

# RHODE ISLAND Lawyers Weekly

## 'Constructive Demand' For Reinstatement OK

By: admin October 15, 2001

An injured bus driver should be reinstated to his job where he notified his employer of his desire to return to work by refusing to drive certain vehicles and complaining to a union agent for an accommodation, the Appellate Division of the Workers' Compensation Court has ruled.

The employer argued that the driver left work due to an injury, and never made an actual demand to the employer's representative for reinstatement.

But the Appellate Division disagreed, and affirmed the trial judge's order for reinstatement.

"We infer from the employer's brief that it believes the law required the employee to make a formal written demand for reinstatement. The express language of the statute does not require such formality," wrote Judge Debra L. Olsson. "We decline to judicially add such a requirement to the statute."

The panel found that trial testimony established "constructive requests" for reinstatement in compliance with I.G.L. Sect. 28-33-47.

The six-page decision is *Sisto v. RIPTA*, Lawyers Weekly No. 72-022-01.

Stephen J. Dennis of Providence, counsel for the petitioner-employee said, "This case shows that a constructive request for reinstatement is sufficient under the reinstatement statute."

He added that "the driver is back now, and he is working and paying taxes. It is the policy of the law to get people rehabilitated and back to work."

Dennis, a veteran workers' compensation attorney, also said the opinion was one of the first in the state on this issue since the court can take cases directly without the need of an administrative hearing.

Timothy P. Gallogly of Providence, co-counsel for employer, expressed surprise at the decision.

"There was no formal request for job reinstatement here. In fact, there was no request at all to the employer," he asserted.

"Employers should be careful now," said Gallogly. "Informal statements to a union rep may be construed as formal requests. Some employers might even ask now, 'Are you requesting a reinstatement?'"

He argued that *employees* should have the burden under the statute of showing a request was made.

### A Bad Back

The petitioner-employee, Robert Sisto, was employed by the respondent-employer, Rhode Island Public Transit

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He attributed the pain to the design of the driver’s seat, which did not provide the smooth cushion of “air seats” on the larger buses, and filed a workers’ compensation report that night. However, the employee he was assigned to a smaller bus again the next day.

Over the radio, the employee demanded a larger bus to drive and indicated he would not be back to work unless he got one.

James Dean, director of transportation for the employer, refused and reiterated that all drivers must be ready to drive all buses in the fleet.

The employee, 55, did not report to work thereafter, but was treated by a doctor in March 1999 for lumbar strains.

The doctor cleared him to return to work with the proviso that he drive large buses.

The employee then filed a petition on Oct. 6, 2000, seeking reinstatement to his former position pursuant to R.I.G.L. Sect. 28-33-47.

After a hearing, the trial judge found that the employee Sisto left his job due to injury, and ruled that the employer must reinstate the employee.

### **No Formality Required**

Olsson said the trial judge was not clearly erroneous in finding that the petitioner left employment due to injury or demanded reinstatement in accord with the statute.

She noted that R.I.G.L. Sect. 28-33-47(a) mandates that a “worker who has sustained a compensable injury shall be reinstated ... upon demand ... if the position exists and is available and the worker is not disabled from performing the duties of the position with reasonable accommodation.”

Olsson also noted that the employee requested an accommodation immediately after injury through his union representative, but RIPTA would not guarantee that the driver could be accommodated.

She emphasized that the employee also met with his union representative a second time about getting his job back when the doctor released him from care on condition he drive a larger bus.

“Dean professed to be completely unaware of Sisto’s workers’ compensation claim and the doctor’s notes. But his testimony made it clear RIPTA was well aware the employee would continue to drive if he was given a larger bus,” observed the judge.

“Although R.I.G.L. Sect. 28-33-47(a) required RIPTA to either make this accommodation or give the employee some other suitable work, Dean made it clear the employer would not entertain this request,” Olsson observed.

“As for the absence of a formal denial of the nonexistent formal request, the fact the employee had not been taken back to work by RIPTA speaks for itself,” the judge said.

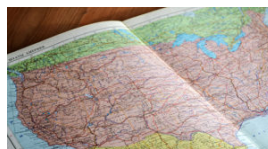
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