

FILED
U.S. DISTRICT COURT
DISTRICT OF WYOMING

2013 DEC 16 AM 9 14

STEPHAN HARRIS, CLERK
CHEYENNE

Henry E. Bailey, Jr. #5-1681
Douglas W. Bailey #7-5102
Bailey, Stock & Harmon, P.C.
P.O. Box 1557
Cheyenne, WY 82003-1557
(307) 638-7745

STATE OF WYOMING)
) SS
COUNTY OF LARAMIE)

IN THE DISTRICT COURT
1ST JUDICIAL DISTRICT

Henry E. Krening,

Plaintiff,

v.

Union Pacific Railroad,

Defendant.

Docket No. 181-897

FILED

NOV 20 2013

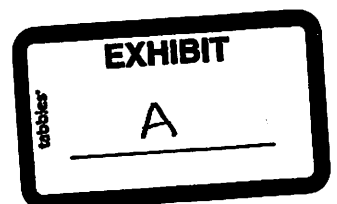
COMPLAINT

SANDY LAMOTHE
CLERK OF THE DISTRICT COURT

Plaintiff, Henry E. Krening, for his claims for relief against Defendant, Union Pacific Railroad, states and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff is a resident and citizen of the State of Wyoming, domiciled in Laramie County, Wyoming.
2. Defendant is a railroad, operating a system of railroads in the State of Wyoming and in this judicial District.
3. Defendant is a common carrier engaged in interstate commerce.
4. Plaintiff is, and was at all relevant times, employed by Defendant, and was therefore also engaged in interstate commerce.
5. Jurisdiction of this Court is based upon 45 U.S.C. § 51 *et seq.*, commonly known as the Federal Employer's Liability Act (FELA).
6. Plaintiff has been employed by Defendant in various capacities since May 27, 1994. From approximately April, 2010 to June 3, 2013, Plaintiff was engaged in the course and scope of his duties as a Forman General 1 at the Union Pacific Steam Locomotive Shop in Cheyenne.



Wyoming.

7. At this time and place, Plaintiff suffered injuries as more fully described below as a result of Defendant's negligence and/or the negligence of Defendant's officers, agents, or employees.

8. Under 45 U.S.C. § 51, Defendant is liable for the injuries sustained by Plaintiff resulting in whole or in part from its negligence or the negligence of any of its officers, agents, or employees.

9. Venue is proper in this District because Defendant operates a railroad and maintains an office in the State of Wyoming. Thus, Defendant is a resident of Wyoming. Furthermore, the injuries complained of arose in the State of Wyoming.

FACTS COMMON TO ALL CLAIMS FOR RELIEF

10. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 9 above.

11. From May 27, 1994 to June 3, 2013 Plaintiff was employed as a machinist, an OGEMP (i.e., oil, gas, electric, motor power technician), and finally as a Foreman General 1 at the Union Pacific Steam Locomotive Shop ("Steam Shop") in Cheyenne, Wyoming.

12. The team of Union Pacific employees at the Steam Shop, including Plaintiff, enjoyed a safe and healthy work environment until approximately April, 2010, when Union Pacific hired Edgar Dickens as Senior Manager of Steam Operations.

13. Prior to the hiring of Dickens as Senior Manager of Steam Operations, Dickens worked as a fireman in the Steam Shop under the management of Steve Lee in approximately 2005. Not even a week into his employment as a fireman at the Steam Shop, Dickens started fomenting conflict and unrest among the employees and created a hostile and unsafe work environment. He criticized their work, attacked them personally, started rumors about them, pitted one against the other, and disrupted operations. Dickens attempted to get Steve Lee fired by misinforming and misleading Lee's superiors regarding Lee's performance and management abilities. During his short tenure as fireman in the Steam Shop, numerous

informal complaints were made to Steve Lee and other management personnel, and at one point, a complaint was filed against him internally with the Equal Employment Opportunity (EEO) Department at Union Pacific. As a result of his behavior, Dickens was dismissed from the Steam Shop.

14. In approximately April of 2010, Steve Lee was promoted to another position, and notwithstanding Dickens' history in the Steam Shop, Union Pacific brought Dickens into the Steam Shop to replace Steve Lee as Senior Manager of Steam Operations. Immediately, Dickens picked up where he left off, criticizing and demeaning the employees at the Steam Shop. Dickens also attempted to instruct the employees in their respective areas of expertise, oftentimes demanding that they perform their duties contrary to how they had been trained and contrary to standard practices and procedures, which created dangerous conditions at the Steam Shop. When these dangerous conditions became known to Union Pacific personnel higher up in the chain of command, Dickens hid the truth and blamed his employees, including Plaintiff.

