U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)

Issue Date: 01 July 2008

CASE No.: 2003-STA-55

In the Matter of:

PETER P. CEFALU,
Complainant,

v.

ROADWAY EXPRESS, INC.,
Respondent.

APPEARANCES:

Paul O. Taylor, Esq.
For the Complainant

Lisa A. McGarrity, Esq.
For the Respondent

Before: Daniel L. Leland
Administrative Law Judge

RECOMMENDED DECISION AND ORDER ON REMAND

This case arises under Section 405 of the Surface Transportation Assistance Act (STAA) of 1982, as amended, 49 U.S.C. § 31105, and its implementing regulations, 29 C.F.R. Part 1978. Peter P. Cefalu (Complainant) filed a complaint with the Occupational Safety and Health Administration (OSHA) on August 19, 2002, alleging that he was terminated by Roadway Express (Respondent) for engaging in protected activity.[1] OSHA investigated and found the claim to be without merit. Complainant appealed, and the case was forwarded to the Office of Administrative Law Judges for a hearing. During the discovery process, Complainant served interrogatories on Respondent seeking, *inter alia*, the identity of the individual(s) who had provided information to Respondent regarding Complainant's driving record. Respondent refused to disclose the name of the individual, citing relevance and confidentiality. Complainant filed a Motion to Compel disclosure of the source, which was granted by the undersigned on December 16, 2003.

1. Specifically, Complainant alleged that he had been fired in retaliation for his support of a co-worker at a grievance hearing.

On January 6, 2004, Complainant brought a Motion for Sanctions against Roadway for its continued failure to reveal the name of the source. The undersigned issued an Order imposing sanctions, prohibiting Respondent from presenting "any evidence that arose from the unidentified confidential source, including, but not limited to, the testimony of the individual(s) who confirmed that Cefalu was terminated from his prior employment, the testimony of the individual(s) who made the decision to terminate Cefalu, and any related documentary evidence."

A hearing was held before the undersigned on January 27, 2004 in Chicago, Illinois. On May 20, 2004, the undersigned issued a Recommended Decision and Order finding in favor of Complainant and awarding reinstatement, back pay, interest, and other relief.[2] Employer appealed to the Administrative Review Board (ARB or the Board), which adopted the Recommended Decision and Order on January 31, 2006.

Respondent then appealed the ARB's Decision to the United States Court of Appeals for the Seventh Circuit. On July 25, 2007, the Seventh Circuit affirmed in part, vacated in part, and remanded the case for further consideration. The court affirmed the determination that Respondent violated the STAA. The court also affirmed my imposition of a discovery sanction excluding evidence related to Respondent's proffered reason for firing Complainant because Respondent refused to identify the source of its information. The Seventh Circuit found, however, that the evidentiary sanction on the merits should not have applied to the remedy. The Seventh Circuit stated that Complainant would not be entitled to reinstatement if, after appropriate proceedings, Respondent can show that it would have terminated him even in the absence of protected conduct. The court stated,

> Roadway's withholding of the identity of its informant in no way prevented Cefalu from contesting Roadway's claim that reinstatement was an inappropriate remedy because of public safety. Nothing about how, why, or when Roadway learned about Cefalu's misstatements is pertinent to Cefalu's effort to keep his job despite his conceded earlier problems. If the facts are as Roadway contends, then the public-safety concerns, or even regulatory rules, may make it impossible for Roadway to reinstate Cefalu. Roadway therefore should have been permitted to refer to Cefalu's earlier driving record during the remedial stage. The Board abused its discretion in disallowing Roadway's public safety argument against the reinstatement remedy.

Roadway Express v. U.S. Dept. of Labor, Administrative Review Board, 495 F.3d 477, 485 (7th Cir. 2007). The Seventh Circuit remanded the case to the ARB for reconsideration of whether reinstatement is an appropriate remedy. The ARB, in turn, remanded the case to the undersigned.

