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Federal Employers' Liability Act--Misrepresentation as to Pre-Existing Injury No Bar to Recovery (Still v. Norfolk & W. Ry., 368 U.S. 35 (1961))

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federal exclusionary procedure could no longer apply only to federal courts, but would be an essential element in the protection of the individual in state court proceedings.

FEDERAL EMPLOYERS' LIABILITY ACT — MISREPRESENTATION AS TO PRE-EXISTING INJURY NO BAR TO RECOVERY. — Plaintiff initiated this action in a West Virginia state court under the Federal Employers' Liability Act[1] seeking damages for injuries sustained during the course of his employment by the defendant, the Norfolk and Western Railway. By a special plea, the defendant entered a defense that the plaintiff was not "employed" within the meaning of the act.[2] This defense was grounded upon allegations that plaintiff had made fraudulent representations in his employment application pertaining to his congenitally defective back condition, that he would not have been hired but for these misrepresentations, and that the physical defects fraudulently concealed contributed to the injury. After all the evidence had been presented, the trial court directed the jury to bring in a verdict for the defendant on the grounds that the defendant had been deceived into hiring the plaintiff, and that his misrepresentations had a "direct causal connection" with the injuries. The Supreme Court of Appeals of West Virginia declined to review. On a writ of *certiorari,* the United States Supreme Court reversed the state court's decision, and *held* that persons procuring employment by means of fraud other than the precise type defined by the Court in *Minneapolis, St. P. & S. Ste. M. Ry. v. Rock*[3] will not be deprived of the status of "employee" under the FELA;[4] moreover, this status will not be affected by the fact that the employee's misrepresentation contributed to the injury. *Still v. Norfolk & W. Ry.,* 368 U.S. 35 (1961).

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1 35 Stat. 65 (1908), 45 U.S.C. §§ 51-60 (1958).

2 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958) provides: "Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is *employed* by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence. . . ." (Emphasis added.)

3 279 U.S. 410 (1929).

4 35 Stat. 65 (1908), as amended, 53 Stat. 1404 (1939), 45 U.S.C. § 51 (1958).

Generally, when an employment contract is induced by fraud on the part of the employee not going to the *factum* of the contract, the contract is voidable rather than void and recovery may be had under the act, "at least where there is no causal connection between the injury and the misrepresentation." [5] Courts have consistently permitted recovery where there has been fraudulent employee misrepresentation as to age,[6] name,[7] prior injuries,[8] and former place of employment.[9] The "causal connection" [10] limitation has been more apparent than real, and is often treated perfunctorily by the courts.[11] Where, however, an employee substituted another to take his physical examination recovery was denied.[12]

The question of fraudulent employee misrepresentation under the act first came before the United States Supreme Court in *Minneapolis, St. P. & S. Ste. M. Ry. v. Rock.*[13] There the employee substituted another to take his physical examination, knowing himself to be physically unqualified for the employment. Mr. Justice Butler, writing for the majority of the Court, indicated that while there was no causal connection between the "employee's" physical condition and the injuries, the misrepresentation "did have direct relation to the propriety of admitting him to such employment [and] the misrepresentation and the injury may not be regarded as unrelated contemporary facts." [14] Because of a fraudulent misrepresentation "so abhorrent to public policy," [15] the plaintiff did not have the requisite status of "employee" under the act and was denied recovery. The Court, in effect, treated

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[5] Newkirk v. Los Angeles Junction Ry., 21 Cal. 2d 308, 320, 131 P.2d 535, 543 (1942); *accord,* Lupher v. Atchison, T. & S.F. Ry., 81 Kan. 585, 106 Pac. 284 (1910), *aff'd,* 86 Kan. 712, 122 Pac. 106, *affirmance upheld on rehearing,* 88 Kan. 203, 127 Pac. 541 (1912) (per curiam).

[6] Laughter v. Powell, 219 N.C. 689, 14 S.E.2d 826, *cert. denied,* 314 U.S. 666 (1941).

[7] Phillips v. Southern Pac. Co., 14 Cal. App. 2d 454, 58 P.2d 688 (1936).

[8] Dawson v. Texas & Pac. Ry., 123 Tex. 191, 70 S.W.2d 392, *cert. denied,* 293 U.S. 580 (1934).

[9] Qualls v. Atchison, T. & S.F. Ry., 112 Cal. App. 7, 296 Pac. 645 (1931).

[10] Newkirk v. Los Angeles Junction Ry., *supra* note 5.

[11] See Eresafe v. New York, N.H. & H. R.R., 250 F.2d 619 (2d Cir. 1957); Matthews v. Atchison, T. & S.F. Ry., 54 Cal. App. 2d 549, 129 P.2d 435 (1942); Blanton v. Northern Pac. Ry., 215 Minn. 442, 10 N.W. 2d 382 (1943).

[12] Stafford v. Baltimore & O. R.R., 262 Fed. 807 (N.D. W. Va. 1919).

[13] 279 U.S. 410 (1929).

[14] Minneapolis, St. P. & S. Ste. M. Ry. v. Rock, 279 U.S. 410, 415 (1929).

