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

JOSEPH C. PERNA,	:	CIVIL ACTION
	:	
v.	:	
	:	
ARCO MARINE, INC.	:	NO. 97-4326

MEMORANDUM AND FINAL JUDGMENT

HUTTON, J. November 29, 1999

Presently before the Court is Defendant's Motion for Summary Judgment (Docket No. 8) and Plaintiff's response thereto. For the reasons stated below, the Defendant's Motion for Summary Judgment is **GRANTED**.

I. BACKGROUND

In the light most favorable to the Plaintiff, the facts are as follows. Plaintiff has worked as a seaman for Defendant since 1972. In May 1994 Plaintiff served aboard the Arco Alaska as Chief Steward under the command of Captain Gray. During this tour Plaintiff's relationship with Captain Grey deteriorated due to Plaintiff's refusal to institute certain changes to the ship's menu. Following the commencement of Plaintiff's tour he was hospitalized for several days, however, he returned to the Alaska to serve another tour on July 21, 1994 under the Command of Captain Devins. During this tour, on or about September 2, 1994, Captain Devins gave Plaintiff a positive evaluation.

Following the September 2, 1994 evaluation Captain Gray returned to command of the vessel. From this point forward Plaintiff and Captain Gray were in conflict with each other. Plaintiff was disciplined by the Captain in front of his staff and subordinates, made to clean the Captain's room excessively, and required to constantly demonstrate equipment use during fire and boat drills; despite the belief that this job would be rotated. Plaintiff further alleges that Captain Grey embarked on a campaign to harass and humiliate Plaintiff. Such conduct included the failure to discipline a shipmate that allegedly threatened Plaintiff with a knife.

At the conclusion of Plaintiff's tour with Captain Grey, Plaintiff received a written evaluation for the period of September 2, 1994 until October 6, 1994. Plaintiff's evaluation stated, inter alia, that Plaintiff's supervisory skills were unacceptable and that there was a perception that Plaintiff was paranoid. Plaintiff finished his last assignment on the Arco Purdoe Bay, on or about April 15, 1995. Since this time Plaintiff has had no gainful employment and is suffering from depression. Plaintiff files this instant action asserting "emotional illness" resulting from the harassment, belittlement, embarrassment, and humiliation inflicted upon him by Captain Grey.

II. DISCUSSION

A. Exhaustion of Remedies in the Collective Bargaining Agreement

Defendant asserts that Plaintiff's complaint should be dismissed by the Court because Plaintiff exercised his legal remedies without first attempting to resolve his grievance under the Collective Bargaining Agreement ("CBA"). (See Def.'s Mot. for Summ. J. at 14). This position, however, is without merit. Generally, when determining the scope of an arbitration clause, courts operate under a "presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" See Battaglia v. McKendry, No. CIV.A.98-5321, 1999 WL 570861, at *4 (E.D. Pa. Aug. 3, 1999) (quoting AT & T Techs. v. Communications Workers, 475 U.S. 643, 650 (1986)). Of course, where an agreement to arbitrate is limited in its substantive scope, courts ought not allow this " 'policy favoring arbitration . . . to override the will of the parties by giving the arbitration clause greater coverage than the parties intended.' " Id. (quoting PaineWebber v. Hartmann, 921 F.2d 507, 513 (3d Cir.1990)).

In this instant matter, Section 206.1 of the CBA states "the following procedure shall govern the . . . complaint of a Chief Steward of unfair treatment in applying the provisions of

this Agreement." (See CBA § 206.1) (emphasis added). Section 206.3 further states that "[n]o complaint or grievance shall be considered unless presented in accordance with the foregoing procedure . . . ." (See CBA § 206.3).

Even in light of the above mentioned provisions, the Court finds that Plaintiff is not required to arbitrate this matter because the very terms of the CBA's arbitration clause is limited to disputes concerning the unfair application or interpretation of the Agreement. (See CBA § 206.1) Plaintiff makes no such claim, rather Plaintiff's claim is for personal injury caused by Defendant's negligence and the vessels unseaworthiness. (See Pl.'s Compl. ¶ 7). The CBA makes no such reference to personal injury matters and further fails to address the possibility of, or the procedure for, resolving claims under the Jones Act or the doctrine of unseaworthiness. As such, the Court finds that there is positive assurance that the arbitration clause does not cover the current dispute and the Court must consider the merits of Plaintiff's claim.

B. Plaintiff's Complaint

Federal Rule of Civil Procedure 8(a) requires that a plaintiff's complaint set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Accordingly, the plaintiff does not have to "set out in detail the facts upon which he bases his claim." Conley v.

