



In the Matter of:

PETER P. CEFALU,

ARB CASE NO. 08-110

COMPLAINANT,

ALJ CASE NO. 2003-STA-055

v.

DATE: December 10, 2008

ROADWAY EXPRESS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Paul O. Taylor, Esq., Truckers Justice Center, Burnsville, Minnesota

For the Respondent:

Lisa A. McGarrity, Esq., Franczek Sullivan, P.C., Chicago, Illinois

FINAL DECISION AND ORDER

In 2002, the Respondent, Roadway Express, Inc., fired the Complainant, Peter P. Cefalu, after he testified for another employee in the employee's grievance hearing. Cefalu filed a complaint with the Department of Labor (DOL), alleging that Roadway retaliated against him in violation of the whistleblower protection provision of the Surface Transportation Assistance Act (STAA), 49 U.S.C.A. § 31105 (West 2008).¹

¹ Regulations that implement the STAA are found at 29 C.F.R. Part 1978 (2007). Congress has amended the STAA since Cefalu filed his complaint. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, 121 Stat. 266 (Aug. 3, 2007). It is not necessary for us to determine whether the amendments are applicable to this case, because, even if they were, they would not affect our decision.

On May 20, 2004, a DOL Administrative Law Judge (ALJ) issued a Recommended Decision and Order (R. D. & O. I) concluding that Roadway violated the STAA. The ALJ excluded evidence relating to Roadway's proffered reason for firing Cefalu, that he had lied about his driving record on his employment application, as a sanction for refusing to comply with the ALJ's discovery order requiring disclosure of the source of that information. The ALJ also ruled that Cefalu was entitled to damages and reinstatement to his previous job as a truck driver. *Cefalu v. Roadway Express, Inc.*, ALJ No. 2003-STA-055 (May 20, 2004). The ALJ forwarded this case to the Administrative Review Board pursuant to the automatic review provisions found at 29 C.F.R. § 1978.109(a), and we adopted the ALJ's recommendations. *Cefalu v. Roadway Express, Inc.*, ARB Nos. 04-103, 161, ALJ No. 2003-STA-055 (ARB Jan. 31, 2006).

Roadway appealed the ARB's decision to the United States Court of Appeals for the Seventh Circuit. On July 25, 2007, the Seventh Circuit affirmed the Board's determination that Roadway had violated the STAA, and that evidence that he lied about his driving record in his employment application had been properly excluded on the merits. *Roadway Express, Inc. v. United States Dep't of Labor*, 495 F.3d 477, 483 (7th Cir. 2007). However, the court remanded the case for the ALJ to reconsider whether, in view of Cefalu's arguably unsafe driving record, reinstatement was an appropriate remedy. *Id.* at 486. The ARB then remanded the case to the ALJ. *Cefalu v. Roadway Express, Inc.*, ARB No. 08-001, ALJ No. 2003-STA-055 (ARB Jan. 30, 2008).

On remand, the ALJ ordered the parties to file briefs addressing the appropriateness of Cefalu's reinstatement and to submit additional documentary evidence. Subsequently, the ALJ issued a Recommended Decision & Order (R. D. & O. II) on July 1, 2008, concluding that reinstatement was a proper remedy and affirming his previous order reinstating Cefalu in his former position. The ALJ forwarded the case again as provided in the automatic review regulations. *See* 29 C.F.R. § 1978.109(a).

Legal standards

Reinstatement is an automatic remedy under the STAA. *Dickey v. West Side Transp., Inc.*, ARB Nos. 06-151, 150, ALJ Nos. 2006-STA-026, 027, slip op. at 8 (ARB May 29, 2008). However, circumstances may exist in which reinstatement is impossible or impractical. *Assistant Sec'y & Bryant v. Bearden Trucking Co.*, ARB No. 04-014, ALJ No. 2003-STA-036, slip op. at 7-8 (ARB June 30, 2005). For example, reinstatement may be inappropriate where the parties have demonstrated "the impossibility of a productive and amicable working relationship." *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, 1993-ERA-024, slip op. at 9 (Sec'y Feb. 14, 1996).

In its decision, the Seventh Circuit indicated that reinstatement may also be inappropriate when public safety concerns arising from Cefalu's unsafe driving record were implicated. *Roadway Express*, 496 F.3d at 486. The court stated, "If the facts are as Roadway contends, then public-safety concerns, or even regulatory rules, may make it

impossible for Roadway to reinstate Cefalu.” *Id.* Thus, Roadway “should have been permitted to refer to Cefalu’s earlier driving record” on the issue of his reinstatement. *Id.*

Nonetheless, because a complainant is presumptively entitled to reinstatement, the respondent employer has the burden of proof to show that reinstatement is not proper. *Cf. Hobson v. Combined Transp., Inc.*, ARB Nos. 06-016, 053, ALJ No. 2005-STA-35, slip op. at 6 (ARB Jan. 31, 2008) (holding that the employer bears the burden of showing that the employee failed to mitigate back pay damages by seeking comparable employment).

The ALJ’s decision

On remand, the issue before the ALJ was not whether Roadway would have had grounds to discharge Cefalu, but whether reinstating him as a driver would have created a public safety issue. R. D. & O. II at 3. The ALJ specifically rejected Roadway’s argument that it could have fired Cefalu because he falsified his employment application. This argument, which Roadway has repeated in its brief to the ARB, Respondent’s Brief at 10-12, concerns the merits of the case. The Seventh Circuit has already affirmed the ALJ’s determination that Roadway fired Cefalu in violation of the STAA, that is for assisting another employee in the employee’s grievance hearing, and not because he provided false information in his employment application. Thus, the ALJ determined that Roadway’s reasons for firing Cefalu were not before him. R. D. & O. II at 3.

