SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0761-15T1

GARY BARELLA,

Plaintiff-Appellant,

v.

NEW JERSEY TRANSIT RAIL OPERATIONS, a Corporation of the State of New Jersey,

Defendant-Respondent.

Submitted December 12, 2016 – Decided January 5, 2017

Before Judges Sabatino and Currier.

On appeal from Superior Court of New Jersey, Law Division, Hudson County, Docket No. L-1076-14.

Howard S. Teitelbaum, attorney for appellant (David A. Parinello, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent (Melissa H. Raksa, Assistant Attorney General, of counsel; Brad M. Reiter, Deputy Attorney General, on the brief).

PER CURIAM

Plaintiff Gary Barella appeals the trial court's order granting summary judgment to defendant New Jersey Transit Rail

Operations ("NJ Transit") dismissing his complaint asserting claims against defendant for emotional injuries pursuant to the Federal Employers' Liability Act ("FELA"), 45 U.S.C.A. §§ 51 to 60. We affirm.

The summary judgment record reflects that at the time of the alleged incident plaintiff worked as a foreman for NJ Transit in Hoboken. Plaintiff worked on the service track, where he was responsible for supervising a group of employees who inspected and serviced train engines. At the time in question, plaintiff himself was supervised by a general foreman, who also worked out of the Hoboken rail yard.

For reasons that are not relevant here, disagreements arose between plaintiff and the general foreman. Those disagreements frequently precipitated loud arguments between the two men.

The incident in question occurred on August 17, 2011, sparked by another dispute between plaintiff and the general foreman. The dispute apparently concerned whether plaintiff had obeyed an order that the general foreman had issued to him earlier that morning. According to plaintiff, he was on the computer in his office when the general foreman walked in and began yelling at him and using profanity. As described by plaintiff, the general foreman shouted

at him for fifteen to twenty minutes. His volume was estimated by plaintiff as representing a "nine" on a scale of one to ten.[1]

Plaintiff alleges that his supervisor's loud harangue caused him to collapse into a chair and experience chest pains. Another foreman called 9-1-1, and plaintiff was taken by ambulance to a local hospital. The hospital staff diagnosed plaintiff with anxiety, depression, and stress. Plaintiff was released from the hospital and filed a report with his employer.

Plaintiff sued NJ Transit under the FELA, a statute which the parties agree covers workplace injuries by railroad workers such as him. Section 51 of the FELA provides that a common carrier is generally liable to its employers for injuries "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such a carrier." Id. at § 51. The FELA is a fault-based statute, and thereby plaintiffs must prove the "traditional common law elements of negligence: duty, breach, foreseeability, and causation" for lawsuits brought under the statute. Stevens v. New Jersey Transit Rail Operations, 356 N.J. Super. 311, 319 (App. Div. 2003).

A significant limitation of the FELA, and one which plaintiff concedes is applicable as a matter of law, is that a "zone of

[1] Defendant asserts in response that loud speaking is not unusual in a noisy railyard.

danger" requirement applies to all claims for emotional injuries under the statute. As the United States Supreme Court explained in Consolidated Rail Corp. v. Gottschall, 512 U.S. 532, 547-48, 114 S. Ct. 2396, 2406, 129 L. Ed. 2d 427, 443 (1994), "the zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of [an FELA] defendant's negligent conduct, or who are placed in immediate risk of harm by that conduct."

For example, in Ferguson v. CSX Transportation, 36 F. Supp. 2d 253, 255 (E.D. Pa. 1999), aff'd without opinion, 208 F.3d 205 (3d Cir.), cert. denied, 530 U.S. 1243, 120 S. Ct. 2690, 147 L. Ed. 2d 962 (2000), the plaintiff failed to establish that he was within the required "zone of danger" when his supervisor threatened his family and threw objects at him while they were separated by a fence. Id. at 255-56. The district court found significant in Ferguson that plaintiff had not demonstrated fear of imminent physical harm when the supervisor's threats were made. Id. at 256.

In the present case, which may be fairly likened to Ferguson, the general foreman inflicted no physical injury upon plaintiff during his loud tirade. Consequently, as plaintiff acknowledges, he must have physically been in the zone of danger in order for

him to be compensated for his emotional distress caused by the incident.

Plaintiff contends that he was within the zone of danger because the office where the shouting took place was in an area adjacent to the railroad tracks. He asserts that it was his "good fortune" that, following the tirade, he "landed in a chair and not near his door." However, there is no competent evidence in the record that the door to the office was open and that the two men were arguing so close to the door that plaintiff realistically could have fallen through the door onto the train tracks some unspecified distance away.

We view the summary judgment factual record in a light most favorable to plaintiff. R. 4:46-2; Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995). Having done so, we affirm the trial court's summary judgment ruling substantially for the sound reasons expressed in Judge Lisa Rose's oral opinion dated September 4, 2015. Although we do not approve of the supervisor's reportedly aggressive manner in how he communicated with his subordinate, we agree with Judge Rose that plaintiff has not presented an issue of genuine material fact showing that the conduct placed plaintiff under the physical "zone of danger" required by the FELA and Supreme Court precedent.

Affirmed.