

10-2809
Goodrich v. LIRR Co.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

August Term 2010

Submitted: March 7, 2011

Decided: August 15, 2011

Docket No. 10-2809-cv

GREGORY GOODRICH,

Plaintiff-Appellant,

-v.-

LONG ISLAND RAIL ROAD COMPANY, DONALD RUSSELL, AND JOHN DOE "A,"
NAME BEING FICTITIOUS, TRUE NAME UNKNOWN,

Defendants-Appellees.

Before: FEINBERG, LIVINGSTON, and LOHIER, *Circuit Judges.*

Plaintiff-Appellant Gregory Goodrich ("Goodrich"), an employee of Defendant-Appellee The Long Island Rail Road Company ("LIRR"), appeals from a judgment of the United States District Court for the Southern District of New York (Scheidlin, *J.*) granting the LIRR's motion to dismiss his complaint for failure to state a claim. Goodrich brought suit under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, against the LIRR and two individual defendants, alleging claims of negligent infliction of emotional distress and intentional infliction of emotional distress against each of the three defendants; he asserts on appeal that his intentional infliction of emotional distress claim against the LIRR should not have been dismissed. Because we hold, in agreement with the district court, that a plaintiff bringing a claim for intentional

1 infliction of emotional distress under FELA is required to satisfy the “zone of danger” test outlined
2 by the Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 547-48, 554 (1994),
3 we affirm.

4 Affirmed.

5 PHILIP J. DINHOFER, Philip J. Dinhofer, LLC, Rockville
6 Centre, NY, *of counsel to* Frederic M. Gold, P.C., New York,
7 NY, *for Plaintiff-Appellant*.

8
9 BRIAN K. SALTZ, Esq., *for* Catherine A. Rinaldi, Vice
10 President/General Counsel & Secretary, The Long Island Rail
11 Road Company, Jamaica, NY, *for Defendant-Appellee Long*
12 *Island Rail Road Company*.

13
14 DEBRA ANN LIVINGSTON, *Circuit Judge*:

15 Plaintiff-Appellant Gregory Goodrich (“Goodrich”) is an employee of Defendant-Appellee
16 The Long Island Rail Road Company (“LIRR”). On March 12, 2010, he brought suit under the
17 Federal Employers’ Liability Act (“FELA”), 45 U.S.C. § 51 *et seq.*, against his employer, the LIRR,
18 and two individual defendants, alleging claims of negligent infliction of emotional distress (“NIED”) and
19 intentional infliction of emotional distress (“IIED”) against each of the three defendants. He
20 appeals from a June 30, 2010, judgment of the United States District Court for the Southern District
21 of New York (Scheidlin, *J.*), granting the LIRR’s motion to dismiss his complaint, including his
22 IIED claim against the LIRR, for failure to state a claim. Because we hold that the district court
23 correctly concluded that a plaintiff bringing a claim for IIED under FELA is required to satisfy the
24 “zone of danger” test outlined by the Supreme Court in *Consolidated Rail Corp. v. Gottshall*, 512
25 U.S. 532, 547-48, 554 (1994), we affirm.

BACKGROUND

1
2 In reviewing the district court's grant of a motion to dismiss brought pursuant to Rule
3 12(b)(6) of the Federal Rules of Civil Procedure, we accept as true the nonconclusory factual
4 allegations made by Goodrich in his complaint. *See Fed. Treasury Enter. Sojuzplodoimport v.*
5 *Spirits Int'l N.V.*, 623 F.3d 61, 63 (2d Cir. 2010).

