

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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JENNIFER DeCESARE,	:	CIVIL ACTION
	:	
Plaintiff,	:	
	:	
v.	:	No. 99-129
	:	
NATIONAL RAILROAD	:	
PASSENGER CORPORATION,	:	
	:	
Defendant.	:	

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**MEMORANDUM**

R.F. KELLY, J.

OCTOBER 25, 1999

Presently before the Court is the Motion of Defendant, National Railroad Passenger Corporation ("Amtrak"), for Summary Judgment of the lawsuit filed by Plaintiff, Jennifer DeCesare ("Plaintiff").<sup>1</sup> Plaintiff filed suit pursuant to 45 U.S.C. section 1951, the Federal Employers' Liability Act ("FELA"), claiming emotional distress incurred during her Amtrak employment. 45 U.S.C. § 51 (West 1986). For the reasons that follow, Amtrak's Motion is granted.

**I. FACTS.**

The facts in this case, although identical to those of DeCesare v. National R.R. Passenger Corp., No. 98-3851, 1999 WL

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<sup>1</sup>On May 24, 1999, this Court granted Amtrak's Summary Judgment Motion in a separate case involving the same parties based on the same facts alleged herein in which Plaintiff sought damages pursuant to Title VII and state law theories of negligent and intentional infliction of emotional distress. See DeCesare v. National R.R. Passenger Corp., No. 98-3851, 1999 WL 330258 (E.D. Pa. May 24, 1999).

330258 (E.D. Pa. May 24, 1999), are set forth herein to adequately address the FELA issues involved. Plaintiff has worked at Amtrak's Maintenance Facility in Bear, Delaware from 1994 through October 23, 1996, and from July 1, 1997 through the present. Beginning in October 1996, she worked as a member of a coach cleaning team responsible for cleaning overhauled railroad coach cars and dumping dumpsters.

Plaintiff alleges that she was sexually harassed by another Amtrak employee, Larry Platt ("Platt"), on at least four different occasions during 1995 and 1996. Sometime in 1995, during a two week period in which Platt transferred in from another Amtrak facility, Plaintiff alleges that Platt addressed an inappropriate comment to her.<sup>2</sup> Plaintiff had no contact with Platt until approximately one year later, in late September or early October 1996, when Platt became her foreman. (DeCesare

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<sup>2</sup>Platt was Plaintiff's temporary supervisor at the time the following occurred:

The one night I was - we have a cafeteria, and I was bending over the tables and he came up behind me. I was reaching over the table to grab the newspaper and he came up behind me and said, that's a dangerous position for a woman to be - for a woman like you to be in.

(DeCesare Dep. of 12/28/98 at 106.) Plaintiff gave Platt a "dirty look" and walked away from him. Although Plaintiff considered this comment to be "totally rude," she was not terribly upset by it and did not report it to anyone in Amtrak management. (Id. at 107-08.)

Dep. of 12/28/98 at 110, 116.) Plaintiff alleges that, in early October 1996, Platt said, "those Barr boys are awful big, how do you handle all that." (Id. at 118.) Platt was apparently referring to Plaintiff's fiancée, Bruce Barr, and his brother, both of whom also worked for Amtrak. (Id.) Plaintiff alleges that Platt would stare at her while she was working and would make grunting noises or "chew on a toothpick or a straw and take his tongue and roll it across his lips and just continue to stare at" her. (Id. at 117, 119.)

At her deposition, Plaintiff also testified about an incident which occurred on October 4, 1996:

Q: Specifically, what did he say and do?

A: I think that was the night that I was up on a car, cleaning . . . and there was the electric wires hanging off the heater grille and they were loose wires, they weren't - they had no connectors on the end. And I told him about the situation, and he said, well, he'd hold the wires and I said fine. And I noticed that there was something around his neck. And when I asked him what was around his neck, he proceeded to grab his crotch area and rub it and say it's my extension and started laughing.