On February 25, 2008, I issued an Order Setting Briefing Schedule, giving the parties until March 31, 2008 to file briefs and submit documentary evidence on the issue of

2. Respondent was also ordered to delete references in Complainant's employment file to any adverse action taken against him because of his protected activity and post a copy of the Decision and Order at all terminals for a period of sixty (60) days. See, Recommended Decision and Order, p. 8.

reinstatement. After numerous extensions of time, Respondent's Brief was received on June 6, 2008 and Complainant's Brief was received on June 9, 2008.[3]

Respondent argues that reinstatement is not an appropriate remedy because Complainant would have been terminated in the absence of protected conduct. According to Respondent, the decision to terminate Complainant was motivated by the falsification of his employment history and his documented history of unsafe driving. Respondent argues that Complainant's dishonesty negates his right to reinstatement and that Complainant's driving record poses a threat to the public safety, thereby rendering his return impractical. Respondent further claims that Complainant is not entitled to front pay (in lieu of reinstatement) because he could not have reasonably expected his employment to continue after his dishonesty. Finally, Respondent argues that Complainant is only entitled to injunctive relief and attorney's fees in a mixed-motive case.

Complainant argues that reinstatement is an appropriate remedy, stating that Respondent has failed to meet its burden to prove otherwise. Complainant presented declarations from numerous employees and union stewards demonstrating that not all employees who are involved in an accident are discharged. As such, Complainant argues that Respondent cannot show that it would have terminated him after learning of his previous driving record. Complainant further argues that any falsification of his employment record is immaterial to the appropriateness of reinstatement as a remedy. Complainant asserts that review of the reinstatement issue is limited by the Seventh Circuit's holding exclusively to the public-safety argument.

At the outset, it is necessary to address whether the Seventh Circuit directed review of the falsification argument as it relates to reinstatement. Complainant relies on the language of the Seventh Circuit's decision to argue that the court limited the discussion on remand exclusively to the "public safety argument." Upon review, I find that Complainant's reading of the court's decision is accurate. The court states, "Roadway therefore should have been permitted to refer to Cefalu's earlier driving record during the remedial stage. The Board abused its discretion in disallowing Roadway's *public safety argument* against the reinstatement remedy." [Emphasis added]. *Roadway Express*, 495 F.3d at 486. Thus, the Seventh Circuit limited the scope of review on remand to Complainant's driving history, including the two accidents he had prior to working for Respondent. As such, the appropriateness of the reinstatement remedy will only be discussed with regard to the public safety issue.

ISSUE

Is reinstatement an appropriate remedy in light of Complainant's history of unsafe driving?

3. It is noted that both parties submitted their briefs late. Part of the late submission stems from a clerical error in which a further request for an extension of time was submitted to the ARB instead of the instant court. In submitting its Brief, Respondent has acknowledged the error and indicated that it was part of the reason for the late filing. As the evidence needed to address the Seventh Circuit's remand is not in the record, the briefs are necessary and are accepted despite their late submission.

SUMMARY OF THE EVIDENCE

Treatment of Drivers with a History of Accidents

Respondent submitted evidence that it routinely discharges employees who are involved in preventable accidents caused by reckless driving. (Discharge Records – Respondent's Brief Tab B). Patrick Osse was terminated by Respondent in November of 2006 after he failed to set the parking break on his trailer, causing the trailer to roll backwards and damage the driver's side door. Osse had no previous violations. Patrick Flanagan was terminated in April of 2008 after he struck a metal pole and caused severe damage to his truck. Flanagan had two previous accidents, both occurring in April of 2008. James Edmonds and Eric Jorgensen were terminated in May of 2008 after they were involved in accidents where they were deemed to have "acted in a reckless manner." Neither individual had any previous accidents on his record.