Gibson, 355 U.S. 41, 47 (1957). In other words, the plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Id.

The purpose of summary judgment is to avoid a pointless trial in cases where it is unnecessary and would only cause delay and expense. See Goodman v. Mead Johnson & Co., 534 F.2d 566, 573 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment has the initial burden of showing the basis for its motion. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the movant adequately supports its motion pursuant to Rule 56(c), the burden shifts to the nonmoving party to go beyond the mere pleadings and present evidence through affidavits, depositions, or admissions on file to show that there is a genuine issue for trial. See id. at 324. A genuine issue is one in which the evidence is such that a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

When deciding a motion for summary judgment, a court must draw all reasonable inferences in the light most favorable to the

nonmoving party. See Big Apple BMW, Inc. v. BMW of N. Am., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992), cert. denied, 507 U.S. 912 (1993). Moreover, a court may not consider the credibility or weight of the evidence in deciding a motion for summary judgment, even if the quantity of the moving party's evidence far outweighs that of its opponent. See id. Nonetheless, a party opposing summary judgment must do more than rest upon mere allegations, general denials, or vague statements. See Trap Rock Indus., Inc. v. Local 825, 982 F.2d 884, 890 (3d Cir. 1992).

1. Count I - Jones Act

Title 46, Section 688 of the United States Code states in relevant part that:

> 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. . . .

42 U.S.C.A. § 688 (West 1999) ("Jones Act") (emphasis added). Further, this section provides that ". . . 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 . . . ." § 688. Thus, in interpreting a plaintiff's rights under § 688, the Court must look to cases which have interpreted the Federal Employers' Liability Act (FELA) at Title 45, Section 51 of the United States Code. See Fashauer v. New Jersey Transit Rail Operations, Inc., 57 F.3d 1269, 1278 n.3 (3d Cir. 1995) (citing

Kernan v. American Dredging Co., 355 U.S. 426, 439, 78 S. Ct. 394, 401, L. Ed. 2d 382 (1958)).

As a threshold question, the Court must determine the nature of Plaintiff's "personal injury" for the purposes of the Jones Act. Only if the Court finds that such injury is one which is cognizable under the Act, can the Court consider the existence of negligence on the part of the Defendant. See, .e.g., Bloom v. Consolidated Rail Corp., 41 F.3d 911, 914 (3rd Cir. 1994).

Plaintiff's complaint alleges that "[o]n or about April 14, 1995 plaintiff suffered injures while under the employment of defendant." (See Pl.'s Compl. ¶ 5). Plaintiff's complaint also states that "[s]olely by reason of the negligence of the defendant and the unseaworthiness of its vessel, plaintiff sustained personal injuries." (See Pl.'s Comp. ¶ 7) (emphasis added). Lastly, Plaintiff's response to Defendant's interrogatories clearly states that the only injury sustained as a result of the alleged occurrences was "emotional illness." (See Pl.'s Resp. to Def.'s Interogs. ¶ 9).

Thus, it is quite evident that the only cognizable causes of action in Count I which Plaintiff has given the Defendant notice of, pursuant to Fed R. Civ. P. 8(a), is for negligent infliction of emotional distress and unseaworthiness. Despite this, Plaintiff contends that his Jones Act claim is not for negligent infliction of emotional distress, but rather for "failure to furnish plaintiff

with a safe place to work in light of the history of ill will between the Captain and [Plaintiff].” (See Pl.’s Resp. to Def.’s Summ. J. Mot. at 12). Plaintiff further states that, “Plaintiff’s claim is for negligently creating a situation which enabled . . . the Captain of [the] vessel, to intentionally inflict such emotional distress as to cause serious injuries.” (See Pl.’s Resp. to Def.’s Summ. J. Mot. at 13).

Characterizing Plaintiff’s claim through circular wording such as the foregoing, has little effect on the Court’s analysis. No matter what label Plaintiff puts on his claim, the only injury alleged is “emotional injury,” which by the very terms of Plaintiff’s complaint sounds in negligence. (See Pl.’s Compl. ¶ 7).

Plaintiff attempts to characterize his claim with a form over substance argument. Despite this, even accepting Plaintiff’s assertion that his claim is for “failing to furnish plaintiff with a safe place to work,” the only injury Plaintiff has claimed is emotional injury based upon the negligent actions of Defendant. (See Pl.’s Compl. ¶ 7; see also Pl.’s Answers to Def.’s Interrogs. ¶¶ 2-9). Based upon Plaintiff’s explanation of the events, the Court simply cannot characterize Plaintiff’s claim as anything other than one based upon Defendant’s negligence for allowing emotional injury to be inflicted upon the Plaintiff. Such a claim is at its core nothing more than a claim for “negligent infliction of emotional distress.”

