either of those events happened. Wolff's testimony was that he was assigned to work alone in retaliation for his safety and health complaints to PESH.

B. *Testimony of Investigator Douglas Dubner*

Douglas Dubner (hereinafter "Dubner") testified that he is an enforcement officer with PESH and, thus, investigates employee safety complaints. He is also a discrimination investigator, so he investigates complaints from employees who feel they were discriminated against for making safety complaints.

Wolff submitted a PESH safety and health complaint against the Town of Mount Pleasant Water and Sewer Department, Wolff's employer at the time, to PESH on July 6, 2010. After an investigation in response to Wolff's complaint, PESH issued several violations to Mount Pleasant on November 1, 2010. The violations included dates by which Mount Pleasant had to abate the violations and if Mount Pleasant timely abated, fines would not be issued by PESH against Mount Pleasant. Dubner testified that all of the violations issued on November 1, 2010 were timely abated. He confirmed this through a re-inspection.

On July 18, 2011, Dubner spoke to Wolff on the phone about Wolff's discrimination complaint. Dubner then mailed Wolff a document that contained the information Wolff provided to Dubner over the phone. On July 26, 2011, Dubner received Wolff's written PESH discrimination complaint. Dubner testified that Wolff told him that on June 30, 2011, Mount Pleasant told Wolff he would be laid off effective July 28, 2011. Dubner sent a notice of Wolff's discrimination complaint to Mount Pleasant. Dubner testified that Mount Pleasant sent a response to Dubner stating that the decisions to eliminate Dubner's position was a "budgetary decision." Dubner testified that Wolff said that he believed he had seniority over some of the employees that were not laid off.

Dubner testified that Wolff's PESH complaint of discrimination was timely because he filed his complaint within 30 days of being given notice that his position was being eliminated. Dubner did not believe that Wolff's job was being eliminated in response to Wolff filing PESH safety complaints, but he believed it was due to budgetary reasons. Dubner further testified that Mount Pleasant was able to freely terminate Wolff because he was not a unionized employee

working under contract. Dubner did not find that Mount Pleasant was "overly upset about [Wolff] making these safety complaints that would cause them to fire him." Dubner did not find that there was a nexus between the safety complaints and the termination, so he recommended that the retaliation complaint be found to have no merit. After Dubner made a recommendation, Steven Pepe, from DOL's Counsel's office, issued a determination finding that there was no causal connection between Wolff's safety and health complaints and the elimination of his job. DOL declined to take further action on Wolff's discrimination complaint.

II. 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]; Industrial Board of Appeals 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

Under the Public Employees Safety and Health Act (hereinafter "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]). 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, 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]; *Matter of Janice Razzano*, Docket No. PES 11-009, at pp. 8-9 [December 14, 2012]).

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 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]). 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).

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). 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).

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. Petitioner's Motion for Reconsideration is Denied

Petitioner asked the Board to reconsider a decision that it issued in a prior retaliation case wherein the petition was dismissed because petitioner failed to appear at the hearing. (*Matter of Robert J. Wolff*, Docket No. PES 07-002 at p. 2 [January 28, 2009]). Were the Board to reconsider its decision and re-open that matter, any evidence prior to July 6, 2010, may be relevant to the instant proceeding. Otherwise, only evidence from July 6, 2010 (the date that petitioner filed PESH safety and health complaints) until July 26, 2011 (the date that petitioner filed the PESH retaliation complaint at issue here) is relevant in this proceeding.

Respondent opposes petitioner's request for reconsideration of the decision issued under Board Docket No. PES 07-002 asserting that petitioner did not demonstrate a good cause for his failure to appear at the hearing and that respondent would be prejudiced by the delay between the January 28, 2009 decision and the instant case.

Petitioner testified that he did not appear at the October 24, 2008 hearing for the case under Board Docket No. PES 07-002 because he was consumed by a federal court discrimination action that he filed against Mount Pleasant. According to petitioner's testimony, the federal court case

was ongoing at that time and he was spending a lot of his time dealing with discovery. Petitioner further testified that he was told by the Board and by the DOL that he could re-open or refile that case at a later time. Petitioner did not offer any documentary evidence to support that testimony nor did he subpoena the Board employee or the DOL employee who he asserted told him the case could be re-opened or re-filed at a later date. The Board does not find petitioner's testimony credible particularly since what he alleges a Board employee and a DOL employee told him is not consistent with the Board's own written rules that govern motions for reinstatement and reconsideration.

