

STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

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In the Matter of the Petition of:

CHARLES TERMINI,

Petitioner,

To Review Under Section 101 of the Labor Law:
A Determination dated August 29, 2023,

- against -

THE COMMISSIONER OF LABOR,

Respondent,
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DOCKET NO. PES 23-013

RESOLUTION OF DECISION

APPEARANCES

Charles Termini, petitioner pro se.

Jill Archambault, General Counsel, NYS Department of Labor, Albany (*Joan K. Harris* of counsel) for respondent.

WHEREAS:

This proceeding was commenced when petitioner Charles Termini (hereinafter “petitioner” or “Termini”) filed a petition with the Industrial Board of Appeals (hereinafter “Board”) on September 29, 2023. On October 5, 2023, the Board served the petition on respondent Commissioner of Labor. Respondent moved on October 27, 2023, to dismiss the petition. Petitioner submitted opposition to the motion on November 24, 2023, and respondent filed a reply on December 22, 2023.

The petition seeks the Board’s review of a determination dated August 29, 2023, in which respondent found that petitioner did not have a claim of retaliation against his employer because: (1) the protected activity occurred three years prior to the adverse action so there was no temporal proximity between the events, which is a required element of a prima facie retaliation complaint; (2) not all of the individuals that interviewed petitioner for promotion positions knew of the safety and health complaints that he made, and thus there is no causal connection between the protected activity and the failure to promote petitioner, which is also a required element of a prima facie retaliation complaint; and, (3) the employer had legitimate business reasons to select candidates other than petitioner for the positions to which petitioner sought promotion.

The petition alleges that petitioner attempted to add the 2020 promotion denials (which are the subject of the current petition) to a retaliation proceeding he previously filed before the Board based on an earlier promotional denial, but the hearing officer in the prior matter denied that request (*Matter of Charles Termini*, Docket No. PES 19-007, at p. 2 [Sept. 21, 2022]). Petitioner further alleges that the Department of Labor delayed providing him with the necessary forms to complain that he was retaliated against when he was denied promotions in 2020. Termini also alleges that the Department of Labor did not conduct a proper investigation of his 2020 retaliation claims because he was not afforded the opportunity to participate in interviews of the witnesses who claimed that they hired other candidates for the 2020 positions based on legitimate business reasons.

Respondent moves to dismiss this proceeding, arguing that the petition: (1) is barred under the doctrine of collateral estoppel; (2) is untimely because it actually seeks review of the Board's decision in *Matter of Charles Termini*, Docket No. PES 19-007, which was decided by the Board on September 21, 2022; and (3) does not allege any reason that respondent's 2023 determination to deny Termini's retaliation claim is invalid or unreasonable, instead asserting only that the investigation was flawed. Petitioner opposes respondent's motion by: (1) detailing several promotions for which he was passed over; (2) detailing an incident in which a former manager at Termini's worksite purportedly yelled at and used inappropriate language with him during a safety and health meeting; and (3) questioning the veracity of witness affidavits submitted during the investigation of Termini's retaliation complaint.

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 PESHA retaliation cases before the Board]).

We agree with respondent that petitioner failed to state a cause of action in his petition. Petitioner did not factually allege any causal connection between the alleged protected activity in which he engaged, and the adverse actions purportedly taken against him, a required element of a prima facie retaliation complaint.¹

¹ Termini also did not plead causation by alleging facts to support a finding of temporal proximity between petitioner's safety and health complaint and the claimed adverse actions. Petitioner failed to plead in the petition any facts as to when his safety and health complaint was made, other than to refer to our prior case, which involved 2017 safety and health complaints, three years prior to the 2020 adverse actions pleaded in this matter (*Matter of Anna Guan*, Docket No. PES 17-013, at p. 6 [October 23, 2019]; see also *Jordan v United Health Group Inc.*, 2019 US App LEXIS 26198

In the petition, Termini provided background from his prior case, including complaints about respondent's handling of his request for forms to contest the 2020 promotion denials. However, petitioner ultimately obtained those forms, filed them, and a determination was issued by respondent based on them. Petitioner lodges complaints about respondent's investigation, but does not assert any requirement allegedly violated by respondent in conducting her investigation. Lastly, and most importantly, petitioner makes no assertion that any particular individual who passed him over for any promotion did so because of his safety and health complaints, nor did petitioner allege that in his opposition to respondent's motion to dismiss. Rather, petitioner's opposition (a) alleges that he made 19 safety and health complaints and was a union steward which occurred from July 1, 2020 to November 29, 2021; (b) claims these incidents involved numerous individuals; (c) alleges examination scores of himself and other candidates; (d) provides conjecture on how two employment actions "could easily be viewed"; (e) outlines how a prior business manager allegedly was forced into early retirement because of his inappropriate treatment of petitioner; and (f) makes allegations (of tangential relevance) regarding his employer's process for notarizing documents. Overall, petitioner challenges respondent's investigation of his claims.

None of these arguments represents an affirmative factual allegation that any particular individual took any action against petitioner in retaliation for any protected health and safety activity, whether such protected activity took place in 2017 or at another time. Petitioner does allege that a specific instance of protected activity occurred in September 2019, but a complaint regarding that alleged protected activity is not before us as the contested determination by respondent indicates it relates only to protected activity in 2017. Neither petitioner nor respondent provided petitioner's retaliation complaint that he filed with the Department. In any event, petitioner does not factually allege that any particular decision maker took an adverse action based on the alleged 2019 protected activity, though he does allege that the person identified to have reacted negatively to his 2019 protected activity was forced to retire. Neither the petition nor petitioner's opposition sets forth a sufficient factual predicate to support either a causal connection or close temporal proximity between the alleged protected activity and the claimed adverse action. Accordingly, neither alleges sufficient facts to support petitioner's prima facie case.

We find that, because the contested determination made by respondent determined that petitioner was not retaliated against in 2020 after engaging in protected activity in 2017, and because petitioner did not plead sufficient facts to form a prima facie case of retaliation, the petition must be dismissed.

Despite the dismissal of the petition, we note that respondent's argument that this matter is barred under the doctrine of collateral estoppel is incorrect because petitioner's specific allegations of adverse action were not before the Board when the prior case was decided (*Matter of Charles Termini*, Docket No. PES 19-007 [Sept. 21, 2022]). Additionally, respondent is incorrect in arguing that the petition is untimely. After the hearing officer ruled that petitioner's challenge to alleged adverse actions occurring in 2020 could not be added to petitioner's previously filed petition, petitioner engaged in the appropriate process to file his new claim of retaliation.

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]). Based on the petition, there is no basis to infer petitioner's intent to rely on any protected activity more recent than the alleged 2017 safety and health complaints.

Nonetheless, as petitioner failed to plead each required element of a prima facie retaliation case, his petition must be dismissed.

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 March 13, 2024.



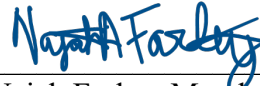
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Patricia Kakalec, Member



Molly Doherty, Chairperson



Najah Farley, Member



Sandra Abeles, Member