Q: What did you say?

A: I didn't say anything. I just quick got done what I was doing, got up and said I'm done. And he started - when he was laughing, he said, no, it's my snake light. And that's when I got up and walked off the car.

(Id. at 128-129.)

Approximately one week later, Platt questioned

Plaintiff about her absence from work on October 10 or 11, 1996. Prior to her absence, Platt had informed Plaintiff that there was a scheduled employee meeting requiring Plaintiff and other employees to report for work one hour early. Plaintiff informed Platt that "other obligations" prevented her from attending the meeting. (Id. at 161.) Plaintiff was subsequently absent from work on the date of the scheduled meeting and Platt allegedly accused her of lying because he thought she wanted to avoid coming to work early. Plaintiff, upset with Platt's accusation, told him to "back off" and leave her alone. (Id. at 161-62.)

Plaintiff claims that after this incident, Platt stared at her and "kind of sort of started getting nasty." (Id. at 156.) On October 16, 1996, Platt insisted that Plaintiff clean a train car that she believed she should not have to clean due to exposed wiring. At the advice of her union representative, she cleaned the car but stayed away from the offending wires. (Id. at 182-84.) On October 22, 1996, Plaintiff stopped working on the advice of her family doctor to "take yourself out of the environment." Plaintiff remained out of work for nearly nine months, during which time she performed the normal duties of a stay at home mother. (Id. at 189, 195-98.)

Instead of reporting these incidents involving Platt to Amtrak management, Plaintiff filed a grievance with the Transit Workers Union which was transmitted to Amtrak on October 25,

1996. (Id. at 127, 148-49, 157-58.) Amtrak investigated Plaintiff's allegations and held a hearing regarding Platt's conduct on December 11 and 12, 1996. (Kirshner Aff., ¶ 5, Ex. C, at ¶ 24.) Platt was found guilty of making the snake light comment and of staring lewdly at Plaintiff. Amtrak terminated Platt's employment. (Id. at ¶ 25.) Platt appealed his termination to the Public Law Board which found that his conduct had not been sufficiently severe to warrant termination and ordered his reinstatement. (Id. at ¶ 6, Ex. D.)

Plaintiff subsequently filed an EEOC charge against Amtrak on April 22, 1997. The EEOC dismissed her claims on April 28, 1998. (Id. at ¶¶ 7, 8, Exs. E, F.) Plaintiff then filed a Title VII action against Amtrak in this Court on July 23, 1998. On May 24, 1999, Plaintiff's case was dismissed in its entirety on summary judgment for failure to prove the sexual harassment cause of action. See supra n.1. Plaintiff's state law claims for negligence and intentional infliction of emotional distress were also dismissed because Plaintiff suffered no physical injury. Plaintiff filed the instant FEHA suit against Amtrak on January 11, 1999, prior to dismissal of her Title VII case.

## **II. STANDARD.**

Pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is proper "if there is no genuine issue as to any material fact and the moving party is entitled to

judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party has the initial burden of informing the court of those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable jury could find for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). A factual dispute is material only if it might affect the outcome of the suit under governing law. Id. at 248. To create a jury question in an FEHA case, a plaintiff must offer sufficient probative evidence in support of the elements of her claim. Brady v. Southern Ry. Co., 320 U.S. 476, 479 (1943)(citations omitted). This may be accomplished "by presenting only a minimum amount of evidence in opposition to the motion. . . . [A] trial court is justified in withdrawing issues from the jury's consideration only . . . where there is zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." Finley v. National R.R. Passenger Corp., No. 95-3594, 1997 WL 59322, at \*2 (E.D. Pa. Feb. 12, 1997)(citations omitted).