15. Dickens exacerbated these dangerous conditions by requiring employees to work outside their area of expertise, requiring long hours, and sometimes refusing to allow restroom breaks.

16. Dickens required Steam Shop employees, including Plaintiff, to sign pledges not to communicate with the media and others outside the Steam Shop regarding the operations or management of the Steam Shop and instructed Steam Shop employees not to communicate or cooperate with the Federal Railroad Administration (FRA) outside of Dickens' presence.

17. As Foreman General 1, Plaintiff worked closely with Dickens from April, 2010 to May, 2013. Plaintiff was subject to Dickens' personal attacks and criticism almost on a daily basis and was exposed to the dangerous and hostile work environment created by Dickens on a daily basis. Additionally, Plaintiff witnessed Dickens fire or remove many of his close, personal friends from the Steam Shop. Many of the other Steam Shop employees that were not removed or fired by Dickens either transferred to other units within Union Pacific or retired early.

18. Within two (2) years of Dickens' employment as Senior Manager, there was nearly 100% turnover in personnel. The following non-exhaustive list identifies individuals from the Steam Shop that were fired, removed, transferred, or retired early:

- a. Edward M. Smith
- b. Rick L. Braunschweig
- c. Jack K. Holland
- d. Kevin Coker
- e. Jim Coker
- f. Ronald G. Tabke
- g. Chris Habner
- h. Randy Quinlin
- i. Scott Turley
- j. Brad Eggeman

19. Notably, each of the individuals listed above is over forty (40) years of age. Dickens referred to these individuals, including Plaintiff, as the "old regime." He commented that older employees acted like they were "already retired" and that they weren't "pretty" enough for "his" program. Dickens required Plaintiff to cut his hair and asked Plaintiff and others whether they had tattoos. Dickens also inquired into Plaintiff's and other employees' political affiliations and religious beliefs. Every replacement Dickens brought into the Steam Shop was either younger and/or "prettier" than the member of the old regime he was replacing. Every replacement Dickens brought into the Steam Shop was also significantly less experienced than the member of the old regime he was replacing, which created more safety hazards in the work place.

20. Dickens referred to himself as the "dictator" and on one occasion, played German marching songs while speaking in hulted German with his new hires in front of Plaintiff.

21. At least three (3) EEO claims were filed against Dickens internally with Union Pacific's EEO Department from April, 2010 to the present time, presumably for age

discrimination. Another EEO claim was filed internally against Dickens for sex discrimination and sexual harassment in 2012, for which he retaliated against the employee by making her work in the break room. This employee then filed an EEO claim with the State of Wyoming, which is still being processed. Because Plaintiff was working directly under Dickens, he did not file any EEO claims with the State of Wyoming against Defendant and Dickens for age discrimination because Plaintiff feared retaliation. Plaintiff did, however, submit an anonymous complaint internally regarding Dickens' behavior.

22. On a number of occasions, Dickens enlisted Plaintiff to help him investigate members of the "old regime," and even attempted to force Plaintiff to frame an employee ostensibly for putting nails under Dickens' car tires, an accusation that was never borne out by the evidence. After his investigations, Dickens forced or attempted to force employees, including Plaintiff, to sign statements that were incomplete or inaccurate. Dickens also sought to "assist" Plaintiff in writing Plaintiff's formal statements regarding investigations.

23. Throughout Dickens' tenure as Senior Manager of Steam Operations, from approximately April, 2010 to June, 2013, the period in which Plaintiff worked directly under and with Dickens, Plaintiff was in constant fear of being fired, unnecessarily reprimanded, belittled, forced to investigate his friends, sign untruthful or incomplete statements, and otherwise endure the dangerous and hostile work environment created by Dickens.

24. Plaintiff eventually could not physically or emotionally tolerate any communication with Dickens, being in Dickens' presence, or even on Union Pacific property. Plaintiff never knew whether he would be the next employee to be fired because of his age, his "look," his politics, or his religious beliefs. And he never knew which of his friends would be next in line for firing, removal, or involuntary retirement.

25. At some point in early 2013, Carolin Miller, the Administrative Assistant at the Steam Shop, informed Dickens that she had concerns about Plaintiff's health and suggested to Dickens to allow Plaintiff time off for medical treatment or counseling. Dickens refused and stated, "I'm the one that needs time off."