6 Goodrich alleges that while he was employed by the LIRR as an electrician at its facility in
7 Hillside Yard, Queens, New York, he suffered severe emotional distress as a result of the actions
8 of defendants the LIRR and two LIRR employees, Donald Russell ("Russell") and an unnamed
9 individual "John Doe 'A.'" At a pretrial conference conducted after the LIRR had filed its motion
10 to dismiss in this case, Goodrich further alleged that, at the time the challenged conduct took place,
11 he had been HIV positive for a number of years.¹ In August 2009, he had allegedly been out of work
12 with the flu for several days and had submitted a sick leave application in order to be compensated
13 for the days missed while he was ill. While he was away from work, an individual, whom Goodrich
14 believes was Russell, took the sick leave form from Goodrich's locker, added the words "And HIV
15 positive" beneath the doctor's flu diagnosis, and posted it on a public bulletin board at the LIRR's
16 facility. Goodrich alleges that in doing so, Russell was acting within the scope of his employment.

17 Goodrich filed his complaint in March 2010, asserting subject matter jurisdiction under
18 FELA and alleging an NIED claim and an IIED claim against the LIRR, Russell, and the unknown

¹ The allegations brought forward in the pretrial conference were not included in the plaintiff's complaint or in a proposed amended complaint and thus are ordinarily not properly considered in a motion to dismiss under Rule 12(b)(6). *See Reliance Ins. Co. v. PolyVision Corp.*, 474 F.3d 54, 57 (2d Cir. 2007). However, the LIRR did not object either below or in this appeal to the district court's consideration of these additional allegations amplifying those made in Goodrich's complaint and, in any event, the district court in no way relied on them in the decision below. *See id.* We include them here solely for background purposes.

1 individual John Doe “A.” The LIRR filed a motion to dismiss with respect to the claims against it,
2 arguing that to state a claim either for NIED or for IIED under FELA, Goodrich was required to
3 satisfy the “zone of danger” test by alleging that he had either sustained a physical impact or been
4 placed in immediate risk of physical harm by the conduct of the LIRR or its agents. Goodrich
5 subsequently withdrew his NIED claim, acknowledging the need to satisfy the zone of danger test
6 in that context, but contested the need to satisfy the same test to bring an IIED claim.

7 The district court concluded that the zone of danger test was applicable to IIED claims
8 brought under FELA, granting LIRR’s motion to dismiss on that basis. Although the individual
9 defendants did not appear before the district court — according to the LIRR, Russell had not been
10 served with a summons and complaint in this proceeding, while the other individual remained
11 unidentified — the district court dismissed the action as to them as well, on the ground that a FELA
12 action can only be brought against a “common carrier by railroad” and not an individual.

13 This appeal followed.

14 15 **DISCUSSION**

16 **I. Standard of Review**

17 We review *de novo* a district court’s grant of a Rule 12(b)(6) motion to dismiss for failure
18 to state a claim upon which relief may be granted, “accepting all factual claims in the complaint as
19 true, and drawing all reasonable inferences in the plaintiff’s favor.” *Famous Horse Inc. v. 5th Ave.*
20 *Photo Inc.*, 624 F.3d 106, 108 (2d Cir. 2010).

21 **II. Applicability of the Zone of Danger Test to IIED Claims Brought Under FELA**

22 The sole question presented by this appeal is whether the zone of danger test applies to IIED

1 claims brought under FELA. We begin with the text of the statute. FELA provides in relevant part
2 that:

3 Every common carrier by railroad . . . shall be liable in damages to any person
4 suffering injury while he is employed by such carrier . . . for such injury or death
5 resulting in whole or in part from the negligence of any of the officers, agents, or
6 employees of such carrier, or by reason of any defect or insufficiency, due to its
7 negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats,
8 wharves, or other equipment.

