[* 1]

# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
*Justice*

JULIO A. VELESACA and TERESA VELESACA,

Plaintiffs,

- v -

METROPOLITAN TRANSPORTATION AUTHORITY and NEW YORK CITY TRANSIT AUTHORITY,

Defendants.

INDEX NO. 106644/11

MOTION DATE 2/9/12

MOTION SEQ. NO. 003



The following papers, numbered 1 to 4 were read on this motion to strike

Notice of Motion— Affirmation — Affirmation— Exhibits A-F ____ No(s).

Affirmation In Opposition — Exhibit A ____ No(s). 4

Replying Affirmation — Exhibits ____ No(s). ____

**Upon the foregoing papers, it is ordered that plaintiff's motion to strike defendants' answer, or in the alternative, to compel defendants to produce documents demanded in notices for discovery and inspection is granted in part, only to the extent that, within 45 days, defendants shall produce:**

**1) the results of the urinalysis test administered to Ested on January 28, 2011. If defendants are not able to produce the results by that time, defendants must provide an affidavit of search for the urinalysis results, detailing the means and methods of the search that was conducted for the urinalysis results;**

**2) any statements from Ested in his personnel file about this alleged accident; any documents in Ested's personnel file as to blood alcohol or drug test results from any exams administered to Ested on the date of the alleged accident; any documents in his personnel file concerning disciplinary action taken against Ested, if any, based on his actions on the date of the alleged accident;**

**3) an affirmation stating whether or not Ested applied for workers' compensation or disability benefits relating to the subject**

**(Continued . . .)**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

occurrence. If so, defendants shall submit to the Court for *in camera* review unredacted copies of any such workers compensation or disability application in their possession, with Bates-stamped pagination;

and the motion is otherwise denied.

In this action, plaintiff alleges that, on January 28, 2011, a subway train owned and operated by defendants ran over the plaintiff, severing both of his legs above the knee. Anthony Ested is the alleged motorman of that subway train.

Plaintiffs move to strike defendants' answer due to their alleged failure to produce certain operations manuals pertaining to motormen and conductors, and certain safety rules and protocols, as demanded in plaintiffs' notice for discovery and inspection dated July 19, 2011. (Blau Affirm., Ex B.) Plaintiff also asserts that defendants refused to comply with plaintiffs' second notice for discovery and inspection dated November 10, 2011, as to items 1, 2, 3, and 7. (*Id.*, Ex C.)

The branch of plaintiffs' motion seeking to strike the answer is denied. "The drastic remedy of striking an answer is inappropriate, absent a clear showing that defendant[s'] failure to comply with discovery demands was willful or contumacious." (*Daimlerchrysler Ins. Co. v Seck*, 82 AD3d 581, 582 [1st Dept 2011].) Here, defendants complied with their obligation to produce the "Operations manuals setting forth rules, regulations and protocols for Motormen and Conductors" and the "Safety rules, regulations and protocols applied when persons and/or objects are believed to be physically present on the subway tracks" by making these documents available to plaintiffs' counsel for inspection and for copying upon appointment. (*See* CPLR 3120 [1] [i].)

In addition, defendants appear to have complied with item 7 of plaintiff's second notice for discovery and inspection, which sought "all records pertaining to work related injuries claimed by Anthony Ested, occurring on or about January 28, 2011." According to defendants' counsel, "a request for medical exam form and the results were sent to plaintiff on or about January 13, 2011. The undersigned made several requests to obtain this document from

(Continued . . .)

our medical unit. . . . This is the only medical record for train operator in our file in connection with the above named incident." (Hamler Opp. Affirm. ¶ 7.) Although plaintiffs argue that they are entitled to "a redacted copy of any worker's compensation and/or disability application relating to the subject occurrence," plaintiffs have presented no evidence indicating that Ested applied for workers' compensation or disability benefits.

However, within 45 days, defendants shall disclose in an affirmation whether or not Ested applied for workers' compensation or disability benefits relating to the subject occurrence. If so, defendants shall submit to the Court for *in camera* review unredacted copies of any such workers compensation or disability application in their possession, with Bates-stamped pagination.

Item 3 of plaintiffs' second notice for discovery and inspection demanded "copies of reports of all medical/scientific tests performed upon Anthony Ested (#259003) on January 28, 2011 including, but not limited to, the breathalyzer, urinalysis and blood tests." According to an incident report, Ested was taken to the Rail Control Center and was "subjected to Incident testing as per The Rail Control Center Directive 01-11." (Blau Affirm., Ex G.) The report states that a breathalyzer was administered to Ested at 0437 hours, and the same technician administered a urinalysis to Ested. (*Id.*) Directive 01-11 appears to require drug and alcohol testing for "employees involved in major incidents/accidents or serious violations." (Blau Affirm., Ex H.)

