

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

YEVGENIYA ZILBER,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Determination dated November 25, 2022,

- against -

THE COMMISSIONER OF LABOR,

Respondent.
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DOCKET NO. PES 23-004

RESOLUTION OF DECISION

APPEARANCES

Yevgeniya Zilber, petitioner pro se.

Jill Archambault, General Counsel, NYS Department of Labor, Albany (*Evan S. Zablow* of counsel), for respondent.

WHEREAS:

This proceeding was commenced when petitioner filed a petition with the Industrial Board of Appeals (hereinafter “Board”) that was received on January 22, 2023. The petition states that respondent’s dismissal of her complaint was unreasonable or invalid because petitioner was retaliated against by her employer for filing an Equal Employment Opportunity Commission complaint and a New York City Human Rights Commission complaint, as well as for reporting crime to the Department of Investigation and the New York City Police Department. On February 1, 2023, the Board served the petition on respondent Commissioner of Labor. Respondent moved, on April 3, 2023, to dismiss the petition because petitioner failed to plead a prima facie case of retaliation, specifically because petitioner did not participate in a workplace safety and health protected activity and there is no causal connection between the adverse action as alleged by petitioner and the purported protected activity. Petitioner did not respond to the motion.

The Public Employees Safety and Health Act (hereinafter “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 respondent within 30 days of the violation (Labor Law §

27-a [10] [b]). If the respondent 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]). To prevail on a claim of unlawful retaliation, under Labor Law § 27-a (10), 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 v Andalex Group, LLC*, 737 F3d 834, 843-44 [2d Cir 2013]; *Matter of Town of Lee*, Docket No. PES 14-014, at p. 6 [May 3, 2017] [*McDonnell Douglas* burden shifting applies to PESHAs retaliation cases before the Board]).

The first element of a prima facie retaliation case requires participation in a protected activity, which in this case would be a complaint that falls within the purview of PESHAs (Labor Law § 27-a [10][a]). The petition alleged several complaints as the basis for the retaliation claim including complaints to the Equal Employment Opportunity Commission, the New York City Human Rights Commission, the Department of Investigation, and the New York City Police Department, none of which apparently alleged a violation of a safety or health standard. The substance of these complaints was instead related to discriminatory actions, such as not being invited to meetings and sexual harassment.

We agree with respondent that petitioner did not allege that she engaged in a PESHAs protected activity because she did not claim that she complained about a safety and health issue governed by PESHAs. Perhaps petitioner has a retaliation claim under the anti-discrimination statutes that fall under the purview of other agencies and/or commissions, but she has not sufficiently pled a claim under PESHAs. Accordingly, the petition must be dismissed for petitioner's failure to state a cause of action upon which relief may be granted.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

The Commissioner of Labor's motion to dismiss the petition for review is granted, and the petition for review be, and the same hereby is, dismissed.

Dated and signed by the Members
of the Industrial Board of Appeals
on August 9, 2023.



Michael A. Arcuri, Member



Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member

RECUSED

Sandra Abeles, Member