9 45 U.S.C. § 51. On its face, the statute offers little reason to conclude that its coverage extends to
10 claims for the intentional infliction of emotional distress, in that the statute creates liability for the
11 “negligence” of a common carrier by railroad resulting in “injury or death” to a worker. The
12 Supreme Court, however, has “recognized generally that the FELA is a broad remedial statute, and
13 ha[s] adopted a ‘standard of liberal construction in order to accomplish [Congress’] objects’ ” in
14 enacting it. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 562 (1987) (second
15 alteration in original) (quoting *Urie v. Thompson*, 337 U.S. 163, 180 (1949)). Of particular
16 relevance to this case, despite the fact that FELA’s text refers to injuries caused by a railroad’s
17 “negligence,” the statute has long been understood to recognize causes of action for some intentional
18 torts like battery as well. *See id.* at 562 n.8 (citing, *inter alia*, *Jamison v. Encarnacion*, 281 U.S. 635
19 (1930)); *see also Higgins v. Metro-North R.R. Co.*, 318 F.3d 422, 425 (2d Cir. 2003) (citing *Davis*
20 *v. Green*, 260 U.S. 349 (1922), and *Harrison v. Mo. Pac. R.R. Co.*, 372 U.S. 248 (1963)).

21 The Supreme Court has only more recently addressed the question whether FELA, through
22 its use of the phrase “injury or death,” provides for recovery not only for physical but also purely
23 emotional harms. In *Buell*, confronting for the first time the question whether a purely emotional
24 injury is cognizable under FELA, the Court noted that the question “may not be susceptible to an
25 all-inclusive ‘yes’ or ‘no’ answer.” 480 U.S. 570. It found the factual record in the case before it

1 insufficiently developed to allow it to come to a conclusion, vacating the lower court's determination
2 that such harms were cognizable and remanding for further proceedings. *See id.*

3 In *Gottshall*, the Supreme Court returned to the issue, addressing in particular the question
4 whether and to what extent a claim for *negligent* infliction of emotional distress is cognizable under
5 FELA. *See* 512 U.S. at 541. The Court structured its analysis into two inquiries. First, it considered
6 "FELA itself, its purposes and background and the construction [the Court has] given it over the
7 years." *Id.* Second, "because 'FELA jurisprudence gleans guidance from common-law
8 developments,'" the Court considered the common law treatment of the NIED cause of action. *See*
9 *id.* at 541-42 (quoting *Buell*, 480 U.S. at 568).

10 With respect to the first inquiry, the Court noted that the statutory purpose of FELA is clear:
11 "when Congress enacted FELA in 1908, its 'attention was focused primarily upon injuries and death
12 resulting from accidents on interstate railroads.'" *Id.* at 542 (quoting *Urie*, 337 U.S. at 181). Under
13 these circumstances, "[c]ognizant of the physical dangers of railroading that resulted in the death
14 or maiming of thousands of workers every year," *id.*, Congress sought through FELA to "d[o] away
15 with several common-law tort defenses that had effectively barred recovery by injured workers,"
16 thereby allowing injured workers to bring claims against their railroad employers more easily, *id.*

17 The Court then proceeded to the second inquiry, the relevant common law treatment of NIED
18 claims, noting that "although common-law principles are not necessarily dispositive of questions
19 arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to
20 great weight in our analysis." *Id.* at 544. As an initial matter, it held that NIED claims could be
21 brought under FELA, given the wide recognition of the claim in some form by many American
22 jurisdictions at the time FELA was passed, its near-universal recognition by the States at present,

1 and the traditionally broad interpretation given to the term “injury” in the statute. *Id.* at 549-50.

2 Having recognized NIED claims as cognizable under FELA, the Court next adopted the zone
3 of danger test to define the scope of the duty FELA places on employers to avoid imposing
4 emotional distress on their employees. Assessing three common-law tests for limiting liability for
5 NIED claims, the Court made clear that it was adopting the test that “best reconciles the concerns
6 of the common law with the principles underlying our FELA jurisprudence.” *Id.* at 554. The zone
7 of danger test, the Court said, was “well established” when FELA was passed in 1908, *id.* at 554,
8 is still presently in use in many states, *id.* at 555, and is “consistent with FELA’s central focus on
9 physical perils,” *id.* “Under this test, a worker within the zone of danger of physical impact will be
10 able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker
11 outside the zone will not.” *Id.* at 556. In rejecting the alternative “relative bystander” test now
12 widely used by many American jurisdictions, the Court noted that the test developed several decades
13 after FELA’s enactment, such that it “lacks historical support,” *id.* at 556, and that in any event the
14 Court “discern[ed] from FELA and its emphasis on protecting employees from physical harms no
15 basis to extend recovery to bystanders outside the zone of danger,” *id.* at 556-57. Thus, under the
16 zone of danger test adopted in *Gottshall*, recovery under FELA for an NIED claim is limited to
17 “those plaintiffs who sustain a physical impact as a result of a defendant’s negligent conduct, or who
18 are placed in immediate risk of a physical harm by that conduct.” *Id.* at 547-48.

