

Local 376, DC 37, 14 OCB2d 13 (BCB 2021)

(IP) (Docket No. BCB-4370-20)

Summary of Decision: The Union claimed that the DOT retaliated against an employee in violation of NYCCBL § 12-306(a)(1) and (3) when the employee's supervisor verbally and physically harassed him. The City argued that the Union failed to demonstrate that the supervisor's actions were motivated by the employee's union activity. It also argued that the supervisor's actions, for which she was disciplined, did not constitute an adverse employment action. The Board found that no adverse employment action occurred and, therefore, a *prima facie* case of retaliation was not established. Accordingly, the petition was denied. **(Official decision follows.)**

**OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING**

In the Matter of the Improper Practice Proceeding

-between-

LOCAL 376, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and-

**THE CITY OF NEW YORK and THE NEW YORK CITY DEPARTMENT
OF TRANSPORTATION,**

Respondents.

DECISION AND ORDER

On January 8, 2020, Local 376, District Council 37, AFSCME, AFL-CIO (“Local 376” or “Union”) filed a verified improper practice petition against the City of New York (“City”) and the New York City Department of Transportation (“DOT”). The Union asserts that the DOT retaliated against Christopher Carrasquillo for his union activities, in violation of § 12-306(a)(1) and (3) of the New York City Collective Bargaining Law (New York City Administrative Code, Title 12, Chapter 3) (“NYCCBL”), when his supervisor verbally and physically harassed him. The City

argues that the Union has failed to demonstrate that the supervisor's actions were motivated by the employee's union activity. It also argues that the supervisor's actions, for which she was disciplined, do not constitute an adverse employment action. The Board finds that no adverse employment action occurred and, therefore, a *prima facie* case of retaliation has not been established. Accordingly, the petition is denied.

BACKGROUND

Carrasquillo has been employed by the DOT as a Highway Repairer since March 2009. He is also a shop steward for Local 376. In this role, Carrasquillo listens to constituents' concerns and files grievances, improper practice petitions, and other complaints on their behalf. According to the Union, on October 11, 2019, Carrasquillo "played a major role in the filing of an improper practice petition" on behalf of another Highway Repairer. (Pet. ¶ 3)

Carrasquillo's direct supervisor is Elisa Clarke, who has been employed by the DOT as a Supervisor Highway Repairer since June 2015, after being promoted from the Highway Repairer title. Supervisor Highway Repairers are represented by District Council 37, Local 1157 ("Local 1157").

On October 21, 2019, Clarke asked Carrasquillo to fill out some paperwork, and a verbal and physical confrontation ensued. According to a statement written by Carrasquillo, on that date he approached a van that was driven by a co-worker with Clarke sitting in the passenger side.¹ After some initial greetings, Clarke asked Carrasquillo to go upstairs and fill out some paperwork. When he asked what the paperwork pertained to, Clarke responded by stating that he should just go upstairs and fill it out. As Carrasquillo walked away, another co-worker approached him and

¹ The statement is dated November 8, 2019.

asked him what was up. Carrasquillo responded that he was in “vacation mode.” (Ans., Ex. D) At this point, Clarke yelled from the van, calling Carrasquillo a “bitch” and asking why he had to tell everyone their business. (*Id.*) Carrasquillo asked why she called him that, and Clarke responded that he was “always telling everyone everything.” (*Id.*) According to Carrasquillo’s statement, after some more back and forth, Clarke exited the van and “got in [his] personal space and put her hand on [his] face and said, ‘what the [“f---”] you gonna do?’,” among other things. (*Id.*) The co-worker who had been driving the van then encouraged Carrasquillo to walk away, and he did so.²

Carrasquillo went inside the building and entered the men’s locker room, where he began talking with another co-worker while he changed his clothes. According to Carrasquillo, Clarke came walking towards the women’s locker room, which was adjacent to the men’s, while “cursing and yelling.” (Ans., Ex. D) Carrasquillo stated that he asked Clarke to leave him alone, but instead she entered the men’s locker room while he was partially undressed and “curs[ed]” and “verbally abuse[d]” him in front of the other co-worker. (*Id.*) She then threw a cup of juice and ice at Carrasquillo, hitting him on his chest, leg, and shoes.

Following these events, the DOT’s Office of the Advocate (“Advocate’s Office”) opened a disciplinary investigation into Clarke’s actions. On February 6, 2020, the Advocate’s Office preferred disciplinary charges against Clarke. Prior to an informal conference on the charges Clarke, Local 1157, and the DOT entered into an agreement in which Clarke accepted a suspension

² The City also submitted a written statement from the co-worker who was driving the van. This statement is dated November 12, 2019, and largely corroborates Carrasquillo’s version of the events.

without pay. As a result, the Advocate's Office concluded its disciplinary proceeding against Clarke.³

