American Maritime Cases

MAE LAKE, Plaintiff
v.
ORGULF TRANSPORT CO. , ET AL., Defendants
United States District Court, Western District of Tennessee,
February 8, 1993

No. 92-2255-M1/A

PERSONAL INJURY - 13. General Maritime Law and Jones Act - PRACTICE - 158. Discovery, Interrogatories - 33. Attorneys - WITNESS - Interviewing Employee of Adversary.

FELA statute 45 U.S.C. 60 applies to Jones Act cases and therefore counsel for defendant may not instruct employees of defendant, other than those whose corporate positions give them power to bind defendant, not to speak to plaintiff or his counsel about the case.

Dennis M. O'Bryan

for Plaintiff

Stephen E. Smith, Jr.

for Defendants

James H. Allen, Magistrate Judge:

Plaintiff has filed, on September 2, 1992, a motion seeking Court action on various discovery disputes she is having with defendants in this litigation. These will be dealt with separately herein.

Motion to Enjoin Counsel

Plaintiff Mae Lake has brought this suit for damages pursuant to 46 U.S.C. app. 688, (the so-called "Jones Act"), alleging that she was injured while working as a crew member aboard the M/V *Dick Conerly*, a vessel owned and operated by defendants.

Plaintiff retained Dennis O'Bryan, an attorney from Birmingham, Michigan, as her counsel to pursue her Jones Act claims against defendants. Apparently someone by the name of "Michelle", associated in some way with Mr. O'Bryan, contacted certain employees of defen ***1491**

dants. It is not clear what status these employees had with defendants (that is, whether they were employees in a similar status as plaintiff, or whether they were officials of the defendants).

These employees advised counsel for defendants, who, on July 23, 1992, wrote O'Bryan, advising him that "(t)he rules of professional conduct prohibit contact with any employees whose acts or omissions in connection with the subject of the litigation may be imputed to my clients." Counsel for defendants further demanded that O'Bryan "immediately discontinue any further efforts to contact or communicate directly with any of my clients' agents or employees."

Counsel for plaintiff has filed a motion seeking an Order of this Court, enjoining counsel for defendants from preventing defendants' employees from voluntarily furnishing information as to the facts concerning plaintiff's injury. Counsel for plaintiff has cited as authority for this proposition the provisions of 45 U.S.C. 60. Defendants, on the other hand, argue that

this statute is inapplicable, and, even if applicable, has not been violated.

The Jones Act provides, where pertinent, as follows:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. 46 U.S.C. app. 688.

The language of the Jones Act thus establishes a relationship between it and 45 U.S.C. 51*et seq.* (hereinafter, the "FELA") This relationship has been stated in different ways by different Courts.

In *Cox v. Roth*, 348 U. S. 207, 209, 1955 AMC 942 , 944 (1955), the Court said (in discussing this relationship):

The Jones Act, in providing that a seaman should have the same right of action as would a railroad employee, does not mean that the very words of the FELA must be lifted bodily from their context and applied mechanically to the specific facts of maritime events. Rather, it means that those contingencies against which Congress has provided to ensure recovery to railroad employees should also be met in the admiralty setting.

In *Cortes v. Baltimore Insular Line, Inc.*, 287 U.S. 367, 378, 1933 AMC 9 , 15 (1932), Mr. Justice Cardozo said that, in comparing the ***1492**

FELA and the Jones Act, where a "concurrence of duty, of negligence and of personal injury is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carriers by rail."

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 439, 1958 AMC 251 , 262 (1958), the Court said that the Jones Act expressly provides for seamen the "causes of action-and consequently the entire judicially developed doctrine of liability-granted to railroad workers by the FELA."

The Sixth Circuit has concluded that FELA rules and decisions govern Jones Act litigation. *Gillespie v. United States Steel Corp.*, 1965 AMC 18 , 24 , 321 F.2d 518, 523 (6 Cir. 1963),*aff'd*379 U.S. 148, 155-156, 1965 AMC 1 , 7-8 (1964); *Tolar v. Kinsman Marine Transit Co.*, 1983 AMC 283 , 287 , 618 F.2d 1193, 1196 (6 Cir. 1980).

