STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of: ANNA GUAN, Petitioner, To Review Under Section 101 of the Labor Law: A Final Determination of the Labor Law dated September 14, 2017, - against - THE COMMISSIONER OF LABOR, Respondent.	DOCKET NO. PES 17-013 RESOLUTION OF DECISION

APPEARANCES

Anna Guan, petitioner pro se.

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

WITNESSES

Petitioner Anna Guan for petitioner.

Safety and Health Investigator Douglas Dubner for respondent.

WHEREAS:

On November 10, 2017, Anna Guan (hereinafter "Guan") filed a petition with the Industrial Board of Appeals (hereinafter "Board") pursuant to Labor Law §§ 27-a (10) and 101 to review a determination issued by the Commissioner of Labor (hereinafter "respondent," "Commissioner," or "DOL") dismissing her complaint of unlawful retaliation and discrimination by her public employer, the New York State Department of Environmental Conservation (hereinafter "DEC"). The Commissioner filed her answer to the petition on December 6, 2017.

A hearing was held on July 10, 2018 and September 17, 2018 in New York, New York before Board Member and the designated hearing officer in this proceeding, Gloribelle J. Perez. 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 that is under review dismissed petitioner's complaint that the DEC discriminated against petitioner in violation of Labor Law § 27-a (10) by terminating Guan after she complained about safety and health issues related to her work for the DEC. The

determination stated that there was no causal connection between Guan's safety and health complaints and her termination, and that the DEC had legitimate, non-discriminatory reasons for terminating her employment. Guan asserted in her petition that the respondent incorrectly determined that her complaint should be dismissed because the DEC terminated her position in retaliation for her safety and health complaints.

The Board finds that the petitioner did not meet her burden of proof to establish that the respondent's determination dismissing her complaint was incorrect or unreasonable because the record did not include sufficient evidence to prove that there was a causal connection between Guan's safety and health complaints and the DEC's termination of her employment.

I. SUMMARY OF EVIDENCE

Testimony and Documentary Evidence of Anna Guan

Guan was employed as an Environmental Engineer 2 in the DEC's Division of Air Resources since 1998, and one of her duties required her to conduct tests measuring perchloroethylene (hereinafter "PERC") concentrations inside the drums of dry-cleaning machines. PERC is a chemical used by dry cleaners and exposure to PERC can cause various health problems, some of which can be serious. Guan became ill due to her repeated exposure at work to high levels of perchloroethylene.

Guan testified that in 2009, she began complaining to her supervisors that she was not provided proper safety equipment to perform her work, such as a full-face respirator. She also testified that she was not provided with enough replacement cartridges or filters for the respirator for the frequency with she inspected the dry cleaning equipment that exposed her to PERC. Given the serious impact PERC exposure can have on someone's health, Guan felt that her complaints were very serious in nature. On October 7, 2011, a representative from Guan's union, the Public Employees Federation (hereinafter "PEF") filed a written complaint with the DEC about Guan and other engineers being exposed to PERC without adequate personal protection equipment. On November 21, 2011 the PEF representative also made a complaint to PESH about Guan and other engineers being exposed to high levels of PERC without adequate personal protection equipment. PESH conducted an investigation from November 21, 2011 until January 10, 2012, including inspections, and issued two violations on January 23, 2012. The first violation found that the DEC had not done a proper hazard assessment of the personal protective equipment available to employees. The second violation found that training provided to employees did not include information about PERC. Both of the violations were categorized as non-serious violations. Guan testified that she did not think the violations were non-serious given the number of years and frequency for which she was inadequately protected from PERC exposure.

On May 26, 2011, Guan submitted to the DEC a Supervisor's Occupational Accident Investigation Report that stated that she has been exposed to PERC repeatedly since 2009 without personal protective equipment, which caused her to become ill. This report was treated as an application for workers' compensation benefits, which Guan ultimately received commencing March 22, 2012. On February 24, 2012, Guan's neurologist wrote a note stating that she should not go to work from February 25, 2012 to March 24, 2012. Guan gave that note to her supervisor at the DEC on March 20, 2012. On March 21, 2012, Guan was sent home from work without pay by her supervisor, Merlange Genece. As stated above, her workers' compensation benefits began on March 22, 2012, although the decision awarding her such benefits did not issue until October 3, 2012. Guan's workers compensation benefits ended on

March 21, 2013. Guan also applied for retirement disability benefits on January 9, 2013 and that application was denied on December 5, 2014. Guan received a letter from the DEC on December 22, 2014 stating that she was terminated effective December 5, 2014.

Guan testified that the DEC was not happy with her because she requested safety equipment and because she filed health and safety complaints. She testified that the DEC did not allow her to use her vacation and sick leave credit during the seven months between when she was escorted off the premises on March 21, 2012 and when the Workers' Compensation Board issued their decision on October 3, 2012 granting her backdated benefits. Guan testified that if the DEC had allowed her to use her earned leave credits between March 21, 2012 and October 3, 2012, then the DEC would not have considered her as someone on an extended unpaid absence and the DEC would not have terminated her employment.

Guan added that many of her colleagues missed months of work, designated as paid time off, and would only report to work a couple of times a year while waiting to be approved for disability retirement benefits. Guan testified that unlike her colleagues, while Guan's disability retirement benefits application was pending, Guan was not allowed to come into work a couple of times a year while using paid time off accruals for the other days of the year. Guan testified that she was treated differently because she filed safety and health complaints with PESH. Guan did not file a complaint with PESH when she was first placed on unpaid leave on March 21, 2012. She contacted PESH on January 21, 2015 to complain that she was terminated by the DEC on December 22, 2014 in retaliation for filing health and safety complaints.