POSITIONS OF THE PARTIES

Union's Position

The Union argues that the DOT violated NYCCBL § 12-306(a)(1) and (3) by retaliating against and harassing Carrasquillo because of his union activity. The Union contends that the DOT was aware of Carrasquillo's role as a shop steward. Additionally, Clarke's statements that Carrasquillo was "getting into other people's business," combined with the temporal proximity to his recent involvement in filing an improper practice petition, demonstrate that Carrasquillo's union activity was a motivating factor in the DOT's harassment of Carrasquillo. (Pet. ¶ 11) In short, the Union asserts that the DOT harassed Carrasquillo because he was an effective shop steward. Thus, the Union argues that the Board should grant the petition.⁴

City's Position

The City contends that the Union has failed to plead facts sufficient to support finding an improper practice because the petition is based on allegations that are patently untrue. According to the City, there is no support for any conceivable argument that the events of October 21, 2019 related to Carrasquillo's recent filing of an improper practice petition on behalf of another employee. Rather, the City argues that the facts more likely indicate that a personal conflict between Carrasquillo and Clarke was the motivation for the confrontation. Citing Board precedent, the City contends that it is well-established that when an action is based on personal

³ These facts were set forth in in the City's answer, and the Union declined to file a reply.

⁴ The Union did not argue that Clarke's conduct independently violated NYCCBL § 12-306(a)(1), and we therefore do not analyze it as such.

animus, a claim that an employer was motivated by anti-union motivation must fail. Additionally, there is nothing to indicate that Clarke, who is represented by a union and is not a member of DOT management, would actively seek to restrict the union activity of a Local 376 member.

The City also argues that the Union failed to establish that the DOT took any adverse employment action against Carrasquillo. There were no disciplinary measures taken against him, and there is no evidence that the October 21, 2019 incident prevented him from engaging in any union activity. According to the City, a personal dispute between two employees does not rise to the level of an adverse employment act nor does it rise to the level of a retaliatory act under the NYCCBL. While Clarke's actions were clearly inappropriate, as evidenced by the fact that she was disciplined for them, there is nothing to indicate that her actions were taken as a result of anti-union animus. Consequently, the City contends that the Union has not pled a *prima facie* claim of retaliation, and the petition should be dismissed.

DISCUSSION

The Union claims that the DOT retaliated against Carrasquillo, in violation of NYCCBL § 12-306(a)(1) and (3), when his supervisor verbally and physically harassed him. "Since no hearing was held, in reviewing the sufficiency of the petition, we draw all permissible inferences in favor of Petitioner from the pleadings and assume for the sake of argument that the factual allegations contained in the petition are true." *Morris*, 3 OCB2d 19, at 12 (BCB 2010) (citing *Seale*, 79 OCB 30 (BCB 2007); *D'Onofrio*, 79 OCB 3, at 20, n. 11 (BCB 2007)).

To determine whether an action violates NYCCBL § 12-306(a)(1) and (3), this Board applies the test enunciated in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the

Board in *Bowman*, 39 OCB 51 (BCB 1987). This test states that, in order to establish a *prima facie* claim of retaliation, a petitioner must demonstrate that:

1. the employer's agent responsible for the alleged discriminatory action had knowledge of the employee's union activity; and
2. the employee's union activity was a motivating factor in the employer's decision.

Bowman, 39 OCB 51, at 18-19; *see also Feder*, 4 OCB2d 46, at 42 (BCB 2011).

Carrasquillo was a shop steward at the time of the incident with Clarke. In its answer, the City denied that the DOT was aware of Carrasquillo's union activity. Nevertheless, for the purposes of this decision we take Petitioner's claims as true and conduct our analysis presuming that the DOT and Clarke did in fact have knowledge of Carrasquillo's union activity. *See Morris*, 3 OCB2d 19, at 12.

However, in order to make out a claim under NYCCBL § 12-306(a)(3), a petition must allege that an adverse employment action was taken against the employee at issue. *See Andreani*, 2 OCB2d 40, at 28 (BCB 2009) ("crucial determination in such claims [is] whether a petitioner has alleged an adverse employment action taken by an employer"); *Moriates*, 1 OCB2d 34, at 13 (BCB 2008), *affd.*, *Matter of Moriates v. NYC OCB*, Index No. 114094/08 (Sup. Ct. N.Y. Co. Mar. 15, 2010) (Sherwood, J.) (petition must allege an adverse employment action regarding the terms and conditions of employment); *see also OSA*, 13 OCB2d 2, at 30-31 (BCB 2020) (finding that termination is an adverse employment action); *DC 37, L. 2507*, 11 OCB2d 18, at 22 (BCB 2018) (finding that the removal of a desirable assignment is an adverse employment action); *OSA*, 7 OCB2d 20, at 27 (BCB 2014) (finding that an undesirable transfer is an adverse employment action). Although the petition alleges that Clarke harassed Carrasquillo because he was an effective shop steward, it does not allege how any such harassment adversely affected

Carrasquillo's terms and conditions of employment. *See CSTG, L. 375*, 3 OCB2d 14, at 16-17 (BCB 2010) (alleged attempt to induce employee into dropping a grievance through intimidation and harassment does not constitute an adverse employment action); *Moriates*, 1 OCB2d 34, at 13 (refusal to allow petitioners to use employer's e-mail system for union campaign purposes did not constitute an adverse action regarding terms and conditions of employment).