Complainant presented declarations from employees and union stewards explaining Respondent's discipline process after an accident.[4] The declarations establish that when a driver is involved in a "major crash," they are usually taken out of service pending an investigation. (Declarations of Winters, Hooser, Alden, Cash, Shadle, Cefalu). When a driver is removed from service, they are given a "Letter of Investigation," notifying the driver that the accident is under investigation, and that he/she may be subject to suspension or discharge under Article 46 of the Central Region Supplemental Agreement. *Id*. In cases of serious accidents where there has been a letter of discharge issued, Respondent has often reduced the charge to a suspension for time served. *Id*. Drivers who are involved in minor accidents are usually not removed from service. (Declarations of Griffin, Alden, Cefalu, Shadle). Thomas B. Griffin, a union official who worked with Respondent during numerous grievance hearings, stated that road drivers typically have accidents for which they may or may not be discharged based upon the number of accidents in a given time period, the severity of the accident, and the judgment of the grievance committee. (Declaration of Griffith).

The declarations also contain, as the Seventh Circuit suggested,[5] numerous examples of employees who were involved in accidents but were not discharged. James A. Winters (Winters) was an over-the-road truck driver for Respondent from 1999 till 2007. (Declaration of James A. Winters). He also served as an alternate union steward and Chief Road Steward for approximately 310 over-the-road drivers at Respondent's Cincinnati, Ohio terminal between 1999 and 2006. Winters has prepared and investigated grievances and represented Respondent's drivers at local and panel grievance hearings. Winters was involved in an accident where he fell asleep while driving and hit a guardrail. Winters received a suspension of three (3) days. Winters detailed numerous examples of employees he represented who were involved in serious accidents and were not discharged. Winters represented a driver named Jim Deaton who turned his trailer over on the interstate. The top of the trailer tore open, resulting in the interstate closing

4. The declarations are from employees who were/are employed in the same position as Complainant; over-the-road truck driver.

5. The Seventh Circuit stated that Complainant should have the opportunity to show that Respondent does not terminate everyone with an unsafe driving record. The Court suggested that such a circumstance may arise where an employee has had a "clean" record for a certain number of years or other "extenuating circumstances exist." *Roadway Express*, 495 F.3d at 485.

for eight (8) hours. Deaton received a seven (7) day suspension. In 2006, Winters represented a driver named Kevin Embry who hit a clearly marked low bridge, "pulling" the trailer. The driver received a one day suspension. In 2001, Ray Waitt had a serious accident where he ran one of Respondent's trailers into the back of another of Respondent's trailers causing damage in excess of $30,000. Waitt was only given a one day suspension.

Christopher Hooser (Hooser) worked as an over-the-road driver in the Oak Creek, Wisconsin terminal, the same terminal where Complainant is domiciled as a driver. (Declaration of Christopher Hooser). In 2004, Hooser became a Business Agent for Teamsters Local 200. Hooser represented Eric Jorgensen who drove a double-trailer off the highway and into a ditch, knocking down a power line in the process. The back trailer rolled on its side, rupturing the fuel tank and causing a hazardous materials spill. Hooser negotiated a settlement such that Jorgensen was not terminated.[6]

Lawrence E. Alden (Alden) has been employed as an over-the-road driver for Respondent since 1979. (Declaration of Lawrence E. Alden). In 1998, Alden was appointed as an alternate union steward to represent over-the-road drivers at the Indianapolis, Indiana terminal. In 2000, Alden was elected Chief Road Steward. He served in this position until 2007. Alden represented Donna Sexton in several grievance proceedings contesting discharge. Sexton's first accident in 2001 occurred when she ran a double-trailer off the road, turning the truck, two trailers, and a converter dolly and causing a hazardous materials spill. Sexton's discharge was reduced to a suspension, despite the fact that she had between ten (10) and eleven (11) prior chargeable accidents as a driver for Respondent. Sexton was later discharged for driving with a suspended license. This discharge was reduced to a two (2) week suspension. On Sexton's first trip back after her suspension she had another major accident which resulted in her permanent discharge. Alden also described the situation of Donald Payne, who was involved in several accidents while Alden served as steward or alternate steward. In 2006 or early 2007, Payne was involved in a side-swipe accident on the highway. Thereafter, Payne was involved in another accident where he drove a tractor-trailer into a drainage ditch while exiting a McDonald's restaurant. Payne failed to report the incident, and he was discharged for failing to report a chargeable accident. Payne's suspension was reduced to a severe verbal warning. Alden also represented Everett Holloway. Holloway had two preventable accidents between 2001 and 2004. Respondent attempted to discharge him for tipping two trailers, but Alden negotiated a settlement where the discharge was reduced to suspension. Holloway was eventually terminated after causing an accident which he was "lucky" to have survived.

