

Case Name: Ballard v. Union Pacific Railroad Company

Date Decided: April 2nd, 2010

Originally Filed in: Nebraska (State)

Decided by: Nebraska Supreme Court (State)

Court: Supreme Court of Nebraska

Judge: Judge McCormack

Citation: Ballard v. Union Pacific Railroad Company, 781 N.W.2d 47 (Neb. 2010)

Background:

Ballard worked as a truck driver for Union Pacific Railroad Company ("UP") and moved to Delta, Utah to be working with a crew consisting of Johnny Adison, Ted Tom, and Oliver Becenti. His immediate supervisor was Craig Dannelly. On March 21, 2005, Becenti and Tom took Ballard under the arms and lifted him off the ground while Adison thrust his hips into Ballard's groin area. Ballard reported the incident to Dannelly. UP conducted an investigation into the incident and charged the three men with violating UP's rules of conduct and suspended them that day. Ballard filed suit in Federal District court which granted UP's motion for summary judgment. He then filed his suit in state court alleging FELA violations. During a deposition he testified that the three men had harassed him before and it was not a normal occurrence for them to joke around. Ballard alleged that UP knew or should have known that Oliver Becenti, Ted Tom, and Johnny Adison had a propensity to harass employees and provided evidence that these men grabbed the buttocks of employees on several occasions while the employees walked down a UP office hallway. In response, UP filed a motion for summary judgment and the court granted the motion stating that Ballard failed to produce sufficient evidence indicating that UP knew or should have known that any of the three men had a propensity for violence or a proclivity for actions which would have resulted in the action and injury to Ballard. The Court explained the fact that these three men may have grabbed people's asses during the week before Ballard's incident does not rise to the level of the harassment that would have reasonably put UP on notice.

Issue:

Is the defense of res judicata available to a defendant on appeal when it was not pleaded at the trial court level? Did the plaintiff fail to raise an issue of material fact in regards to the defendant's FELA liability for its employees?

Overall Issues Discussed or Touched Upon in this Case:

- *Procedural Issues - State*
- *Insufficient Evidence of Negligence*
- *Ruling on Summary Judgment*
- *Summary Judgment - Defendant Factual Granted*
- *Summary Judgment - Defendant Legal Granted*

Held:

The Court rejected UP's ability to raise the issue of res judicata for a first time on appeal. The court noted that while it could raise the issue sua sponte but that doing so is a power infrequently used by appellate courts and as such it would refrain from doing so. Next, the court explained the standard of judgment requires it to review all facts in favor of the non-moving party and to find no genuine issue of material fact or law. Under FELA, a railroad company is held liable to any employee who suffers injury during the course of employment when the injury results in any part of the railroad's negligence. Thus, the plaintiff is required to prove the employer's negligence and that the employer's negligence was a proximate cause of the employee's injury. Here, Ballard seeks to hold UP liable for the harassment of its employees. Under FELA, there are two theories of liability for cases involving intentional assaults by fellow employees: 1) respondeat superior or 2) direct negligence. Under respondeat superior, a FELA plaintiff may prevail by showing that the intentional tort was committed in furtherance of the employer's objectives. While the theory of direct negligence requires the plaintiff to prove the employer was negligent in hiring, supervising, or failing to fire the tortfeasor employee. To do this courts require the plaintiff to show that the defendant had knowledge of the employee's tortious propensities and failed to act. Ballard asserts that UP is liable under the theory of direct negligence. The Court took issue with Ballard's ability to present evidence that proved that UP knew or should have known prior to his incident that Becenti, Tom, or Adison had dangerous propensities. The Court in its review of the record found no evidence sufficient to support a finding of knowledge on UP's part. Neither Ballard nor any other UP employee had reported any inappropriate behavior regarding these three men to UP. Further, the record does not disclose that the three men had a history of violent acts or of sexual harassment or that their supervisors were aware of facts which would have led them to suspect that the three men might engage in such conduct. Further, the Court explained that the one incident involving the grabbing of the buttocks when viewed in the light most favorable to Ballard is insufficient to support the notion that the three tortfeasors had dangerous propensities. Finally, the court found no case law to support Ballard's argument that UP's failure to train its employees not to harass or touch other employees and as such it is without merit. Thus, the court held that Ballard presented no evidence from which a jury could infer that UP knew or should have known that the three men would commit the tortious acts that Ballard complains of.

Comments:

An employer can be held liable for its employee's intentional torts under the theories of respondeat superior or direct negligence under the Federal Employers Liability Act.