Importantly, we also do not find an adverse employment action where, as here, the conduct consisted of one isolated incident and "there is no evidence to indicate that the employer encouraged, authorized, or ratified [Clarke's] conduct." *Echevarria*, 43 OCB 28, at 11-12 (BCB 1989); *see also Andreani*, 2 OCB2d 40, at 28 (finding no adverse employment action where the record lacked evidence that the employer "encouraged, counseled, ratified, condoned, or was in any other manner responsible for" disparaging statements allegedly made by petitioner's fellow union members concerning his union activity). In *Echevarria*, a supervisor allegedly verbally abused, harassed, and physically assaulted an employee because of his union activity.⁵ However, the Board found that the employer did not violate the NYCCBL since it brought disciplinary charges against the supervisor for his conduct and, thus, the conduct was not attributable to the employer. We find the same is true here. Rather than condoning Clarke's actions, the DOT brought disciplinary charges against her and ultimately, she was suspended without pay. *Cf. Fabbricante*, 71 OCB 30 (BCB 2003), (distinguishing *Echevarria* and finding a violation of NYCCBL § 12-306(a)(3) where members of management engaged in retaliatory conduct themselves and failed to take action to stop the improperly motivated conduct of the petitioner's

⁵ In that case, both employees were members of the same bargaining unit, but the supervisor was an official in a competing union that was attempting to persuade employees to change their certified bargaining representation. *See Echevarria*, 43 OCB 28.

immediate supervisors). As a result, it is clear that the DOT did not condone Clarke's treatment of Carrasquillo.

We find that no adverse employment action was taken against Carrasquillo for his union activity. Consequently, we find that the DOT did not violate NYCCBL § 12-306(a)(1) and (a)(3), and we dismiss the petition in its entirety.⁶

⁶ The dissent argues that it would find a violation of the NYCCBL because Clarke's actions had a "chilling effect" on Carrasquillo and his constituents. However, we note that a "chilling effect" is only relevant to the analysis of an alleged independent violation of NYCCBL § 12-306(a)(1). *See, e.g., DC 37, L. 1087*, 11 OCB2d 41, at 15 (BCB 2018) ("conduct that contains an innate element of coercion, irrespective of motive, can constitute conduct which, because of its potentially chilling effect . . . is inherently destructive of important rights guaranteed under the NYCCBL") (citations and internal editing marks omitted); *see also OSA*, 6 OCB2d 26 (BCB 2013); *DC 37, L. 376*, 73 OCB 6 (BCB 2004). As noted, the petition did not allege such a violation.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the improper practice petition, docketed as BCB-4370-20, filed by Local 376, District Council 37, AFSCME, AFL-CIO against the City of New York and the New York City Department of Transportation, hereby is dismissed in its entirety.

Dated: June 1, 2021
New York, New York

SUSAN J. PANEPENTO
CHAIR

ALAN R. VIANI
MEMBER

M. DAVID ZURNDORFER
MEMBER

CAROLE O'BLENES
MEMBER

I dissent (see attached dissent)

GWYNNE A. WILCOX
MEMBER

I concur in the dissent (see attached dissent)

PETER PEPPER
MEMBER

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Dissenting Opinion of Gwynne A. Wilcox in which Peter Pepper Concurs

Ten days before the incident that led to the filing of this case, Highway Repairer Christophe Carrasquillo, in his capacity as a shop steward, filed an improper practice petition on behalf of another Highway Repairer. The City admits that Carrasquillo is a shop steward. Further, on October 21, 2019, the date of the incident in this case, his direct supervisor, Elisa Clarke, accused Carrasquillo of “always telling everyone everything” when he did not promptly follow her directive as a supervisor to go upstairs and fill out some unspecified paperwork, when she observed him speaking with a co-worker. Her conduct supports that she was motivated by his union activity as shop steward because she did not want him talking to his co-workers. Clarke acted with supervisory authority when she gave Carrasquillo a work-related directive. Then, in the presence of Carrasquillo’s co-workers outside and when Clarke entered the men’s locker room, she continued her outburst at him and then threw a cup of juice and ice at Carrasquillo, hitting him on his chest, leg and shoes. This conduct by Clarke was in the presence of shop steward Carrasquillo and other Highway Repairers, who she supervises, which had a chilling effect on him and his constituents. The Board, having assumed the Petitioner’s claims were true, the facts establish the Board test in *City of Salamanca*, 18 PERB ¶ 3012 (1985), and adopted by the Board in *Bowman*, 39 OCB 51 (BCB 1987).

As such, the conduct by Clarke in her supervisory capacity adversely impacted Carrasquillo’s role as a shop steward and the subsequent suspension of Clarke without pay did not cure the harm caused by Clarke’s October 21, 2019 conduct towards him and resulting impact on his co-workers.

May 7, 2021

GWYNNE A. WILCOX

Gwynne A. Wilcox