Doris Cash (Cash) was employed as an over-the-road driver in the Atlanta, Georgia terminal from 1986 to 2005. (Declaration of Doris Cash). Cash was a union steward representing Respondent's over-the-road drivers from 1988 to 1996. In 1996, Cash was appointed a full time business agent for Teamster Local 728. Cash represented N.A. Howell, a driver who rear-ended a passenger vehicle on the highway. Howell received no discipline for this incident, not even a warning letter. Soon thereafter, Howell had a second accident in which he ran a passenger

6. Respondent's discharge records indicate that Jorgensen was eventually terminated on May 30, 2008 stemming from the accident described in Hooser's Declaration. See, Discharge Records – Respondent's Brief Tab B.

vehicle off the road. Again, Respondent imposed no discipline. Cash also negotiated one and two week suspensions for two separate employees who tipped over their trailers.

Greg Shadle (Shadle) is an over-the-road truck driver who is currently employed by Respondent. (Declaration of Greg Shadle). Shadle served as a union steward and part-time business agent from 1994 to 2006 at the North Lima, Ohio terminal. Shadle represented a driver who crashed his tractor-trailer combination into the back of another of Respondent's vehicles. The driver who was rear-ended had to seek medical attention. Shadle was able to negotiate the driver's discharge down to a two (2) week suspension.

Complainant's Driving History

Complainant was hired by the United Parcel Service (UPS) in 1974 as a commercial truck driver. (Cefalu Depo. pp. 5-6). In 1978 he bid for, and was awarded, the position of "feeder driver."[7] *Id*. at 5. In April of 1992, Complainant was involved in an accident when a passenger vehicle "cut off" Complainant's vehicle. *Id*. As Complainant "reacted to" the vehicle, his trailer went off the road and collided with a drainage pipe. *Id*. at 8-9. Complainant was discharged in May of 1992, and he grieved his termination to the Motor Carrier Advisory Counsel's joint-management grievance committee. *Id*. at 10. The grievance was denied, and his termination was upheld. *Id*. at 14.

Complainant was thereafter employed by ANR Advance as a commercial truck driver. *Id*. at 12. In May of 1998, Complainant fell asleep at the wheel, causing his trailer to hit a side guardrail and land in a ditch along the freeway. *Id*. at 13. Complainant was subsequently terminated for recklessness. *Id*. at 14. Complainant filed a grievance with the Motor Carrier Labor Advisory Council, which upheld the discharge. *Id*.

After working for ANR Advance, Complainant worked as a part time driver for Flemming Company, B&T Mail Service, Alpine Freight Systems, and Schwerman Trucking Company. *Id*. at 15-19. Complainant left Schwerman in November of 1999 to begin working for Respondent. *Id*. at 19.

After prevailing on his STAA claim in 2004, Complainant was reinstated to his former position with Respondent. Since then, Complainant has been involved in three accidents involving company vehicles. (Accident Reports – Respondent's Brief Tab I). On August 27, 2005, Complainant hit another of Respondent's vehicles as he was entering the Chicago facility. On May 29, 2006, Complainant damaged the left side of the truck cab while backing the vehicle up. Complainant again caused damage to a company vehicle on October 21, 2006.

