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

McCULLOM, et al.,	:	CONSOLIDATED UNDER
	:	MDL 875
Plaintiffs,	:	
	:	Transferred from the Southern
	:	District of New York
v.	:	(Case No. 10-cv-01742)
	:	
	:	
ALLEN-BRADLEY Co.,	:	
et al.,	:	E.D. PA CIVIL ACTION NO.
	:	10-65924
Defendants.	:	

O R D E R

AND NOW, this **1st** day of **December, 2011**, it is hereby **ORDERED** that the Motion for Summary Judgment of Defendants Long Island Railroad and Metropolitan Transportation Authority (doc. no. 114) is **GRANTED** in part and **DENIED** in part.[1]

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[1] This action was originally filed in the Supreme Court of the State of New York, New York County, on January 11, 2010. The action was removed to the United States District Court for the Southern District of New York, and on March 17, 2010, the action was transferred to the Eastern District of Pennsylvania as part of MDL 875.

Plaintiff, who developed mesothelioma, was deposed in this matter. Plaintiff filed a Federal Employers' Liability Act ("FELA") claim, 45 U.S.C. § 51 et seq., against Long Island Rail Road ("LIRR") and the Metropolitan Transportation Authority ("MTA"), as well as punitive damages claims. Plaintiff's wife, Elizabeth McCullom, brought a claim against LIRR and MTA for loss of consortium.

I. Legal Standard

A. Federal Employers' Liability Act

In 1908, Congress enacted FELA to provide a compensation scheme to allow railroad workers to recover damages from their employers for railroad workplace injuries. FELA

provides a statutory cause of action sounding in negligence. Norfolk S. Ry. v. Sorrell, 549 U.S. 158, 165 (2007).

In order to bring a FELA claim, a plaintiff must have been employed by the defendant. The statute 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 injuries caused by the railroad's negligence. 45 U.S.C. § 51 (emphasis added). The plaintiff "must have been injured while being employed by the defendant Railroad." Taras v. Baker, 411 F. Supp. 426, 427 (E.D. Pa. 1975), aff'd sub nom. Baker v. Atl. & Guld Stevedores, Inc., 535 F.2d 1245 (3d Cir. 1976).

Regarding federal preemption, the Third Circuit has said that, even where a Plaintiff's **state law** claims against asbestos locomotive parts manufacturers were preempted by the LIA (an issue that is currently on review to the Supreme Court), "federal law offers recourse to workers exposed to asbestos under [FELA], which provides a federal cause of action for any railroad employee injured on the job due to employer negligence." Kurns v. A.W. Chesterton Inc., 620 F.3d 392, 400 (3d Cir. 2010), cert granted on other grounds, Kurns v. Railroad Friction Products Corp., 131 S.Ct. 2959 (U.S. Jun 06, 2011) (NO. 10-879). Additionally, along with the LIA, FELA offers "a broad, reasonable, and comprehensive legal framework under which railroad industry employees injured by employer negligence may seek damages." Id. Moreover, "FELA has been recognized as the appropriate avenue of relief in several" state supreme court cases, which held that "tort claims claiming asbestos exposure and seeking recourse under state law were preempted by the LIA." Id. (citations omitted).

As for loss of consortium claims brought under FELA, federal courts have found that "there exists no right to recover for loss of consortium when the underlying claim is brought pursuant to FELA." Sindoni v. Consol. Rail Corp., 4 F. Supp. 2d 358, 360 (M.D. Pa. 1996); see also Quitmeyer v. Se. Pa. Transp. Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990). Additionally, FELA provides a right to compensatory damages only, and not to punitive damages. See, e.g., Kozar v. Chesapeake & O. Ry. Co., 449 F.2d 1238, 1241 (6th Cir. 1971) (citations omitted) (discussing "the clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under [FELA] are compensatory only").

B. Locomotive Inspection Act

The Third Circuit has explained the LIA as follows:

> The LIA was originally passed in 1911, and was amended in 1915 and 1924. In pertinent part, it provides that "[a] railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances-(1) are in proper condition and safe to operate without unnecessary danger of personal injury...." 49 U.S.C. § 20701. While the statute itself is silent as to any preemptive effect, one can easily understand how a state law or action which regulates whether a locomotive or any of its parts and appurtenances "are in proper condition and safe to operate" could conflict with federal safety regulations.

Id. at 396.

II. Motion for Summary Judgment by Defendants Long Island Rail Road and Metropolitan Transportation Authority

Plaintiff was an electrician for LIRR from 1965 to 1993. (See Def.'s Ex. A). It is undisputed that Plaintiff, for the entirety of his career at LIRR, performed inspections and/or repaired diesel electric locomotives. He testified that he was exposed to asbestos performing his work duties, as various component parts on these locomotives contained asbestos. (See Def.'s Br. at 2, doc. no. 125-4) (citing numerous deposition pages).