19 The zone of danger test was refined in *Metro-North Commuter Railroad Co. v. Buckley*, 521
20 U.S. 424 (1997). In *Buckley*, the Supreme Court had to decide whether a railroad employee’s
21 exposure to asbestos, resulting in alleged emotional distress but no symptoms of illness at the time
22 of the suit, constituted a “physical impact” meeting the requirements of the *Gottshall* zone of danger

1 test. 521 U.S. at 428-29. The Court held that such exposure did *not* constitute a physical impact
2 “unless, and until, [the railroad worker] manifests symptoms of a disease.” *Id.* at 427. In rejecting
3 a more expansive reading of the test, the Court noted that its reading was consistent with the general
4 common law understanding of the zone of danger test in similar contexts, with FELA’s focus on
5 physical harms, and with *Gottshall*’s use of the term “physical impact,” which “do[es] not encompass
6 every form of ‘physical contact.’” *See id.* at 430-33. Moreover, the Court noted that the “general
7 policy reasons” cited in *Gottshall* as common-law rationales for restricting claims for recovery for
8 emotional harm — “(a) [the] special ‘difficult[y] for judges and juries’ in separating valid, important
9 claims from those that are invalid or ‘trivial’; (b) [the] threat of ‘unlimited and unpredictable
10 liability’; and (c) the ‘potential for a flood’ of comparatively unimportant, or ‘trivial,’ claims,” *id.*
11 at 433 (alteration in original; internal citations omitted) (quoting *Gottshall*, 512 U.S. at 557) — also
12 “militate against an expansive definition of ‘physical impact’ here.” *Id.* In light of these
13 considerations, the Court rejected the notion that a claim for emotional harm could be brought under
14 FELA in the circumstances alleged by the plaintiff in *Buckley*. *See id.* at 436.²

15 After *Gottshall* and *Buckley*, we examined in *Higgins* whether an IIED claim is cognizable
16 under FELA and concluded that it was, reasoning that “[b]ecause intentional torts are recognized
17 under FELA and claims for solely emotional injury are also recognized, . . . claims of intentional
18 infliction of emotional distress can be brought under FELA.” 318 F.3d at 425 (internal citations

² In *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), the Supreme Court further clarified the rule set out by *Buckley*, noting that when an employee who had been exposed to asbestos in fact *has* developed asbestosis, a cognizable injury under FELA, that employee can then recover for his or her fear of cancer as part of the pain and suffering resulting from this physical injury without being subject to the zone of danger test of *Gottshall* and *Metro-North*. *See id.* at 141, 148-49.

1 omitted). The majority in *Higgins* expressly declined, however, to decide whether the zone of
2 danger test applied by the Supreme Court in *Gottshall* was also applicable in FELA cases raising
3 IIED claims, as the common-law requirement that an IIED claim be based on extreme and
4 outrageous conduct was sufficient to dispose of the case before it. *See id.* at 425 n.1.

5 Concurring in the result, then-Judge Sotomayor concluded that the zone of danger test *did*
6 apply and would have decided the case on that basis. In doing so, she noted that while the Supreme
7 Court in *Gottshall* considered an NIED claim, its discussion extended broadly to the types of *injuries*
8 compensable under FELA. *See id.* at 430 (Sotomayor, *J.*, concurring in the judgment). Analyzing
9 the Court's decisions in *Gottshall* and *Buckley*, Judge Sotomayor reasoned that, while the common
10 law's focus on the extreme or outrageous nature of a defendant's conduct may adequately guarantee
11 that a claim of emotional distress is genuine, "this approach takes the focus away from the core
12 concern of FELA as described in both *Gottshall* and *Buckley*: that employees must suffer some kind
13 of physical harm, impact, or invasion before they may recover under the Act." *Id.* at 431-32.