26. Dickens' behavior caused and continues to cause Plaintiff severe emotional distress. This severe emotional distress has physically manifested itself in a number of ways. In the middle of May of 2013, Plaintiff was hospitalized after he lost consciousness outside his home that morning. Plaintiff was then diagnosed with hyponatremia, caused by diabetes mellitus, type II. After treatment and consistent monitoring of Plaintiff's glucose levels, which showed and continue to show precipitous drops in Plaintiff's glucose levels when Plaintiff is away from work at the Steam Shop and concomitant rises in Plaintiff's glucose levels when he is at the Steam Shop or near Union Pacific property, it has been determined that Plaintiff's emotional distress caused by the work environment at the Steam Shop led to and continues to lead to uncontrolled glucose levels and electrolyte imbalances. In short, Dickens' behavior as Senior Manager of Steam Operations and the hostile and unsafe work environment he created has caused the onset of diabetes mellitus, type II and hyponatremia for Plaintiff. As a result, Plaintiff suffers from excess thirst, frequent urination, and constant hunger. Plaintiff also experiences dizziness, nausea, headaches, confusion, lethargy, fatigue, irritability, muscle weakness, and loss of consciousness.

27. Even after he was hospitalized and diagnosed with hyponatremia and diabetes mellitus, type II in May of 2013, Plaintiff returned to work.

28. In late May or early June, Plaintiff was feeling particularly dizzy and weak when he told Dickens he had to take the rest of the day off. Plaintiff went to the locker room to change clothes, but he lost consciousness before he made it to his locker. He was discovered on the floor of the locker room by a fellow employee. Shortly after this incident, on approximately June 6, 2013, Plaintiff went on short-term medical leave. He has not returned to work since then.

29. In essence, Plaintiff was constructively discharged by the conduct of Dickens and the hostile and unsafe work environment Dickens created.

30. Plaintiff also suffers from high stress, depression, low self-esteem, and anxiety due to Dickens' behavior, the possibility of retaliation by Dickens, and the loss of his job at the

Steam Shop. Plaintiff has even begun to experience suicidal ideation, for which he was hospitalized in September of 2013. Plaintiff is currently receiving psychological treatment for these issues.

31. Before Union Pacific hired Dickens as Senior Manager of Steam Operations, Plaintiff loved his job and the work environment at Union Pacific. Plaintiff voluntarily worked around ten (10) hours a day for which he received satisfaction and fair compensation.

32. As a Foreman General 1, Plaintiff's salary was approximately \$77,172.45 per year. However, in light of extensive travel and work hours on weekends, Plaintiff earned about \$103,314.00 in 2012-2013.

33. As a result of Dickens' behavior and the unsafe and hostile work environment Dickens created, Plaintiff has sustained economic and non-economic losses, including but not limited to, lost wages and benefits, past, present, and future medical expenses, physical and emotional pain and suffering, and loss of enjoyment of life. Plaintiff's damages for the losses sustained will be more specifically set out and proved at trial.

34. Edgar Dickens is an employee of Defendant, and at all relevant times herein was employed as a fireman or as Senior Manager of Steam Operations. From approximately April, 2010 to the present time, Dickens was engaged in the course and scope of his duties as a Senior Manager of Steam Operations at Defendant's Steam Locomotive Shop in Cheyenne, Wyoming when he engaged in the willful, wanton, reckless, or negligent behavior outlined above, which caused Plaintiff injuries and harm.

35. Defendant knew or had reason to know of Dickens behavior, the harm it was causing to employees of the Steam Shop, and the unsafe and hostile conditions it created in the workplace.

36. Defendant is liable for Plaintiff's injuries and damages caused by the negligence of Defendant's employees, including Dickens, while acting within the course and scope of their duties, employment, or agency.

37. In failing to provide a reasonably safe place to work, which caused Plaintiff's

injuries and damages, Defendant was acting by and through Dickens and its other employees, agents, officers, officials, administrative personnel, or other persons acting on behalf or in the service of Defendant in an official capacity, whether with or without compensation.

FIRST CLAIM FOR RELIEF
INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

38. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 37 above.

39. Dickens' conduct, as outlined above, was extreme and outrageous and went beyond all possible bounds of decency and is intolerable in a civilized community.

40. Dickens' extreme and outrageous conduct intentionally or recklessly caused Plaintiff to suffer severe emotional harm, which has manifested itself in a variety of ways as outlined in Paragraphs 26 and 30 above.