Defendants' counsel responded, "Have a made a request for BAT test results will forward under separate cover." (Hamler Opp. Affirm., Ex A.) It appears that plaintiff was provided a one page document which states, "ABT Less Than 0.020." (Blau Affirm., Ex I.) Defendants' response does not mention any urinalysis results. However, plaintiff has not demonstrated that defendants' failure to produce Ested's urinalysis results was willful or contumacious.

Within 45 days, defendants are directed to produce the results of the urinalysis test administered to Ested, as referenced in the incident report. If defendants are not able to produce the results by that time, defendants must provide an affidavit of search for the urinalysis results, detailing the means and

(Continued . . .)

methods of the search that was conducted for the urinalysis results. (*See Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992].)

Although plaintiff's counsel states that no disclosure was made as to any blood tests or a "tox screen" taken on the date of the occurrence, nothing in Directive 01-11 or the incident report indicates that Ested should have undergone blood testing or a "tox screen" separate from a urinalysis.

As to the remaining items of plaintiffs' second notice for discovery and inspection, defendants objected to their production. Insofar as plaintiffs have not sought a ruling on those objections until this motion, it cannot be said that defendants' refusal to provide these items of discovery was willful or contumacious.

Defendants' objection to "all medical records and for related physical examinations for Anthony Ested # 259003" as overly broad is sustained. This demand is separate from the demand for the tests administered to Ested on the date of the incident. Plaintiffs' counsel has not explained how these records in defendants' possession, custody, or control either are relevant, or reasonably calculated to lead to admissible evidence as to the issues of this action.

Item 1 of plaintiff's second notice for discovery and inspection seeks the "Complete personnel and work file maintained for Anthony Esteve #259003." Defendants' objection to the personnel file as "non discoverable" is overruled. *Karoon v New York City Transit Authority* (241 AD2d 323 [1st Dept 1997]) does not stand for the proposition that an employee's personnel file is not discoverable.

In *Karoon*, the Appellate Division, First Department reversed the decision of the motion court to grant the plaintiff additional discovery of any records of earlier accidents of a bus driver, and to deny defendants' cross motion for summary judgment dismissing causes of action for negligent hiring, retention, and training of the bus driver. The Appellate Court ruled that defendants were entitled to summary judgment dismissing plaintiff's claims of negligent hiring, retention and training, reasoning

(Continued . . .)

> "Generally, where an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention. . .
>
> While an exception exists to this general principle where the injured plaintiff is seeking punitive damages from the employer based on alleged gross negligence in the hiring or retention of the employee, that exception is inapposite here."

(*Karoon*, 241 AD2d at 325 [internal citations omitted].) The Appellate Division did not state why the motion court's decision granting plaintiff's motion for additional discovery was reversed. However, given the context, one would conclude that the additional discovery sought in *Karoon* was relevant to the causes of action that were dismissed on appeal.

Here, plaintiffs seek discovery of Ested's personnel file to obtain any statements "concerning the happening of the accident," which the Court agrees with plaintiffs are relevant to this action. Therefore, defendants are directed to produce any statements from Ested in his personnel file about this alleged accident. Defendants are also directed to produce any documents in Ested's personnel file as to blood alcohol or drug test results from any exams administered to Ested on the date of the alleged accident. Finally, defendants are directed to produce any documents in his personnel file concerning disciplinary action taken against Ested, if any, based on his actions on the date of the alleged accident.

However, the Court disagrees with plaintiffs' counsel that "disciplinary and civilian complaint records" are *per se* relevant. Plaintiffs' reliance on police misconduct cases is misplaced, because those cases involved Civil Rights Law § 50-a, which does not apply to Ested. *Butler v City of New York* (15 Misc 3d 1134 [A]), which plaintiffs cited, involved a cause of action under 42 USC 1983. Federal law, not state law, governs the scope of disclosure with respect to that cause of action, and in such civil rights cases, the scope of discovery under federal law is much more liberal. (*Ramos v City of New York*, 285 AD2d 284 [1st Dept 2001]; *Mann v Alvarez*, 242 AD2d 318, 320 [2d Dept 1997].)

(Continued . . .)

**Finally, the branch of plaintiffs' motion for an order compelling plaintiffs to produce a redacted copy of any report of an examination of Ested by a psychiatrist or psychologists, for the purpose of evaluating Ested's fitness for duty, is denied, without prejudice to serving a formal demand. An order to compel is not warranted because the discovery sought was not contained in a prior notice for discovery and inspection. (See CPLR 3124 [a party may move to compel if a person fails to comply with any demand.) Nothing in the record indicates that his employer required Ested to submit to such exams, or that these exams were performed on Ested.**

**Copies to counsel.**

Dated: 4/23/12
New York, New York

_____, J.S.C.

1. Check one: ..... ☐ CASE DISPOSED ■ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☐ GRANTED ☐ DENIED ■ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

HON. MICHAEL D. STALLMAN