Guan testified that while she was not the only DEC employee that was part of the safety and health complaints made to PESH, she was the person who the DEC fired because she asked for personal protective equipment more than the other employees did. Guan also testified that she was treated differently than white and/or male engineers because she was given assignments that exposed her to high levels of PERC much more than white and/or male engineers. Guan also testified that the DEC violated the Americans with Disabilities Act by not allowing her to use leave time when she could not come to work due to the health problems she got from work.

Testimony of Investigator Douglas Dubner

Douglas Dubner (hereinafter "Dubner") works in the PESH bureau as an investigator and industrial hygienist. The PESH Bureau received Guan's retaliation complaint on January 21, 2015 and had not received any prior complaints from her regarding retaliation. Dubner testified that Guan did not contact PESH to file a complaint regarding being placed on worker's compensation in 2012 nor did she file a retaliation claim after being placed on unpaid leave on March 21, 2012.

In January 2012, PESH issued violations to the DEC in response to a complaint filed by Guan's union representative regarding high exposure to PERC without proper personal protective equipment. Dubner assisted with that investigation but was not the investigator who handled the entire investigation. Dubner did know that two violations were issued against the DEC. Dubner testified that the nature of the violations was non-serious and would not have caused the DEC to incur excessive costs, so he did not think the DEC was retaliating against Guan because of those violations.

Dubner conducted an investigative conference on December 6, 2016 during which he interviewed Guan; Marlene Agnew, the DEC director of personnel; Mark Cadrette, the DEC

director of employee relations; Merlange Genece, Guan's former supervisor at the DEC; Juan Abidia, a representative of the DEC affirmative action office; Ajay Shah, a DEC engineer and sometimes supervisor to Guan; Katy Murphy, the PEF representative for Guan and other DEC employees; Deepak Ramrakhiani, a DEC engineer; and Shaun Snee, a DEC engineer. Dubner testified that the DEC representatives stated that Guan was terminated because she had not reported to work for two years and nine months and they believed she had no intention of returning to work. Dubner also testified that the DEC representatives told Dubner that she was not fired in retaliation for making safety and health complaints, which she had done around three years prior to her being terminated.

After completing his investigation, Dubner made a recommendation in his report that Guan was not retaliated against by the DEC in violation of Labor Law § 27-a (10) (a). Dubner testified that Guan did engage in protected activity that her employer knew about, and her employer did terminate her after that, but that there was no evident causal connection between Guan's protected activity and the adverse action given that she was terminated well over two years after she made a safety and health complaint. Dubner testified that the adverse action would have needed to occur much closer in time to the protected activity to find causation.

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 her 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 that 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 she 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 Engaged in Protected Activity, Her Employer Knew About That Protected Activity, and Her Employer Terminated Her, Which Was an Adverse Action.

There is no dispute that petitioner engaged in protected activity by complaining repeatedly between 2009 and 2011 that she did not have adequate personal protective equipment to use when she was exposed to PERC. There is also no dispute that the DEC had knowledge of the safety and health complaints that petitioner made. The DEC terminated petitioner after she made safety and health complaints, and the parties are not in dispute that there was an adverse action. As petitioner satisfied the first three prongs of a prima facie retaliation case, the only remaining required element of a retaliation case is that there be a causal connection between the protected activity and the adverse action. The parties disagree as to whether petitioner established that required causal connection to make out her prima facie case.

B. 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 no causation between the protected activity and the adverse employment action. We find that it was reasonable for respondent to determine that there was no causal connection between Guan's safety and health complaints and her 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 at *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] [8 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 at **3 [2d Cir 2005] [10 months between complaint and adverse action is too attenuated]).

Guan was terminated from her position in December 2014, which was almost three years after PESH issued safety and health violations in January 2012 to the DEC that were based, at least in part, on Guan's safety and health complaints. Petitioner testified that she also complained to PESH that the DEC forced her to go on unpaid leave in March 2012 in retaliation for making safety and health complaints. There is no evidence in the record that she ever made a discrimination complaint at that time other than her vague testimony that does not specify when she made such a complaint. There is no documentary evidence to corroborate that testimony. Without more, we find the gap between petitioner's protected activity and DEC's alleged retaliatory actions, a gap approximately three years in length, is insufficient to 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 Guan's termination. Petitioner did not meet her burden to prove that the PESH determination dismissing Guan's retaliation complaint was incorrect or unreasonable. Thus, the Board denies the petition.

We note that Guan also testified that the DEC discriminated against her because she is an Asian woman who has a disability. We do not make any findings or determinations with regard to those allegations that may be viable claims under anti-discrimination laws, which the Board does not have jurisdiction over.

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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

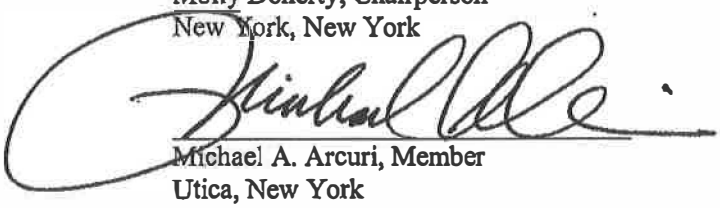
Najah Farley, Member
New York, New York

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



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