The ALJ went on to consider the driving and disciplinary records of other Roadway drivers and Cefalu’s own driving record in the context of whether reinstatement was an appropriate remedy. The ALJ reviewed Roadway’s contention that it routinely discharged employees who were involved in preventable accidents caused by reckless driving. The ALJ also considered Cefalu’s evidence from employees and union stewards explaining Roadway’s discipline procedures after an accident, as well as Cefalu’s truck driving history since 1974. *Id.* at 4-6. Based on the declarations of other drivers, the ALJ found that Roadway did not always fire drivers who had accidents. To the contrary, numerous drivers remained employed after having accidents of greater severity and greater frequency than Cefalu. *Id.* at 8.

Further, the ALJ found that the accidents Cefalu had had since being reinstated consisted of minor mishaps that caused property damage in Roadway’s yards and did not pose a danger to the driving public. *Id.* The ALJ concluded that Cefalu’s driving record did not render his return to work impossible or impractical. *Id.*

Analysis

Substantial evidence supports the ALJ’s conclusion. On remand and now before us, Roadway argues that Cefalu should not be reinstated because Roadway had grounds to discipline or discharge him, either for dishonesty or reckless driving. But those arguments go to the merits of the case, which have already been resolved in Cefalu’s favor, not to the question of reinstatement. We agree with the ALJ that Roadway failed

to prove by a preponderance of the evidence that reinstating Cefalu to his position as a truck driver would endanger public safety.

On remand, Roadway introduced into evidence four notices to drivers who were discharged for dishonesty, dated from May 2006 through May 2008. Tab A, Respondent's Brief in Opposition to Complainant's Reinstatement. Roadway also submitted Cefalu's deposition taken on December 30, 2003, his statement to DOL's Occupational Safety and Health Administration (OSHA) in support of his complaint, his responses to Roadway's request for admissions, the decision from the Motor Carrier Labor Advisory Council concerning Cefalu's 1998 accident prior to the date on which Roadway hired him, and the depositions of three Roadway employees concerning Cefalu's discharge. Tabs C-H. These documents show that Cefalu admitted lying on his employment application about two accidents in 1992 and 1998, that Roadway discovered the falsification, and that Roadway had fired other drivers for dishonesty. But we are not going to relitigate the issue whether Roadway did or could have disciplined or discharged Cefalu for dishonesty. The issue before us is whether Roadway's evidence demonstrates that Cefalu is a dangerous driver whose reinstatement is therefore impractical or impossible.

Roadway also submitted notices of discharge to four other drivers for recklessness in support of its argument that it routinely fires employees who are involved in preventable accidents caused by reckless driving. Tab B. However, Cefalu submitted the declarations of eight Roadway employees and union stewards who recounted numerous incidents of drivers involved in far more serious accidents than Cefalu. Complainant's Brief on Remand, Declarations of Thomas B. Griffith, James E. Winters, Michael T. Uszak, Christopher Hooser, Jonathan Gomaz, Lawrence Alden, Doris Cash, and Gregory A. Shadle. This evidence fully supports the ALJ's conclusion that Roadway, following its grievance procedure, retains the services of many employees involved in serious and preventable accidents. R. D. & O. II at 7-8.

Finally, Roadway produced Cefalu's driving record since his reinstatement in 2004. It shows three accidents and two warning letters. TAB I. The August 27, 2005 "preventable" accident occurred in the Chicago yard when Cefalu hit another trailer while positioning his vehicle. The May 29, 2006 accident occurred at the Milwaukee terminal while Cefalu was backing up to hook up a trailer. The warning letters indicated damage to the tractor/trailer involved in these accidents. No information about the October 21, 2006 accident was provided.

Again, Roadway seeks to relitigate the question of whether Roadway could have disciplined or discharged Cefalu for his driving record. The issue actually before us is whether Roadway's reinstatement of Cefalu as a driver would endanger public safety. On that issue, we note that Roadway has not introduced Cefalu's department of motor vehicles driving record; evidence that Cefalu does not hold a valid commercial driver's license; evidence that, with his accident record, his driving a truck would violate a United States Department of Transportation rule or regulation; or affidavits of other drivers or supervisors who had personal knowledge of his unsafe driving. Nor does the record

reflect that Cefalu was taken out of service following the three accidents noted above. All of Cefalu's vehicle mishaps since his reinstatement in 2004 occurred off public roads, thereby posing no danger to public safety. Further, the accidents involved no personal injury but only property damage to the tractor/trailers involved.

Roadway's evidence falls short of meeting its burden of proof. While a record of accidents is not to be condoned, Roadway has not demonstrated that an application of its personnel policies and practices to Cefalu's driving record would have resulted in his permanently being taken off the road as an unsafe driver. Although our decision does not immunize Cefalu from future discipline, on the record before us we cannot conclude that Cefalu's reinstatement posed a substantial threat to the driving public. Accordingly, we affirm the ALJ's determination that reinstatement is an appropriate remedy.

Cefalu's attorney shall have thirty days from receipt of this Decision and Order in which to file a fully supported attorney's fee petition, with simultaneous service on opposing counsel, for services performed before us. Thereafter, Roadway shall have twenty days from receipt of the fee petition to file a response.²

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

OLIVER M. TRANSUE
Administrative Appeals Judge

² To obtain a fee for his services on remand to the ALJ, Cefalu must file a petition with the ALJ. See Complainant's Brief at 30.