To defeat summary judgment, the non-moving party cannot rest on the pleadings, but must go beyond the pleadings and present "specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). The non-moving party must produce evidence such that a reasonable juror could find for that party. Anderson, 477 U.S. at 248. If the court, in viewing all

reasonable inferences in favor of the non-moving party, determines that there is no genuine issue of material fact, then summary judgment is proper. Celotex, 477 U.S. at 322; Wisniewski v. Johns-Manville Corp., 812 F.2d 81, 83 (3d Cir. 1987).

### III. DISCUSSION.

FELA provides that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 (West 1986). FELA is a broad remedial statute intended by Congress to be liberally construed, but it does not relieve plaintiffs from establishing negligence to prove employer liability. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542-44 (1994). Traditional common law elements of duty, breach, causation and damages apply to an FELA cause of action. Ferguson v. CSX Transp., 36 F. Supp. 2d 253, 255 (E.D. Pa. 1999)(citations omitted). Thus, this Court must first examine whether Amtrak owed a legal duty to Plaintiff.

Facts alleged to support a claim under the FELA for negligent infliction of emotional distress must "provide a threshold assurance that there is a likelihood of genuine and serious emotional injury." Gottshall v. Consolidated Rail Corp.,

56 F.3d 530 (1995).<sup>3</sup> Plaintiff alleges that Amtrak was negligent because it failed to take reasonable action when it had knowledge of Platt's harassing conduct toward other women. (Pl.'s Resp. to Def.'s Mot. Summ. J. at 9).<sup>4</sup> As a result, Plaintiff claims that Amtrak is liable for her resulting emotional distress.

Negligently produced emotional distress is actionable under FELA if a plaintiff is within the "zone of danger" of a physical impact. See Consolidated Rail Corp. Gottshall, 512 U.S. 532 (1994). The United States Court of Appeals for the Third Circuit ("Third Circuit") has stated that a defendant will owe a plaintiff a legal duty for a claim of negligent infliction of emotional distress only if "1) the plaintiff sustained a physical impact or 2) plaintiff was placed in immediate risk of physical

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<sup>3</sup>The United States Court of Appeals for the Third Circuit ("Third Circuit") defines "purely emotional claims" as "mental disturbance unaccompanied by a contemporaneous infliction of physical injury," and distinguishes this sort of injury from damages for pain and suffering which often attach to claims for physical injury. See Gottshall v. Consolidated Rail Corp., 56 F.3d 530, 534 n.3 (1995). The Court has not decided whether emotional distress, to be actionable, must produce accompanying physical manifestations in reaction to the mind's disturbance. Id.

<sup>4</sup>Other female Amtrak employees lodged complaints against Platt for harassment. (Pl.'s Opp'n to Def.'s Mot. Summ. J. at 8-9; See also Bishop v. National R.R. Passenger Corp., No. 98-3852, 1999 WL 800422 (E.D. Pa. Oct. 7, 1999).) Plaintiff claims that Amtrak negligently handled these complaints, which "laid the foundation for [her] subsequent harassment at the hands of Mr. Platt." Id.

harm or threatened imminently with physical impact." Ferguson, 36 F. Supp. 2d at 256 (citing Bloom v. Consolidated Rail Corp., 41 F.3d 911, 915-16 (3d Cir. 1994)). In examining physical impact, the Supreme Court rejects the notion that every form of physical contact can give rise to an FELA emotional distress claim. Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. 424, 432 (1997). Rather, there must be a threat of immediate traumatic harm. Id. at 428-38. Nothing in the record before this Court establishes that there was any physical impact between Platt and Plaintiff or any threat by Platt of immediate traumatic harm to Plaintiff.<sup>5</sup>

Plaintiff notes that Amtrak does not address any cases involving FELA and sexual harassment injuries in support of its Motion for Summary Judgment. (Pl.'s Resp. to Def.'s Mot. Summ. J. at 3.) Plaintiff contends that Smolsky v. Consolidated Rail Corp., 780 F. Supp. 283 (E.D. Pa. 1991), a case in which a plaintiff filed suit under FELA and Title VII seeking to recover for a supervisor's alleged harassment, and Dennis v. Consolidated Rail Corp., No. 93-1915, 1994 WL 494453 (E.D. Pa. Sept. 7, 1994),

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<sup>5</sup>Plaintiff, at deposition, stated:

Q: . . .[H]e never touched you, correct?