CONCLUSIONS OF LAW

The STAA expressly provides that a prevailing complainant is entitled to reinstatement. 49 U.S.C. §2305(c)(2)(B). While reinstatement is a statutory remedy, there may be cases where reinstatement is impossible or impractical. Reinstatement is considered impractical where there is hostility or animosity between the parties, where a "productive and amicable working

7. Feeder driver is equivalent to the position of over-the-road driver.

relationship would be impossible," or where a complainant is no longer qualified to work for respondent. *EEOC v. Prudential Federal Savings and Loan Ass'n*, 763 F.2d 1166, 1172 (10th Cir.); See also, *Blum v. Witco Chemical Corp*., 829 F.2d 367 (3rd Cir.); *Dutile v. Tighe Trucking, Inc*., 93-STA-31 (Sec'y Oct. 31, 1994); *Pope v. Transportation Services, Inc*., 88-STA-8 (ALJ May 19, 1988). "[I]f the premises behind the statutory remedy, that the *status quo ante* can be restored, fails, then the Board is entitled to adopt a remedy that is the functional equivalent of the one prescribed by statue." *Roadway Express*, 495 F.3d at 485. The party who opposes reinstatement under the STAA has the burden to show that reinstatement is not an appropriate remedy. *Dickey v. West Side Transport, Inc.*, ARB Case No. 06-151, 2006-STA-26 (ARB, May 29, 2008).

Respondent argues that it discharges drivers who fail to maintain "clean" driving records and has presented Discharge Records to substantiate its claim. According to Respondent, Complainant has already had five accidents, three of which occurred after Complainant was reinstated to his position. Respondent argues that reinstating Complainant violates "the very purpose of the STAA – to ensure that only safe commercial truck drivers share the road with the general public." See, Respondent's Brief at 14. Respondent also asserts that it is aware of Complainant's unsafe driving history, but "has been prevented from acting on that history as it would with any other employee." See, Respondent's Brief at 14.

Complainant has presented evidence contradicting Respondent's assertions. Complainant's evidence, derived from the union stewards who represented numerous Roadway employees during their grievance hearings, unequivocally demonstrates that not all employees who are involved in accidents, even serious accidents, are discharged.

Where the evidence shows that other employees, similarly situated, are not discharged for similar behavior, then the respondent has failed to sustain its burden of proof to show that the complainant would have been discharged even if he/she had not engaged in the protected activity. *Cach v. Distribution Trucking Co*., 958-STA-12 (ARB, Aug. 20, 1996). The ARB has noted that, "under the dual motive analysis it is not sufficient for an employer to prove that it had good reason to take adverse action against an employee. Rather, the employer must prove by a preponderance of the evidence that it actually would have taken that action, even if the employee had not engaged in protected activity." *Johnson v. Roadway Express, Inc*, ARB No. 99-111, ALJ No. 1999-STA-5 (ARB Mar. 29, 2000). Similarly, the Supreme Court has noted that proving that the same decision would have been *justified* in a mixed motive case is not the same as proving that the same decision would have been *made*. [Emphasis added]. *McKennon v. Nashville Banner Publishing Co*., 513 U.S. 352 (1995); *Platone v. Atlantic Coast Airline Holdings, Inc*., 2004 WL 50303056 (ALJ July 13, 2004).

In the instant case, Respondent has presented evidence suggesting that it terminates employees who are involved in accidents. Complainant, however, has presented ample evidence refuting this assertion. The evidence does not demonstrate that it was Respondent's customary employment practice to fire all employees who have "unclean" driving records. Numerous employees received a suspension after being involved in an accident, indicating that discharge is not the only disciplinary option available to, or used by, Respondent. Other employees received no disciplinary action after causing an accident. While Respondent's evidence is sufficient to

show that it would have been *justified* in firing Complainant in light of his driving history, Respondent has failed to show that it would have *made* the decision to terminate Complainant on the basis of his safety record. Since similarly situated employees were not discharged for similar behavior, Respondent has failed to meet its burden of proof to show that it would have fired Complainant in the absence of protected activity.

