STATE OF MICHIGAN

COURT OF APPEALS

SALLY J. PORTER,

Plaintiff-Appellant,

v

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 24, 1998

No. 194409
Wayne Circuit Court
LC No. 95-508183-NO

Before: Holbrook, Jr., P.J., and Young and J.M. Batzer*, JJ.

PER CURIAM.

Plaintiff brought this action under the Federal Employer's Liability Act, 45 USC 51 *et seq*. (FELA), after injuring her back while employed as a crew dispatch clerk for defendant Consolidated Rail Corporation (Conrail) at its Dearborn facility. Plaintiff alleged that she had just sat down at her desk following one of her breaks when her chair suddenly "went back." Plaintiff appeals as of right from the order granting Conrail's motion for a directed verdict. We affirm.

Plaintiff argues that a directed verdict in favor of Conrail was improper because there was sufficient evidence for a reasonable jury to conclude that Conrail was negligent. We disagree. In reviewing a motion for a directed verdict, this Court reviews all of the evidence presented up to the time of the motion in a light most favorable to the nonmoving party to determine whether a question of fact existed. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997).

A FELA claim requires proof of the traditional common-law elements of negligence: duty, breach, foreseeability, and causation. *Adams v CSX Transportation, Inc*, 899 F2d 536, 539 (CA 6, 1990). Under FELA, an employer has the duty to provide its employees with a reasonably safe workplace. *Id*. The employer breaches this duty if it knew or should have known of a workplace hazard and failed to exercise reasonable care under the circumstances. *Urie v Thompson*, 337 US 163, 178; 69 S Ct 1018; 93 L Ed 1282 (1949); *Patterson v Norfolk and Western Railway Co*, 489 F2d 303, 305 (CA 6, 1973). In *Peyton v St. Louis Southwestern Railway Co*, 962 F2d 832, 833 (CA 8, 1992), the court explained that "the employer's duty under FELA to maintain a safe workplace

* Circuit judge, sitting on the Court of Appeals by assignment.

turns in a general sense on the reasonable foreseeability of harm." Thus, "an employer is not liable if it had no reasonable way of knowing about the hazard that caused the employee's injury." *Id*.

In this case, we conclude that a directed verdict in Conrail's favor was appropriate because plaintiff failed to establish that Conrail knew or should have known of a risk of harm to plaintiff. Plaintiff introduced evidence that, two years before plaintiff's accident, Don Carnell, Conrail's facilities manager, asked Phil Bommarito, a non-Conrail employee who performed work for Conrail but was actually employed by Mile Post Industries, to solicit bids for bi-annual inspections of all modular workstations in the building, including chairs. That inspection program was never implemented. Notwithstanding, plaintiff presented no evidence that the request for bids on workstation inspections was made because of concern about the safety of Conrail's chairs.[1] We believe that, in the absence of *some* evidence suggesting *why* the request for workstation inspection bids was made, the jury would have been allowed impermissibly to speculate about those reasons. In addition to safety, the inspections could just as easily have been for the purpose of evaluating workstation ergonomics, efficiency, etc.

Plaintiff also attempted to introduce evidence, through the testimony of Gary Brightman, a Conrail police officer, of a previous incident in which another one of Conrail's chairs was involved. However, plaintiff ended her direct examination of Brightman without having elicited any testimony establishing either what caused the prior accident or that the chair involved was itself defective.[2] In sum, there simply was no record evidence upon which the jury could reasonably conclude that Conrail knew or should have known of potential defects in plaintiff's chair until her accident.

Plaintiff argues that the accident report prepared by Christopher Pace, a Conrail manager, which indicated that the chair was defective and that the defect was caused by constant use without inspection, was "sufficient to allow the jury to make a finding that [Conrail] was negligent by allowing a defective chair to be used by [] [p]laintiff and by failing to inspect the chairs for defects." However, even if the jury could properly find that the chair was defective and further that it caused plaintiff's injuries, that does not end the inquiry. To the contrary, as stated above, plaintiff was required to provide evidence that the risk of harm was reasonably foreseeable to her employer before her accident.[3] Because she failed to do so, the directed verdict in favor of Conrail was properly granted.

We have reviewed plaintiff's remaining claims of error, none of which require reversal of the trial court's decision.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Robert P. Young, Jr.
/s/ James M. Batzer

[1] Bommarito testified that he did not know why Carnell requested workstation inspection bids and Carnell did not testify.

[2] We reject as unfounded plaintiff's claim that it was the trial court that "terminated the inquiry into the subject."

[3] While plaintiff is correct that, unlike the common law, an employer may be held liable under FELA if the employer's negligence "played any part at all in the injury," *Rogers v Missouri Pacific Railroad Co*, 352 US 500, 506; 77 S Ct 443; 1 L Ed 2d 493 (1957), FELA is neither a worker's compensation statute nor a strict liability statute. *Fashauer v New Jersey Transit Rail Operations, Inc*, 57 F3d 1269, 1282 (CA 3, 1995). Again, a plaintiff is required to prove some form of linkage between the employer's conduct and the injury. Under FELA, the employer's negligence can be proven by showing the employer's preaccident knowledge or notice of a potential risk of harm and failure to exercise reasonable care to avoid that harm. As stated, plaintiff's proofs failed to establish linkage between the harm and Conrail's preaccident awareness of it.