Plaintiff makes no mention of any physical injury occurring concurrently with Defendant's negligence, nor does Plaintiff allege that Defendant's negligence caused Plaintiff to suffer later physical consequences. Plaintiff had the opportunity to state such injuries in his interrogatory answers, yet failed to do so, instead unequivocally stating without specific explanation, that the only injuries incurred were "emotional injury." (See Pl.'s Answers to Def.'s Interrogs. ¶ 2). Since there are no facts in the record which would allow the Court to conclude Plaintiff's injuries were actually physical in nature the Court must analyze Plaintiff's claim based upon the standards for "emotional injury" set forth by the Supreme Court and the Third Circuit.

In Consolidated Rail Corp. v. Gottshall, the Supreme Court held that "as part of its 'duty to use reasonable care in furnishing its employees with a safe place to work,' a railroad has a duty under FELA to avoid subjecting its workers to negligently inflicted emotional injury." 512 U.S. 532, 550 (1994). However, such emotional injury did not "impose a duty to avoid creating a stressful work environment . . . ." Id. at 554. When a recovery for negligently inflicted emotional injury is cognizable, "workers within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not." Id. at 556. Thus, the zone of danger test limits recovery for emotional injury

resulting from a defendant's negligent conduct, notwithstanding the fact that its application will foreclose some genuine claims. See Bloom, 41 F.3d at 914 (citing Gottshall, 512 U.S. at 532). Such restriction on "emotional distress" claims equally apply to Plaintiff's claims under the Jones Act as the body of FELA jurisprudence is expressly incorporated into the Jones Act. See Fashauer, 57 F.3d at 1278 n.3; see also 42 U.S.C.A. § 688.

In the current matter, to recover for purely emotional injuries, as so admitted, Plaintiff must be within the zone of danger; requiring that Plaintiff suffer a physical impact or be placed in immediate risk of physical harm by Defendant's negligence. See Gottshall v. Consolidated Rail Corp., 56 F.3d 530, 532 (3d Cir. 1995) (applying the zone of danger test to purely emotional injuries after remand of the matter by the Supreme Court); See also Ferguson v. CSX Transp., 36 F. Supp.2d 253, 256 (E.D. Pa. 1999) (finding plaintiff did not show his emotional distress was the result of the fear of immediate physical harm); Decesare v. Nat'l R.R. Passenger Corp., No. CIV.A.99-129, 1999 WL 927009 (E.D. Pa. Oct. 25, 1999) (finding that plaintiff claiming emotional distress from sexual harassment did not satisfy the zone of danger requirement where there was no physical impact or immediate risk of physical harm).

Plaintiff's deposition and responses to Defendant's interrogatories reveal three potential grounds on which to assert

said emotional injury. First, there is reference to a fall in which Plaintiff fell backwards on a set of stairs aboard the vessel. (See Perna Dep. at 235). Second, Plaintiff makes reference to an alleged incident in which a fellow employee threatened Plaintiff with a knife. (See Perna Dep. at 80, 149). Third, Plaintiff asserts emotional injury resulting from harassment and humiliation by the Captain of the vessel. (See Pl.'s Answer to Interrogs. ¶ 2). The Court will consider the merits of each of these events in turn.

C. Plaintiff's Fall On The Steps

With respect to Plaintiff's fall, it simply cannot serve as a basis for the claimed emotional injury; despite a physical impact. First, there is no evidence or allegation in the record that said fall was the result of Defendant's negligence and second, and most importantly, Plaintiff admits in his deposition that he was not injured as a result of said fall. (See Perna Dep. at 235-36). Since Plaintiff claims no injury as a result of the fall, nor does he allege he suffered emotional trauma as a result, there is no genuine issue of material fact in dispute which would allow a reasonable jury to return a verdict in Plaintiff's favor.

D. The Threatening Behavior of Plaintiff's Co-Worker

With respect to the threatening behavior of Plaintiff's co-worker in which Plaintiff was allegedly threatened with a knife,

Plaintiff acknowledges that there was never any physical impact. (See Pl.'s Dep. at 149). Therefore, to state a cognizable emotional distress claim the Plaintiff must show that his emotional injury is the result of the fear of immediate physical harm arising out of said threat. See Bloom, 41 F.3d at 911 (applying the zone of danger test to emotional distress claims).