14 As an initial matter, we agree with the concurring opinion in *Higgins* that *Gottshall* and
15 *Buckley* are highly relevant to the zone of danger test's applicability in the IIED context, even
16 though both decisions dealt with NIED claims. As the concurrence in *Higgins* notes, the Supreme
17 Court in *Gottshall* focused its analysis on the nature of the injury, stating that "[t]he injury we deal
18 with here is mental or emotional harm (such as fright or anxiety) that is caused by the negligence
19 of another and that is not directly brought about by a physical injury, but that may manifest itself
20 in physical symptoms." *Higgins*, 318 F.3d at 430-31 (Sotomayor, *J.*, concurring in the judgment)
21 (quoting *Gottshall*, 512 U.S. at 544); *see also Smith v. Union Pacific R.R. Co.*, 236 F.3d 1168, 1171
22 (10th Cir. 2000) ("A close reading of [*Gottshall*] reveals that the Court focused on whether

1 emotional injuries were generally compensable under FELA, rather than upon the specific cause of
2 action.”). Language in the Supreme Court’s most recent discussion of the zone of danger test for
3 NIED claims in *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), a decision that
4 followed *Higgins*, only reinforces our conclusion that the focus should be on the *injury* involved:
5 “In sum, our decisions in *Gottshall* and [*Buckley*] describe two categories: Stand-alone emotional
6 distress claims not provoked by any physical injury, for which recovery is sharply circumscribed
7 by the zone-of-danger test; and emotional distress claims brought on by a physical injury, for which
8 pain and suffering recovery is permitted.” *Id.* at 147.

9 We also agree with the concurrence in *Higgins* that, in analyzing the question here, we
10 properly begin with the understanding that FELA’s “core concern,” *see Higgins*, 318 F.3d at 431
11 (Sotomayor, *J.*, concurring in the judgment), is *physical* harm, impact, or invasion. As the Supreme
12 Court noted approvingly in *Gottshall*, the Seventh Circuit has observed that “FELA was (and is)
13 aimed at ensuring ‘the security of the person from *physical* invasions or menaces.’” *Gottshall*, 512
14 U.S. at 555-56 (emphasis added) (quoting *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807,
15 813 (7th Cir. 1985)). The Seventh Circuit went on to hold in the same case that even in the
16 intentional tort context, “FELA does not create a cause of action for tortious harms brought about
17 by acts that lack any physical contact or threat of physical contact,” *Lancaster*, 773 F.3d at 813; *see*
18 *also Ray v. Consol. Rail Corp.*, 938 F.2d 704, 705 (7th Cir. 1991) (reaffirming *Lancaster*). Indeed,
19 our understanding of FELA is shared by all our sister Circuits that have expressly considered the
20 extent to which claims based on emotional distress may be brought under the Act. *See Adkins v.*
21 *Seaboard Sys. R.R.*, 821 F.2d 340, 341-42 (6th Cir. 1987) (per curiam) (“Although *Buell* notes that
22 the FELA has been held to apply to some intentional torts, the FELA has not been applied to any

1 intentional torts lacking any physical dimension such as assault. . . . [W]e have held that a claim for
2 intentional infliction of emotional distress is not cognizable under the FELA.” (internal citations
3 omitted)); *cf. Rivera v. Nat’l R.R. Passenger Corp.*, 331 F.3d 1074, 1082 (9th Cir. 2003) (“In light
4 of the historical interpretation of FELA as intended to compensate for injury caused by a physical
5 phenomenon, defamation is not properly pled as a FELA claim.”).