41. Whether a plaintiff can recover for *intentional* infliction of emotional distress under FELA is an unsettled question. See 123 A.L.R. Fed. 583. The language of FELA states explicitly that railroads will be responsible for the injury or death of employees resulting in whole or in part from their "negligence"; nevertheless, since FELA is supposed to be interpreted liberally so as to effect its purpose, the literal reference to negligence has not always been held to bar a claim based on an allegation of *intentional* misconduct. See *id.* Therefore, when faced with the question whether intentional infliction of emotional distress states a cognizable claim under FELA, some courts have recognized that it is cognizable. See *id.*

42. It is likely that a Wyoming court would find a claim for intentional infliction of emotional distress cognizable. In *Leithend v. American Colluid*, 721 P.2d 1059 (Wyo. 1986), the Wyoming Supreme Court reasoned that if a person can recover damages for negligently inflicted mental harm, then without question he should have a cause of action for intentional harm. See also *Sheltru v. Smith*, 392 A.2d 431, 432-433 (1978).

43. Thus, this Court should recognize Plaintiff's claim against Defendant for intentional infliction of emotional distress. Accordingly, Plaintiff is entitled to an award of

compensatory damages.

SECOND CLAIM FOR RELIEF
NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

44. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 43 above.

45. Dickens' creation of an unsafe and hostile work environment exposed Plaintiff to physical harm, as outlined in Paragraphs 14-16 and 19 above.

46. Physical symptoms arose and continue to arise after and because of the emotional distress sustained by Plaintiff, as outlined above in Paragraphs 26 and 30 above.

47. Dickens' extreme and outrageous conduct directly and proximately caused Plaintiff severe emotional distress for which Plaintiff is entitled to an award of compensatory damages.

THIRD CLAIM FOR RELIEF
NEGLIGENT HIRING

48. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 47 above.

49. Defendant knew or should have known Dickens had a history of troublesome behavior before Defendant hired Dickens as Senior Manager of Steam Operations.

50. Dickens had a reputation and a record that showed his propensity to misuse authority and to harass and abuse his fellow co-workers before Defendant hired Dickens as Senior Manager of Steam Operations.

51. Defendant had a duty not to hire Dickens, knowing or having reason to know of Dickens' history of troublesome behavior.

52. Defendant's hiring of Dickens as Senior Manager of Steam Operations directly and proximately caused injury to Plaintiff for which Plaintiff is entitled to an award of compensatory damages.

FOURTH CLAIM FOR RELIEF
NEGLIGENT RETENTION

53. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 52 above.

54. Defendant had a duty to terminate Dickens' employment or transfer him to another department when it knew or had reason to know of Dickens' extreme and outrageous conduct.

55. Defendant knew or had reason to know of Dickens' extreme and outrageous conduct. Multiple internal complaints have been filed with Defendant's EEO Department, including complaints regarding Dickens' demeaning treatment of Steam Shop employees, age discrimination, sexual harassment and discrimination, and various other violations of Defendant's rules, policies, and regulations. Some of these complaints, because they were not resolved locally, reached Defendant's Executive Vice President of Operations, Lance Fritz, when Mr. Fritz came to Defendant's Cheyenne office for a Town Hall meeting in April of 2013. Furthermore, at least two (2) EEO claims have been filed with the State of Wyoming's Department of Workforce Services.

56. Notwithstanding Defendant's knowledge of Dickens' extreme and outrageous behavior, Defendant has retained Dickens in his position as Senior Manager of Steam Operations.

57. Defendant's retention of Dickens in his position as Senior Manager of Steam Operations directly and proximately caused injury to Plaintiff for which Plaintiff is entitled to an award of compensatory damages.

FIFTH CLAIM FOR RELIEF
NEGLIGENT SUPERVISION

58. Plaintiff realleges and incorporates by reference the allegations in paragraphs 1 through 57 above.

59. Defendant had a duty to reasonably monitor or control Dickens' actions and behavior.

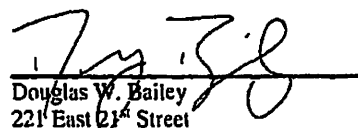
60. Defendant failed to reasonably monitor or control Dickens' actions or behavior, notwithstanding Defendant knew or had reason to know of Dickens' extreme and outrageous actions and behavior.

61. Defendant's failure to reasonably monitor or control Dickens' actions or behavior directly and proximately caused injury to Plaintiff for which Plaintiff is entitled to an award of

compensatory damages.

Dated this 20th day of November, 2013.

BAILEY, STOCK & HARMON P.C.


Douglas W. Bailey
221 East 6th Street
P.O. Box 1557
Cheyenne, WY 82003
307-638-7745
Attorney for Plaintiff