While the Third Circuit has not specifically announced the parameters required to satisfy the "fear of immediate physical harm" condition, see, e.g., Bloom, 41 F.3d at 915 n.4, it is clear from the established record that Plaintiff's emotional illness is not the result of such fear. The Court has examined Plaintiff's Complaint, Depositions, Answers to Interrogatories, and Affidavits in the light most favorable to the plaintiff for facts that could reasonably infer the requisite fear; but no such evidence can be located. At best the record evidences only that Plaintiff anticipated a future physical conflict.\[1] Further, Plaintiff's

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[1] Plaintiff's Deposition states in relevant part that:

> And I had told them before, I - - you know, the guy's threatening me all the time. I told the captain a couple of times. I told the office. I told the Union. I said, He comes at me with that knife, comes near me, I'll crush his head in. So don't, you know, like - - I mean, how would you like to work like that every day?

(See Perna Dep. at 84). Plaintiff further stated:

> Q: When you said he pulled a knife on you wasn't that a fight?
> A: Well, it's not a physical fight, you know. It's a threat. It's not a, you know - -
> Q: Well, did you mention that?
> A: We didn't come into physical. Yea, I told them about - -

(continued...)

interrogatory answers do not allege Plaintiff's emotional illness is related to any fear of such immediate harm. Rather, Plaintiff's "emotional illness" appears to wholly revolve around the harassment and inaction of Captain Gray.\[2] Lastly, the expert report supplied by Plaintiff states that "[t]his major depressive episode occurred as a result of apparent mistreatment by his supervisor, Captain Gray." (Report of Stuart J. Cohen, Ph. D.).

As such, the Court cannot locate any evidence which when viewed in the light most favorable to the Plaintiff would allow a reasonable jury to determine that the Plaintiff's emotional distress was the result of a fear of immediate physical harm from the threatening incident. This result is consistent with a recent decision in this district where the mere fact that plaintiff could have been in fear of immediate harm, was insufficient without supporting evidence in the record. See Ferguson, 36 F. Supp.2d at

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[1](...continued)

well, I didn't tell the doctor about that.
Q: What did you tell the doctor when you went to the hospital?
A: Well, they ran all these tests on me and they couldn't find anything.
Q: What did you tell the doctor?
A: When he asked me, you know, exactly what happened. I told him, you know, I did have problems on there with the captain, you know.

(See Perna Dep. at 149-50).

[2] In Defendant's interrogatory requesting an explanation of the subject matter of the suit, Plaintiff answers "Captain Grey [sic] harassed, embarrassed and humiliated plaintiff in front of other crew members . . . . Captain Grey [sic] failed to discharge or discipline a member of the Steward's Department who was insubordinate and menacing to plaintiff." (See Def.'s Interrogs. ¶ 2; see also Pl.'s Answer to Def.'s Interrogs. ¶ 2).

256 (finding that plaintiff's deposition testimony clearly reveals that his emotional distress claim was not the result of fear of immediate physical harm from death threats or possibly being hit by objects projected at him).

E. Harassment, Embarrassment, Humiliation, and Inaction

Lastly, Plaintiff's claim of emotional injury resulting from the harassment, embarrassment, humiliation, and inaction of Captain Gray must be considered. From the outset, it is clear from the evidence in the record that the foregoing claims do not implicate any physical impact or threat of immediate physical harm. As such, said claims are analogous to claims based on a stressful work environment. The Supreme Court has held that such stress related claims do not state a cognizant cause of action under the FELA. See Gottshall, 512 U.S. at 554 (reversing the Third Circuit). Further, in a recent decision in this district the court held that emotional distress resulting from allegations of sexual harassment failed to state a claim under the FELA when there was no physical impact or threat of physical impact. See Decesare, 1999 WL 972009, at *4. As these restrictions on FELA claims also apply to the Jones Act, they bear directly on Plaintiff's ability to state a claim under the Act.

In the instant matter, Plaintiff does not adduce evidence, nor can any be located, that said emotional injury was

the result of physical impact or a threat of immediate physical harm. Thus, in the light most favorable to the plaintiff, a reasonable jury considering Captain Gray's actions could not find that Plaintiff's claim of purely "emotional illness" was within the requisite zone of danger as announced in Gottshall, 56 F.3d at 534. See also Bloom, 41 F.3d at 911.

As a result of the foregoing analysis, Plaintiff's claim for emotional injury resulting from his fall, his co-workers threatening behavior, and the actions of Captain Gray are not cognizable under the Jones Act. Thus, the Plaintiff has not suffered a "personal injury" within the meaning of the Act and Defendant's motion to dismiss Count I must be granted to the extent it asserts a claim of negligence under the Jones Act.