[15] *Ibid.*

the contract of employment as void.[16] The *Rock* case was reconsidered in *Minneapolis, St. P. & S. Ste. M. R.R. v. Borum*,[17] wherein the prospective employee misstated his true age in order to gain employment. The Court, finding that the plaintiff had the status of "employee," permitted recovery, concluding from the record that the false statement did not substantially affect the examining surgeon's conclusion. Mr. Justice Butler, who wrote the *Rock* opinion, spoke again for the majority: "It is clear that the *facts* found . . . are not sufficient to bring this case within the rule applied in *Minneapolis, St. P. & S. S. M. Ry. Co. v. Rock* . . . or the reasons upon which that decision rests." [18]

Prior to the *Rock* and *Borum* decisions the courts were faced with the problem of the causality between the fraud and the injury, while subsequent cases had the additional burden of determining what degree and what types of fraud were sufficiently "abhorrent" [19] to deny recovery.[20] Without further guidance, the courts distinguished *Rock* on a factual basis, and thereby were able to grant recovery in the great majority of cases.[21] In several instances, however, the courts interpreted the *Rock* and *Borum* decisions so as to preclude recovery under the act.[22]

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[16] See Still v. Norfolk & W. Ry., 368 U.S. 35, 40-41 (1961).

[17] 286 U.S. 447 (1932).

[18] Minneapolis, St. P. & S. Ste. M. R.R. v. Borum, 286 U.S. 447, 451 (1932) (emphasis added).

[19] Minneapolis, St. P. & S. Ste. M. Ry. v. Rock, *supra* note 14, at 415.

[20] An example of the difficulty incurred by the courts interpreting *Rock* can be found in the litigation of a Texas case. Prior to the *Borum* decision the trial court, notwithstanding the jury's finding of no causal connection between the injury and the plaintiff's misrepresentation of prior back and hip injuries, granted defendant's motion for judgment. The Court of Civil Appeals of Texas affirmed on the ground that "the trial court correctly . . . followed the law as announced . . . in the case of Minneapolis Railway v. Rock . . . to the effect that there can be no recovery by an employee . . . who has secured his employment through fraud. . . ." Dawson v. Texas & Pac. Ry., 45 S.W.2d 367, 370 (Tex. 1931).

Subsequent to the *Borum* decision the Supreme Court of Texas *reversed*, in accordance with the *Borum* interpretation of *Rock* that it should be limited to the factual situation there presented. The court indicated that absent causal connection recovery must be granted. Dawson v. Texas & Pac. Ry., 123 Tex. 191, 196, 70 S.W.2d 392, 394, *cert. denied*, 293 U.S. 580 (1934).

[21] See Still v. Norfolk & W. Ry., *supra* note 16, at 41-42. See, *e.g.*, Eresafe v. New York, N.H. & H. R.R., 250 F.2d 619 (2d Cir. 1957); Casso v. Pennsylvania R.R., 219 F.2d 303 (3d Cir. 1955); White v. Thompson, 181 Kan. 485, 312 P.2d 612 (1957), *aff'd*, 183 Kan. 133, 325 P.2d 28 (1958).

[22] See Southern Pac. Co. v. Libbey, 199 F.2d 341 (9th Cir. 1952); Talarowski v. Pennsylvania R.R., 135 F. Supp. 503 (D. Del. 1955); Clark v. Union Pac. R.R., 70 Idaho 70, 211 P.2d 402 (1949); Fort Worth & D.C. R.R. v. Griffin, 27 S.W.2d 351 (Tex. Civ. App. 1930). All four of these cases involved misrepresentations of physical condition.

In the principal case the Court was again compelled "in the interest of the orderly administration of justice, to take a fresh look at [the problems involved in *Rock* and *Borum*] in an effort to supply an intelligible guide for future decisions." [23] In the majority opinion, Mr. Justice Black emphasized that the *Rock* case certainly did not lay down any broad rule to preclude recovery in all cases of "employee" fraud. The opinion observed that the *Borum* decision clearly limited the application of *Rock* by *factually* distinguishing the two cases, thereby indicating the Court's "reluctance . . . to extend the vague notions of public policy upon which [*Rock*] rested to new factual situations." [24] The Court went on to contrast the *Rock* and *Borum* decisions. Rock, unlike Borum, had obtained his employment as an imposter. Rock had never been approved by a company physician as physically fit, whereas Borum had been approved, and once approved could not be discharged under the company rules after thirty days. In both cases, however, there was a material, fraudulent representation without which employment would not have been obtained. The Court in *Borum,* therefore, allowed recovery primarily on the basis of factual distinctions which precluded the application of the *Rock* rule.[25]

Mr. Justice Black noted that being able to distinguish factually the *Rock* case was sufficient to show that it laid down no general principle to bar recovery under the act; moreover, *Rock* failed to establish an "intelligible guide" [26] by which courts could determine what types of fraud were so "abhorrent" as to bar recovery. The opinion observed that courts avoided the harsh consequences of *Rock* by formulating numerous exceptions, but the few cases denying recovery appeared to the Court "entirely indistinguishable on any significant grounds" from the many cases in which courts made exceptions.[27] To avoid further confusion the Court concluded that the *Rock* case "must be limited to its *precise* facts." [28] The majority felt that the considerations of public policy upon which the *Rock* decision was based should not be permitted to encroach further upon the congressional intent as expressed in the act.[29]