6 It is true that the common law does not currently impose a zone of danger test on IIED
7 claims. The Restatement (Second) of Torts defines the tort in these terms: “One who by extreme
8 and outrageous conduct intentionally or recklessly causes severe emotional distress to another is
9 subject to liability for such emotional distress, and if bodily harm to the other results from it, for
10 such bodily harm.” Restatement (Second) of Torts § 46(1) (1965). This approach has been followed
11 by most, if not all, American jurisdictions, *see* Restatement (Third) of Torts: Liability for Physical
12 & Emotional Harm § 45, Reporter’s Note, cmt. a (Tentative Draft No. 5, 2007) (collecting cases),
13 albeit not without reservation in some cases, *see, e.g., Supervalu, Inc. v. Johnson*, 276 Va. 356, 370
14 (2008) (“[T]he tort of intentional infliction of emotional distress is ‘not favored’ in the law, because
15 there are inherent problems in proving a claim alleging injury to the mind or emotions in the absence
16 of accompanying physical injury.”). Courts have noted that the Restatement’s “extreme and
17 outrageous” conduct requirement “serves the dual function of filtering out petty and trivial
18 complaints that do not belong in court, and assuring that plaintiff’s claim of severe emotional
19 distress is genuine.” *Holwell v. N.Y. Post Co., Inc.*, 81 N.Y.2d 115, 121 (1993); *see also*
20 Restatement (Third) of Torts: Liability for Physical & Emotional Harm § 45, cmt. a (Tentative Draft
21 No. 5, 2007) (“Courts have played an especially critical role in cabining [the IIED tort] by requiring
22 ‘extreme and outrageous’ conduct and ‘severe’ emotional disturbance. A great deal of conduct may

1 cause emotional disturbance, but the requisite conduct for this claim — extreme and outrageous —
2 is a very small slice of human behavior, and the requirement that the resulting harm be severe further
3 limits claims.”).

4 Our inquiry does not end with the present day state of the common law on this question,
5 however. Under *Gottshall*, we are also compelled to “[c]onsider[] the question ‘in the appropriate
6 historical context,’” 512 U.S. at 555 (quoting *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 337
7 (1988)), requiring here an assessment of the treatment of claims for IIED at common law at the time
8 of FELA’s passage in 1908, *cf. id.* at 556 (noting that the “relative bystander” test for NIED claims
9 “was not developed until 60 years after FELA’s enactment, and therefore lacks historical support”).

10 We find highly significant – though not dispositive *per se*, see *Nelson v. Metro-North*
11 *Commuter R.R.*, 235 F.3d 101, 107-10 (2d Cir. 2000) – that the tort of IIED or outrage was in a
12 nascent stage at the time of FELA’s passage. The Restatement (First) of Torts, published in 1934,
13 stated categorically that “conduct which is intended or which though not so intended is likely to
14 cause only a mental or emotional disturbance to another does not subject the actor to liability (a) for
15 emotional distress resulting therefrom or (b) for bodily harm unexpectedly resulting from such
16 disturbance.” *Id.* § 46.³ As Professor William Prosser, arguing in 1939 for the recognition of a new
17 tort of “intentional infliction of mental suffering,” described the situation:

18 [T]he law has been reluctant, and very slow indeed, to accept the interest in peace
19 of mind as entitled to independent legal protection. This has been true even where
20 the invasion has been an intentional one. It is not until comparatively recent years
21 that there has been anything like a general admission that the infliction of mental
22 distress, standing alone, may ever serve as the basis of an action. In this respect the
23 law is clearly in a process of growth, the ultimate limits of which must be as yet only
24 a matter of conjecture.

³ The Restatement did recognize traditional exceptions to this rule like the tort of assault, *id.* §§ 21-34, and the liability of common carriers to their customers for insults by employees, *id.* § 48.