F. Count I - Unseaworthiness

The doctrine of unseaworthiness in essence imposes a nondelegable duty on a shipowner to provide seamen with a vessel that is reasonably fit for its purpose; "it is a 'species of liability without fault.'" See Calhoun v. Yamaha Motor Corp., U.S.A., 40 F.3d 622, 631 (3d Cir. 1994). Liability based upon unseaworthiness is entirely distinct from liability based upon negligence. See Earles v. Union Barge Line Corp., 486 F.2d 1097, 1105 (3d. Cir. 1973). Under maritime law unseaworthiness is a condition of the vessel which is the proximate cause of the seaman's injuries. Id. at 1102. Such liability is imposed without

regard to fault or the exercise of due care. Id. Unseaworthiness applies, inter alia, when injury is caused by a crew member that is unfit. Id. However, where no defective condition exists there can be no liability for unseaworthiness. Id.

Defendant in its motion for summary judgment asserts that like the Jones Act, Plaintiff's purely "emotional injuries" are also subject to the "zone of danger" test under the doctrine of unseaworthiness as it exists in general maritime law. (See Def.'s Resp. to Pl.'s Opp'n at 3). Such a restriction on the doctrine of unseaworthiness is apparently one of first impression as the Court has been unable to locate any cases within this circuit that apply the Gottshall "zone of danger" requirement to this doctrine. See, e.g., Gottshall, 56 F.3d at 534.

Nevertheless, the Sixth Circuit has recently had occasion to consider such application in Szymanski v. Columbia Transp. Co., 154 F.3d 591 (6th Cir. 1998). In Szymanski, the court stated that "[a] seaman's claim under the Jones Act or the unseaworthiness doctrine is fundamentally a single cause of action, and the remedies under one must be congruent with the remedies under the other. If no damages are permitted under the Jones Act, then an unseaworthiness claim cannot supply them either." 154 F.3d at 569. The court further stated, "[w]hile an incompetent workman could . . . cause a ship to be unseaworthy, 'unseaworthiness" that leads only to the type of 'emotional distress' claim that we have

rejected above is not unseaworthiness that entitles a seaman to compensation. The incompetent employee still must either cause some kind of direct physical injury, or place the plaintiff within the zone of danger of such injury." Id.

The crux of the Sixth Circuit's decision relied on the guidance of the Supreme Court in both Gottshall, 512 U.S. at 532, and Miles v. Apex Marine Corp., 498 U.S. 19 (1990). The Supreme Court in Miles stated that "[t]he Jones Act evinces no general hostility to recovery under general maritime law. It does not disturb seamen's general maritime claims for injures resulting from unseaworthiness . . . ." Miles, 498 U.S. 29. Nevertheless, the Court limited the availability of "loss of society" damages in unseaworthiness claims in order to develop a uniform rule throughout all maritime law. See Miles, 498 U.S. at 33 (stating "we restore a uniform rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or general maritime law."). In reaching its decision to develop such a uniform rule the Court explained that "[i]t would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action [unseaworthiness] in which liability is without fault than Congress has allowed in cases of death resulting from negligence." Id. at 326.

By analogy, applying the above reasoning to the "zone of danger" requirement announced in Gottshall, it would be illogical to require a showing of physical injury or the threat of immediate physical harm with regard to negligence-based Jones Act claims, but not to impose an equal restriction when liability is without fault. As such, the Court is compelled to extend the "zone of danger" requirement as adopted by the Supreme Court and the Third Circuit, to cases where a plaintiff claims only emotional injury that fails to state a cognizable claim under the Jones Act because plaintiff is not within the meaning of the "zone of danger." Therefore, the Court also dismisses Plaintiff's unseaworthiness claim in Count I.

G. Count II - Admiralty

Count II of Plaintiff's complaint realleges Count I of the complaint in its entirety under the Court's Admiralty Jurisdiction. Therefore, the Court must dismiss Count II of Plaintiff's complaint consistent with the analysis already set forth in this memorandum.

An appropriate Order follows.

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

JOSEPH C. PERNA,	:	CIVIL ACTION
v.	:	
ARCO MARINE, INC.	:	NO. 97-4326

FINAL JUDGMENT

AND NOW, this 29th day of November, 1999, upon consideration of the Defendant's Motion for Summary Judgment (Docket No. 8), and Plaintiff's response thereto, IT IS HEREBY ORDERED that the Defendant's Motion is **GRANTED**.

IT IS FURTHER ORDERED that JUDGMENT is entered in favor of the Defendant and against the Plaintiff.

BY THE COURT:

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HERBERT J. HUTTON, J.