A: No, he didn't.

Q: He never threatened, physically threatened, you, correct?

A: Correct.

(DeCesare Dep. of 12/28/98 at 60.)

an FELA case also involving sexual harassment, appropriately address this issue. Both Smolsky and Dennis, however, were decided prior to Gottshall. Although Smolsky is similar to this case because both plaintiffs alleged sexual harassment without physical impact, Smolsky was decided three years prior to the Supreme Court's holding in Gottshall that the plaintiff must demonstrate that she was within the "zone of danger" of imminent physical impact. Dennis is equally unsupportive of Plaintiff's case because Dennis involved a clear physical impact. Here, there was no physical impact to Plaintiff.<sup>6</sup>

Plaintiff contends that Amtrak's discussion involving Gottshall is incomplete since Amtrak did not address Walsh v. Consolidated Rail Corp., 937 F. Supp. 380 (E.D. Pa. 1996), a case in which the Court denied summary judgment and stated that Gottshall does not preclude FELA claims where a specific and unsafe condition exists which leads to the stress or emotional distress suffered by an employee. Id. Amtrak notes, however, that in the Ferguson case, decided in this District more recently than Walsh, the Court granted summary judgment to a defendant

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<sup>6</sup>Amtrak notes that the Third Circuit has not addressed the issue whether Title VII is the exclusive remedy for sexual harassment claims or whether such claims may also be brought pursuant to the FELA. (Def.'s Mem. Law in Supp. Mot. Summ. J. at 9.) Even assuming that the Third Circuit agrees with the holding in Smolsky that Title VII does not preclude a sexual harassment claim from being pursued under the FELA, Plaintiff still must demonstrate that she was within the zone of danger.

railroad on an FELA emotional distress claim with more compelling facts than in the instant case. (Def.'s Mem. Law in Supp. of Mot. Summ. J. at 9.) In Ferguson, a railroad employee alleged that he suffered severe emotional distress as a result of verbal and physical threats by a co-employee. In that case, the co-employee threatened to kill him for reporting indiscretions of another employee to a supervisor, threatened to burn down the plaintiff's house and kill his family, and on one occasion made slashing motions across his neck and threw rocks and lumber at the plaintiff. Ferguson, 36 F. Supp. 2d at 253-54. The Court held that none of the actions gave rise to an FELA claim because none of the events placed the plaintiff in the zone of danger of immediate risk of physical harm. Id. at 255-56. In the instant case, Platt's conduct cannot be considered as egregious as that demonstrated in Ferguson. Accordingly, Plaintiff was never in the zone of danger of immediate risk of physical harm.

Plaintiff's claims for intentional infliction of emotional distress also do not allow her to avoid summary judgment. As stated previously, traditional common law tort elements apply to causes of action pursuant to the FELA. Ferguson, 36 F. Supp. 2d at 255. This Court previously dismissed Plaintiff's intentional infliction of emotional distress claim in the Title VII and state law contexts as not outrageous enough to be actionable. See DeCesare v. National R.R. Passenger Corp.,

No. 98-3851, 1999 WL 330258, at \*6 (E.D. Pa. May 24, 1999).

Thus, Plaintiff's FELA claim for intentional infliction of emotional distress also fails. In addition, Plaintiff's claim for intentional infliction of emotional distress, as a purely emotional injury with no significant impact or threat of immediate physical impact, fails under Gottshall.

#### **IV. CONCLUSION.**

For the foregoing reasons, Amtrak's Motion for Summary Judgment is granted. Plaintiff's case is dismissed with prejudice.

An appropriate Order follows.

