

March 8, 1999

IF STICKS AND STONES DON'T BREAK MAN'S BONES, FELA CANNOT HELP HIM, SAYS
FEDERAL JUDGE

THREATS OF FUTURE HARM DON'T MEET 'ZONE OF DANGER' TEST

Shannon P. Duffy
U.S. Courthouse Correspondent

Death threats from a co-worker that caused a railway worker to live in constant fear don't meet the U.S. Supreme Court's "zone of danger" test, a federal judge ruled, dismissing a claim of negligent infliction of emotional distress.

In the suit, Ronald T. Ferguson brought claims against his employer, CSX Transportation, under the Federal Employer's Liability Act, claiming he had suffered severe emotional distress as a result of the threats of fellow CSX employee Larry Deery.

Ferguson, who is represented by Lawrence R. Cohan and Thomas R. Anapol of Anapol Schwartz Weiss & Schwartz, said that he had reported Deery's brother, Phillip Deery, to a supervisor for safety violations.

Although Ferguson never had any run-ins with Phillip Deery, the suit alleged that Larry Deery threatened to kill him on several occasions. Ferguson said the threats at first were not made face-to-face, but transmitted over a hand-held radio.

But in August 1996, Ferguson said, Larry Deery drove his car to the site where Ferguson was working and began screaming obscenities and threats at him.

He claimed that for a period of about five to 10 minutes, Deery continued to scream at him, threatening to burn down his home and kill his family.

At first, when the verbal abuse began, Ferguson said he could not hear exactly what Deery was saying because he was standing next to a running locomotive and Deery was inside his parked car, behind a fence, about 50 feet away.

Ferguson said he began walking toward the fence separating him from Deery and that Deery exited his car and also walked toward the fence. When the two were no more than five feet apart but still separated by a fence, Ferguson said, Deery continued his verbal threats for a few more minutes, and then picked up some rocks and stones, as well as a 2-by-4 piece of lumber, and threw them at Ferguson.

When Deery returned to his car, he allegedly made slashing motions across his throat before driving out of the area.

Although he was not hit by any of the objects, Ferguson claimed that Deery's

tirade of both words and rocks caused him severe emotional distress. He claims that since the incident, he has been continuously fearful for his life and that of his family, has been unable to work, and has difficulty concentrating.

The distress led to a major depression and severe anxiety disorder which has required long-term psychiatric care, his suit said.

CSX's lawyers, John J. Barrett, Edward J. Kelbon and Brent L. Hoffman of Saul Ewing Remick & Saul, argued that Ferguson's own description of the facts showed that he had no case under FELA.

U.S. District Judge Eduardo C. Robreno found that FELA "is not a workers' compensation statute and does not require railroad employers to insure the safety of their employees," but that "nevertheless, the Supreme Court has liberally construed FELA to further the statute's broad remedial goal."

The traditional common law negligence elements of duty, breach, foreseeability, causation and damages apply in an action brought under FELA, Robreno noted.

"The question in this case is whether, under the circumstances of this case, defendant owed plaintiff a legal duty," he wrote.

Robreno found that the analysis began with the U.S. Supreme Court's 1994 decision in Consolidated Rail Corp v. Gottshall which outlined the standard to be applied when considering claims for negligent infliction of emotional distress under the FELA.

In Gottshall, the justices held that "an emotional injury constitutes 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be compensable under the terms of the zone of danger test."

The high court defined the "zone of danger" test by stating that the law "limits recovery of emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct."

Robreno found that the 3rd U.S. Circuit Court of Appeals has since ruled that "the Supreme Court adopted the zone of danger test, in part, to limit defendants' liability to certain classes of plaintiffs and to certain types of harm, notwithstanding that some genuine claims would be fore-closed."

The 3rd Circuit, in Bloom v. Conrail, concluded that under Gottshall, when a plaintiff asserts a claim for negligent infliction of emotional distress, a defendant will owe the plaintiff a legal duty only if:

- . 1) the plaintiff sustained a physical impact or
- . 2) the plaintiff was placed in immediate risk of physical harm or threatened imminently with physical impact.

Applying that test to Ferguson's case, Robreno said it was clear that he did not sustain a physical impact since he testified at his deposition that he was never hit by any of the objects thrown by Deery.

"Therefore, the only issue remaining is whether, under the circumstance,

does plaintiff satisfy the second prong of the Bloom test," Robreno wrote.

Robreno found he could not since the fear Ferguson felt was for his family and focused on future harms.

"Plaintiff's deposition testimony clearly reveals that the emotional distress he claims was not the result of the fear of immediate physical harm from being hit by the objects thrown over the fence by Deery, but rather by the fear of the threats of future harm which Deery was making toward plaintiff and his family," Robreno wrote.

"This Court concludes that the fear of some future harm caused by verbal threats is insufficient to place plaintiff within the actionable zone of danger because these threats of future harm did not place plaintiff 'in immediate risk of physical harm or threatened [him] imminently with physical impact'," Robreno wrote, quoting Bloom.

"The fear plaintiff suffered due to the threat to burn down his house, as well as the threat of future harm to plaintiff and his family is, therefore, not compensable."

(Copies of the 10-page opinion in Ferguson v. CSX Transportation, PICS NO. 99-0432, are available from The Legal Intelligencer. Please refer to the order form on p. 11).