Respondent also argues that Complainant's "dangerous driving record illustrates the substantial threat that his reinstatement poses to the public," thereby violating the purpose behind the STAA. The STAA was enacted to combat the increasing number of deaths, injuries, and property damage caused by commercial trucking accidents. *Brock v. Roadway Express, Inc.,* 481 U.S. 252, 262, 95 L. Ed. 2d 239, 107 S. Ct. 1740 (1987) (quoting remarks of Sen. Danforth and summary of proposed statute at 128 Cong. Rec. 35209, 32510 (1982)); *see also Lewis Grocer Co. v. Holloway*, 874 F.2d 1009, 1011 (5th Cir. 1989) ("Congress enacted the STAA to promote safe interstate commerce of commercial motor vehicles."). While Complainant has, admittedly, been involved in several driving accidents, his reinstatement does not automatically violate the policy behind the STAA. The evidence suggests that numerous drivers remained employed by Respondent after having accidents of a greater severity, and with greater frequency, than Complainant. The three (3) accidents that Complainant has had since being reinstated, the most recent of which occurred nearly two (2) years ago, consist of minor incidents that occurred in Respondent's truck yard and did not pose a danger to passenger vehicles. Aside from these three minor incidents, Complainant's record has been "clean" since 1998. In light of the records of past drivers who have remained employed with Respondent, Complainant's driving record does not render his return impossible or impractical. Respondent cannot selectively shield itself under the policy underlying the STAA.

Having determined that reinstatement is an appropriate remedy, Respondent's front pay argument becomes moot.[8] Additionally, Respondent's front pay argument relies upon evidence of Complainant's falsification of his driving record, which, as noted above, was not to be considered on remand. The argument that Complainant is only entitled to injunctive relief and attorney's fees is contrary to the Seventh Circuit's instructions on remand and is, therefore, without merit.

On review, I find that reinstatement is a proper remedy. [9] As such, the previous finding reinstating Complainant to his former position with Respondent is affirmed.[10]

---

8. Front pay is an equitable remedy that is the "functional equivalent" of reinstatement as it provides the same economic benefit. *Williams v. Pharmacia*, 137 F.3d 944 (7th Cir. 1998). While front pay is not specified as a remedy under the STAA, the ARB has held that it can be applied. *Ass't Sec'y & Bryant v Mendenhall Acquisition Corp.*, ARB No. 04-014, ALJ No. 2003-STA-36 (ARB June 30, 2005). See also, *Palmer v. Triple R Trucking*, 2003-STA-28 (ARB Aug. 30, 2006). Generally, front pay is awarded as a substitute remedy only when reinstatement is inappropriate, such as when "there [is] no position available or the employer-employee relationship [is] pervaded by hostility." *McNeil v. Economics Lab., Inc*., 800 F.2d 111, 118 (7th Cir.1986), cert. denied, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 823 (1987), overruled on other grounds, *Coston v. Plitt Theatres, Inc.*, 860 F.2d 834, 836 (7th Cir.1988). Front pay may only be awarded for as long as the employee could have expected to hold the job. *Williams*, 137 F.3d at 951; *Schick v. Illinois Dept. Of Human Services*, 307 F.3d 605, 614 (7th Cir. 2002).

9. Pursuant to 29 C.F.R. § 1978.109(b), an administrative law judge's decision and order concerning whether reinstatement is appropriate shall be effective immediately upon receipt of the decision by the named person.

RECOMMENDED ORDER

IT IS ORDERED THAT the finding that Complainant is entitled to reinstatement is AFFIRMED.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE OF REVIEW: The administrative law judge's Recommended Decision and Order, along with the Administrative File, will be automatically forwarded for review to the Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 29 C.F.R. § 1978.109(a); Secretary's Order 1-2002, ¶4.c.(35), 67 Fed. Reg. 64272 (2002).

Within thirty (30) days of the date of issuance of the administrative law judge's Recommended Decision and Order, the parties may file briefs with the Board in support of, or in opposition to, the administrative law judge's decision unless the Board, upon notice to the parties, establishes a different briefing schedule. See 29 C.F.R. § 1978.109(c)(2). All further inquiries and correspondence in this matter should be directed to the Board.

The order directing reinstatement of the complainant is effective immediately upon receipt of the decision by the respondent. All other relief ordered in the Recommended Decision and Order is stayed pending review by the Secretary. 29 C.F.R. § 1978.109(b).

---

10. It is noted that Respondent is not required to employ Complainant indefinitely. Respondent may discharge Complainant if his driving record becomes such that termination is warranted and the termination does not violate the provisions of the STAA or any other federal regulatory provision.