Defendants argue that 45 U.S.C. 60 is not one of the FELA statutes incorporated into the Jones Act, presumably because it is not a statute "modifying or extending the common-law right or remedy in cases of personal injury". See 46 U.S.C. app. 688.

This position is, however, untenable. The ability, or inability, of counsel for plaintiff to investigate the merit (or lack of merit) of a client's claim under the Jones Act certainly bears upon (*i.e.*, modifies or extends) plaintiff's common-law right or remedy. Even though the provisions of 45 U.S.C. 60 can be looked at as procedural, rather than substantive, this fact alone is not dispositive. In *Sawyer v. Federal Barge Lines*, 1984 AMC 2856 , 2856-57 , 577 F.Supp. 37, 38 (S.D.Ill. 1982), the Court held that the provisions of 28 U.S.C. 1445 (a), prohibiting the removal from State Court to Federal Court of FELA actions, also applied to Jones Act cases, because of the language in 46 U.S.C. app. 688. This is certainly a procedural, rather than a substantive, matter.

It is therefore held herein that the provision of 45 U.S.C. 60 applies to a Jones Act case.

45 U.S.C. 60 provides as follows:

Any contract, rule, regulation, or device whatsoever,

the purpose, intent, or effect of which shall be to prevent employees of any common carrier from furnishing voluntarily information to a person in interest as to the facts incident to the injury or death of any employee, shall be void, and whoever, by threat, intimidation, order, rule, contract, regulation, or device whatsoever, shall attempt to prevent any person from furnishing voluntarily such information to a person in interest, or whoever discharges or otherwise ***1493**

disciplines or attempts to discipline any employee for furnishing voluntarily such information to a person in interest, shall, upon conviction thereof, be punished by a fine of not more than $1,000 or imprisoned for not more than one year, or by both such fine and imprisonment, for each offense: *Provided*, That nothing herein contained shall be construed to void any contract, rule, or regulation with respect to any information contained in the files of the carrier, or other privileged or confidential reports. 45 U.S.C. 60.

Defendants have argued that it is improper for plaintiff's *counsel*to contact defendants' employees (at least inferentially indicating that it would be satisfactory for *plaintiff*to contact them).

The statute speaks of rules, devices, etc., attempting to prevent the voluntary furnishing of information to a "person in interest". This includes attorneys or prospective attorneys for injured employees. *Sheet Metal Workers International Association v. Burlington Northern Railroad Co.*, 736 F.2d. 1250, 1251-1252 (8 Cir. 1984). Therefore, 45 U.S.C. 60 protects plaintiff's *counsel*, as well as plaintiff, from such attempted prohibition of interviews.

Tenn. S. Ct. Rule 8, DR 7-104, provides, where pertinent, as follows:

(A) During the course of his representation of a client a lawyer shall not:

(1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so.

This rule has been adopted as a rule of practice in this District. See Local Court Rule 1 (e).

There are, however, two (2) reasons why this ethical principle does not prohibit plaintiff's counsel from contacting employees of defendants (not officers or other corporate employees whose position gives them the legal authority to bind the employer).

First, as has been previously indicated, plaintiff's counsel is "authorized by law (i.e., the provisions of 45 U.S.C. 60) to do so."

Second, there is no showing that the employees approached by plaintiff's counsel (or his associate) were corporate employees whose position gives them the legal authority to bind the employer in a legal ***1494**

evidentiary sense. These are the only corporate employees covered by DR 7-104 (A).*Sherrod v. Furniture Center*, 769 F.Supp. 1021, 1022 (W. D. Tenn. 1991) (Turner, J.).

It therefore results that counsel for defendants was incorrect in instructing those employees not to speak to counsel for plaintiff, and should not do so in the future. As long as the employees interviewed by plaintiff's counsel are not corporate employees whose position gives them the legal authority to bind the corporate defendants, counsel for plaintiff may legitimately interview them. FNa1

FNa1. Note: Rulings on various discovery issues omitted-Eds.

W.D.Tenn., 1993

Not Reported in F.Supp., 1993 WL 194096 (W.D.Tenn.), 1993 A.M.C. 1490

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