We exercise our discretion and deny petitioner's motion for reconsideration in Board Docket No. PES 07-002. Petitioner elected to abandon that case because of the federal court action that he was also involved in at that time and he took no steps to have the Board reconsider the January 28, 2009 decision dismissing his petition until he filed a petition in this matter on May 7, 2015, more than six years after the Board dismissed the petition in Board Docket No. PES 07-002. While Board Rule (12 NYCRR) § 65.41 does not fix a time by which an application for reconsideration must be made, we decline to exercise our discretion to grant reconsideration that was requested more than six years after the decision was issued (*See Matter of Hassan Osman et al.*, Docket No. PR 15-338, at p. 2 [December 13, 2017] [request for reconsideration denied when it was brought more than eight months after the decision dismissing the petition was served]). We also do not find that petitioner's choice to abandon his case before the Board so that he could focus on a federal court case that he was litigating against Mount Pleasant to constitute good cause to excuse his default at the October 24, 2008 hearing. As such, the only relevant evidence in this matter must have occurred on or after July 6, 2010, the date on which petitioner made safety and health complaints to PESH.

B. There is No Dispute that Petitioner Engaged in Activities Protected by PESHA and Mount Pleasant Had Knowledge of those Protected Activities

There is no dispute that petitioner engaged in protected activity because on or about July 6, 2010, petitioner filed safety and health complaints with PESH, some of which resulted in the issuance of citations to Mount Pleasant. There is also no dispute that Mount Pleasant had knowledge of the safety and health complaints that petitioner filed in July 2010. Petitioner thereby satisfied the first two prongs of a prima facie case – protected activity and the employer had knowledge of the protected activity

C. There is No Dispute that the Termination of Petitioner's Employment Was an Adverse Action

It is also undisputed that the elimination of petitioner's laborer position on July 30, 2011 was an adverse action under PESHA (Labor Law § 27-a [10] [a]). Thus, petitioner satisfied the third prong of a prima facie retaliation case. The remaining element of the prima facie case is whether there was a causal connection between petitioner's protected activities and the adverse action.

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D. Respondent Reasonably Determined that there was No Causal Connection Between Petitioner's Protected Activity and the Adverse Action

The issue in dispute in this matter is whether it was reasonable for respondent to determine that there was not a sufficient nexus between the protected activity and the adverse employment action. We find that there is insufficient evidence in the record to show that there was a causal connection between Wolff's safety and health complaints and his termination.

Causation may be established indirectly by circumstantial evidence "showing that the protected activity was closely followed in time by the adverse action" (*Kwan*, 737 F3d at 845) (citations omitted). There is no clear definition of how much time is too much time to evidence temporal proximity (*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."]). While there is no "bright line," it is reasonable to find that there is a range within which the events must occur to constitute temporal proximity (*Jordan v United Health Group Inc.*, 2019 US App LEXIS 26198, *5-6 [2d Cir 2019] [over one year is too long to show temporal proximity]; *Grant v Bethlehem Steel Corp.*, 622 F2d 43, 45-46 [2d Cir 1980] [Eight months between the protected activity and the adverse action is sufficient to show temporal proximity]; *Nicastro v New York City Dep't of Design & Const.*, 2005 US App LEXIS 4255, **3 [2d Cir 2005] [Ten months between complaint and adverse action is too attenuated]).

Petitioner's own testimony and records reflect that he was terminated from his position about 11 months after he made safety and health complaints. He made safety and health complaints on July 6, 2010 and he was informed that his position would be eliminated on June 30, 2011. Petitioner asserted at the hearing that he also made a safety complaint on May 23, 2011 after he was injured on a truck at work. There is no evidence in the record that Mount Pleasant actually had knowledge of that complaint, a required element of petitioner's prima facie case for retaliation (*Kwan*, 737 F3d at 844). The "supervisor's investigation report" about the May 23, 2011 incident does not show who completed that report or who that report was given to. Additionally, petitioner's retaliation complaint submitted to PESH makes no reference to the May 23, 2011 safety incident that petitioner asserted he complained about.

We find that the temporal proximity of the adverse action taken against Wolff in relation to his protected activities was too attenuated to meet the required causation element of prima facie retaliation. Ultimately, petitioner failed to provide any evidence that would support a finding of the requisite nexus. As petitioner failed to offer sufficient evidence to establish a prima facie case of retaliation, the burden did not shift and we need not consider whether there was a legitimate, nondiscriminatory reason for the elimination of Wolff's position. Petitioner did not meet his burden to prove that the PESH determination dismissing Wolff's retaliation complaint was incorrect or unreasonable. Thus, the Board denies the petition.

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NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The petition for review filed herein is denied.

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
New York, New York

Najah Farley, Member
New York, New York

Dated and signed by the Members
of the Industrial Board of Appeals
on October 23, 2019.

NOW, THEREFORE IT IS HEREBY RESOLVED THAT:

1. The petition for review filed herein is denied.

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
New York, New York

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