The Court recognized that, in order to be in accord with congressional intent, the terms "employed" and "employee" must be "in-

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[23] Still v. Norfolk & W. Ry., *supra* note 16, at 43-44 (1961).
[24] *Id.* at 39.
[25] *Id.* at 41.
[26] *Ibid.*
[27] *Id.* at 42-43.
[28] *Id.* at 44 (emphasis added).
[29] *Id.* at 44-45.

terpreted according to their ordinary meaning. . . ." [30] The Court indicated that to permit the defense of causal connection to survive would suggest that an employee could be simultaneously within and without the benefits of the act, depending solely upon the nature of his injury. Thus, the defense of direct causal connection between the misrepresentation and the injury has no meaning under the act. The majority readily points out that pre-existing defects would be relevant to the question of mitigation of damages.

Mr. Justice Frankfurter, concurring in the granting of a new trial, was also of the opinion that, as a matter of law, fraud does not preclude an employee from claiming the benefits of the act. Beyond this, however, he was of the view that the approach in *Borum* should be followed by submitting to the jury the question whether "deceit in obtaining employment had materially prejudiced the employer's efforts to select fit employees." [31] If it did, then recovery should be barred.

Mr. Justice Whittaker, dissenting, indicated that the question at hand was not whether one who has procured employment through fraud may maintain an action under the act, for it is clear that he may. Rather the issue was whether such a person was entitled to the benefits of the act. The dissent emphasized that Congress did not intend to confer the benefits of the act upon those obtaining employment by fraud, even if such fraud is not of the precise variety involved in *Rock*. It further stressed that to allow one to recover from his own wrong is to "tamper with the sound underlying principles of the *Rock* case." [32]

The Court's decision sheds new light on the *Rock* and *Borum* cases by indicating that fraud in obtaining employment does not preclude recovery under the act, and by removing from the jury the question whether the fraud is of such a type as to prevent a recovery, except where the factual situation is precisely the same as that in *Rock*. In addition, the troublesome question of causal connection is eliminated, thus depriving the railroads of another defense and imposing upon them, to an even greater degree, the obligation of insurers. Under the statute the doctrines of contributory negligence, assumption of risk, and the fellow-servant rule, formerly available to carriers as defenses, have been eliminated.[33]

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[30] *Id.* at 45.

[31] *Id.* at 47. Mr. Justice Frankfurter commented upon the Court's holding in the present case: "The Court does not now overrule *Rock* but says that it 'must be limited to its precise facts.' I take it this statement refers to the facts relevant to the result of that case; it does not mean that the plaintiff must be named Rock."

[32] *Id.* at 51 (dissenting opinion).

[33] See HANNA, FEDERAL REMEDIES FOR EMPLOYEE INJURIES 111 (1955).

Although the act did not make the employer an insurer, it was "designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed. . . ." [34] The conclusion reached in the principal case effectuates that purpose. It is evident that Congress did not intend to include troublesome problems of causation that could bring about harsh results in the application of the act.[35] The Court's decision will tend to bring future litigation closer in line with the original objectives of the Federal Employers' Liability Act.

LABOR LAW — CONCURRENT JURISDICTION OF NLRB AND ARBITRATOR WHEN UNFAIR LABOR PRACTICE BREACHES COLLECTIVE BARGAINING AGREEMENT. — Petitioner, a labor union, sought to compel Westinghouse Electric Corporation to arbitrate a representation dispute which included a grievance constituting an unfair labor practice under the Taft-Hartley Act.[1] The collective bargaining agreement required Westinghouse to recognize the union as the representative of "production and maintenance" employees. The grievance stated that certain workers supposedly doing "experimental" work were actually doing "production" work and hence, that the union should be recognized as the bargaining agent for these workers. The refusal of Westinghouse to do so constituted both a breach of contract and an unfair labor practice since petitioner union had been certified by the National Labor Relations Board as the representative of "production and maintenance" workers. Since the grievance involved an unfair labor practice, a matter exclusively within the jurisdiction of the NLRB, the question arose whether the controversy could be sent to arbitration, pursuant to an arbitration clause in the agreement, by a state court. The Appellate Division *held* that the dispute should be heard by the NLRB because of its expertise in the field of union representation, but emphasized that "a breach of contract does not become *ipso facto* incapable of arbitration because it also

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[34] Wilkerson v. McCarthy, 336 U.S. 53, 68, *rehearing denied,* 336 U.S. 940 (1949).

[35] See Pound, *Foreword* to Elkind, *Which Court?*, 17 OHIO ST. L.J. 356, 358-60 (1956).

[1] Labor Management Relations Act (Taft-Hartley Act) § 8(a)(5), 61 Stat. 140-41 (1947), 29 U.S.C. § 158(a)(5) (1958). "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a). . . ." *Ibid.*