1 William L. Prosser, *Intentional Infliction of Mental Suffering: A New Tort*, 37 Mich. L. Rev. 874,
2 874 (1939); *see also* Calvert Magruder, *Mental and Emotional Disturbance in the Law of Torts*, 49
3 Harv. L. Rev. 1033, 1035 (1936). Granted, Professors Prosser and Magruder forcefully attacked
4 the Restatement view that no recovery could be obtained for the intentional infliction of emotional
5 distress. But in assessing decided cases over 25 years after the FELA's enactment, they could
6 identify at most a "rule which seems to be emerging . . . that there is liability only for conduct
7 exceeding all bounds which could be tolerated by society, of a nature especially calculated to cause
8 mental damage of a very serious kind." Prosser, *supra*, at 889; *see also* Magruder, *supra*, at 1058
9 (suggesting "the gradual emergence of a broad principle somewhat to this effect: that one who,
10 without just cause or excuse, and beyond all the bounds of decency, purposely causes a disturbance
11 of another's mental and emotional tranquillity of so acute a nature that harmful physical
12 consequences might be not unlikely to result, is subject to liability in damages for such mental and
13 emotional disturbance even though no demonstrable physical consequences actually ensue");
14 William L. Prosser, *Insult and Outrage*, 44 Cal. L. Rev. 40, 43 (1956) ("[S]omewhere around 1930
15 it began to be generally recognized that the intentional infliction of mental disturbance, at least by
16 extreme and outrageous conduct, could be a cause of action in itself.").

17 Reflective of the still undetermined contours of this emerging cause of action, when the tort
18 of intentional infliction of emotional distress was first added to the Restatement in a 1948
19 Supplement to the Restatement (First) of Torts, the provision simply stated that "[o]ne who, without
20 a privilege to do so, intentionally causes severe emotional distress to another is liable . . . for such
21 emotional distress." Restatement (First) of Torts, § 46 (Supp. 1948). It was not until the
22 Restatement (Second) of Torts, published in 1965, that the cause of action assumed the form in
23 which it was widely adopted and persists at present, its scope cabined only by the requirements that

1 the defendant's underlying conduct be "extreme and outrageous" and the resulting emotional distress
2 "severe." *See* Restatement (Second) of Torts § 46 (1965).

3 We of course give "great weight" to common law principles in deciding claims brought
4 under FELA, unless they are expressly rejected in the text of the statute. *See Gottshall*, 512 U.S.
5 at 544. At the same time, they are "not necessarily dispositive of questions arising under FELA,"
6 *id.*, and we must "reconcile[] the concerns of the common law with the principles underlying our
7 FELA jurisprudence," *id.* at 554. At present, the common law in almost all American jurisdictions
8 has largely settled on the formulation of the IIED tort put forward by the Restatement in 1965, using
9 the outrageousness of the conduct and the severity of the injury to address concerns regarding the
10 triviality or authenticity of claims that may be brought under its heading. Nevertheless, we agree
11 with then-Judge Sotomayor in *Higgins* that this approach "takes the focus away from the core
12 concern of FELA as described in both *Gottshall* and *Buckley*: that employees must suffer some kind
13 of physical harm, impact, or invasion before they may recover under the Act." *Higgins*, 318 F.3d
14 at 431-32 (Sotomayor, *J.*, concurring in the judgment).

15 Neither FELA's terms nor any court decision of which we are aware supports expanding the
16 injuries for which recovery is available under FELA to include those occurring outside a zone of
17 physical danger. The IIED claim is a tort unbounded by any connection to the dangers originally
18 prompting Congress to protect railroad workers through enactment of FELA — a tort, in the words
19 of the New York Court of Appeals, "as limitless as the human capacity for cruelty." *Holwell*, 81
20 N.Y.2d at 122. In contrast, as the Supreme Court has stated, "an emotional injury constitutes
21 'injury' resulting from the employer's 'negligence' for purposes of FELA only if it would be
22 compensable under the terms of the zone of danger test." *Gottshall*, 512 U.S. at 555. The fact that
23 an "injury" of this type results from an intentional act for which the employer is responsible rather

1 than from “mere inadvertence or carelessness” does not excuse the employer from liability under
2 FELA. *See Jamison*, 281 U.S. at 641. We see no reason, however, why the same definition of
3 injury should not apply in the NIED and IIED contexts.