A. FELA is not preempted by the LIA

Defendant's argues that FELA is preempted by the LIA. This argument is unfounded. Defendant acknowledges that the Supreme Court in Napier v. Atlantic Coast Line Railroad Co., 272 U.S. 605, 613 (1926), and the Third Circuit's decision in Kurns, "demonstrate that, because the LIA occupies the field of locomotive safety, any **state law cause of action** challenging the presence of asbestos in locomotives is preempted even if the [Federal Railroad Administration] has not issued a regulation with respect to asbestos in locomotives." (Def.'s Br. at 17, doc. no. 125-4) (emphasis added). However, Defendant nevertheless argues that "the same reasoning should apply when a plaintiff

attempts to use a **federal cause of action** like the FELA to intrude upon the field of locomotive safety." (Id.) (emphasis added). This argument fails. As cited above, Kurns itself notes that FELA offers "a broad, reasonable, and comprehensive legal framework under which railroad industry employees injured by employer negligence may seek damages." Kurns, 620 F.3d at 400. This is exactly the case that the Court has before it: a railroad industry employee injured by alleged employer negligence bringing a federal claim.

B. MTA is entitled to summary judgment based on Plaintiff's employment status

Defendant MTA seeks dismissal of Plaintiff's complaint on the ground that Plaintiff has failed to establish an employer/employee relationship with MTA, which would be required in order for Plaintiff to maintain his FELA claim.

Plaintiff testified that during the time he worked for LIRR, he was employed directly by LIRR. He took orders from an LIRR foreman and was paid by LIRR. He did not know of any MTA employee who directed or supervised his work.

It is undisputed that Plaintiff was employed by LIRR. It is disputed whether this employment also constituted employment by MTA. However, Plaintiff cites to only one case to support his argument that he was also employed by MTA while he worked for LIRR, and this case does not help his position. The Second Circuit case of Greene v. Long Island R.R. Co. discussed the issue of whether, "with respect to the police officers whom MTA employs to provide security for LIRR railroad parking lots, MTA 'operates' an 'interstate common carrier by railroad' within the meaning of FELA," such that a FELA claim could be brought against MTA. 280 F.3d 224, 240 (2d Cir. 2002). The plaintiff was, at the time he was injured (in a parking lot maintained by the LIRR, but owned and operated by the MTA), a police officer employed by MTA. Id. at 270. It was undisputed that the MTA was his employer, so that was not at issue in the case. The Second Circuit's finding that the MTA is a "common carrier," such that it could be sued under FELA, does not support Plaintiff's claim that he was employed by MTA (regardless of whether it is a common carrier) while he was also employed by LIRR.

As plaintiff has not presented evidence that he was employed by MTA, but rather has testified that he was employed by LIRR, Defendant MTA is entitled to summary judgment on the basis

that it was not Plaintiff's employer at the time Plaintiff was injured.

C. Defendants are entitled to summary judgment on Elizabeth McCullom's claims for loss of consortium

Federal courts have found that "there exists no right to recover for loss of consortium when the underlying claim is brought pursuant to FELA." Sindoni v. Consol. Rail Corp., 4 F. Supp. 2d 358, 360 (M.D. Pa. 1996); see also Quitmeyer v. Se. Pa. Transp. Auth., 740 F. Supp. 363, 370 (E.D. Pa. 1990). Therefore, summary judgment is granted regarding Mrs. McCullom's loss of consortium claims.

D. Defendants are entitled to summary judgment on punitive damages claims

FELA provides a right to compensatory damages only, and not to punitive damages. See, e.g., Kozar v. Chesapeake & O. Ry. Co., 449 F.2d 1238, 1241 (6th Cir. 1971) (citations omitted) (discussing "the clear, unambiguous statements in the line of Supreme Court authorities holding that damages recoverable under [FELA] are compensatory only"). Therefore, summary judgment is granted for Defendant regarding the punitive damages claims.

III. Conclusion

Summary judgment is granted in part and denied in part.

As Plaintiff testified to his exposure to asbestos while working for LIRR, and as the LIA does not preclude plaintiffs from bringing federal FELA claims, summary judgment is denied for LIRR regarding Plaintiff's FELA claims.

However, as there is no evidence that Plaintiff was ever employed by MTA, summary judgment is granted regarding Plaintiff's FELA claims against MTA.

Additionally, as loss of consortium claims and punitive damages claims cannot be sought under FELA, summary judgment is granted regarding those particular claims.

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AND IT IS SO ORDERED.

EDUARDO C. ROBRENO, J.