4 Goodrich contends that applying the zone of danger test in the IIED context will have the
5 effect either of precluding recovery for otherwise meritorious IIED claims — perhaps limiting the
6 successful claims to those most like the traditional tort of assault — or of channeling many such
7 IIED actions into NIED claims instead, where the common law does not require that the underlying
8 conduct of which a plaintiff complains be extreme or outrageous.⁴ Neither contention alters our
9 conclusion here. As then-Judge Sotomayor noted in *Higgins*, the fact that recognizing the
10 applicability of the zone of danger test to this type of claim may preclude the bringing of some
11 otherwise meritorious IIED claims under the aegis of FELA does not address, much less answer, the
12 question whether the zone of danger test is applicable: “While I recognize that this may preclude
13 recovery for purely emotional harm even where the conduct alleged is extreme and outrageous, this
14 is not a sufficient basis . . . to conclude that the zone of danger test does not apply.” *Higgins*, 318
15 F.3d at 432 n.5 (Sotomayor, *J.*, concurring in the judgment). To the extent that some IIED claims
16 may be brought as NIED claims due to the “extreme and outrageous” conduct requirement
17 applicable to IIED claims, moreover, this is a result of the Court’s decision in *Higgins*, not the
18 decision today. The question whether a FELA plaintiff who satisfies the zone of danger test and
19 asserts an IIED claim must also satisfy the “extreme and outrageous” conduct requirement is simply

⁴ We note that with respect to the argument that the tort of IIED, when delimited by the zone of danger test, mirrors the traditional tort of assault, this Circuit has observed that the full extent of the phrase “immediate risk of physical harm” in the Supreme Court’s formulation of the zone of danger test is not entirely settled. *See Nelson v. Metro-North Commuter R.R.*, 235 F.3d 101, 110 (2d Cir. 2000). Because Goodrich specifically disclaims any fear of imminent bodily harm in this case, this appeal presents us with no occasion to explore the boundaries of this test.

1 not before this panel. The issue before us is whether the zone of danger test applies. In light of
2 FELA's overall focus on physical injuries, the decisions of our sister circuits, the dearth of decisions
3 holding that IIED claims may be brought under FELA without satisfying the zone of danger test, and
4 the unsettled state of the common law on this point at the time of FELA's enactment, we hold that
5 the zone of danger test applies to IIED claims brought under FELA. Because Goodrich failed to
6 allege that he "sustain[ed] a physical impact" as a result of the defendants' alleged conduct or was
7 "placed in immediate risk of physical harm by that conduct," *Gottshall*, 512 U.S. at 547-48, we
8 affirm the district court's dismissal of his complaint.

9 **III. Leave to Amend**

10 Goodrich argues that, even if we conclude that the zone of danger test applies to the claim
11 at issue in this case, the judgment here should nevertheless be vacated and he should be granted
12 leave to file and serve an amended complaint. Under Rule 15 of the Federal Rules of Civil
13 Procedure, a "court should freely give leave [to amend the complaint] when justice so requires."
14 Fed. R. Civ. P. 15(a)(2). However, as this Court has noted, a request to replead should be denied
15 in the event that repleading would be futile. *See Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 507
16 F.3d 117, 127 (2d Cir. 2007). Here, Goodrich "readily concedes that he was never placed in fear
17 of imminent bodily harm, nor did he ever suffer any physical impact." Plaintiff-Appellant's Br. at
18 2. In light of this concession and without any showing that the deficiencies in the complaint could
19 be cured, we must conclude that repleading would be futile. We therefore decline to vacate the
20 district court's judgment on this ground.

22 **CONCLUSION**

23 For all of the foregoing reasons, the judgment of the district court is therefore **AFFIRMED**.