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Abstract

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ARTICLES

CURRENT STATUS OF LAY SHARE WAGE CLAIMS IN ADMIRALTY LAW†

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INTRODUCTION

Fishermen are still going to sea under oral lay share agreements. A noted scholar has stated that "[s]cant consideration appears to have been given to such questions as to what constitute[s] 'the end of the voyage'."[1] This Article explores the parameters of claims under oral lay share agreements in the commercial fishing industry. The Article analyzes such agreements by exploring the rationale used in the four principal lay share cases in the geographic area of the U.S. Court of Appeals for the Ninth Circuit.[2] Additionally, this Article considers the historical development of, and policies behind, maritime laws favoring able seamen, and how these laws have contributed to oral lay share agreements as those agreements affect the rights of commercial fishermen.

I. *THE MARITIME INDUSTRY IN U.S. HISTORY*

The term "lay share" denotes "a share of the profits in a venture given in lieu of wages."[3] From the earliest times, a seaman's share in the proceeds of a voyage has been consid-

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1. M.J. NORRIS, THE LAW OF SEAMEN § 26:7, at 16 (4th ed. 1985). It is well settled in the law that a seaman ill or injured in the service of his vessel, absent willful misconduct, is entitled to wages "to the end of the voyage." *Id.* at 15; *see The Osceola*, 189 U.S. 158, 167 (1903).

2. *See* Dacruz v. Knutsen, 1987 AMC 1675 (9th Cir. 1987); Ekornas v. Nordic Fury, Inc., 1987 AMC 1277 (W.D. Wash. 1986); Thompson v. *M/V Progress*, 1979 AMC 2686 (D. Or. 1978); Weason v. Harville, 706 P.2d 306 (Alaska 1985).

3. M.J. NORRIS, *supra* note 1, § 5:9, at 160-61; *see* Putnam v. Lower, 236 F.2d 561, 563 n.2 (9th Cir. 1956). According to the Ninth Circuit, "seamen were compensated by a stake or share in the profits of [a] voyage." *Id.* at 570. By the mid-1900s, it

ered to be a wage.[4]

The United States, bordered by two oceans, has always been engaged in maritime activity.[5] Thus, U.S. courts have long recognized "the necessity for skilled and courageous mariners."[6] In the century following the Mayflower's voyage, few settlements were more than thirty miles from tide water, and all depended heavily on the flow of sea-borne commerce.[7] Today, the maritime industries have become an integral part of U.S. national and foreign policies, and U.S. courts have created a body of law that favors the interests of able seamen. A further understanding of why U.S. law jealously protects able seamen requires a brief historical review.

A. *The Historical Plight of Seamen*

The problems with securing sufficient numbers of able-bodied seamen were all too evident during the latter half of the nineteenth century.[8] Low wages were only one aspect of the exploitation suffered by seamen.[9] The mid-1800s saw a rash of new employment opportunities created by the emergence of

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became customary to pay fixed wages. *Id.* The old form of lay share compensation, however, has survived in the more speculative sealing and fishing industries. *Id.*

4. Harden v. Gordon, 11 F. Cas. 480, 481 (C.C.D. Me. 1823) (No. 6,047). "[T]he compensation of fishermen comes within the reach of the admiralty jurisdiction, although they claim specific shares in the cargo; for their share of the proceeds of the voyage are considered as in the nature of wages." *Id.* These wages have been determined by a "hierarchy in which skill, age, experience, and resources [define] an individual's position and share in the . . . profits." C.L. HEYRMAN, COMMERCE AND CULTURE: THE MARITIME COMMUNITIES OF COLONIAL MASSACHUSETTS 212 (1984). "Expertise in navigation, knowledge of methods for curing the catch . . . and familiarity with the fishing grounds and the migratory patterns of the [fish can] accord higher pay to pilots, ship carpenters, [and] older hands . . . . *Id.* "[L]ess seasoned men hired to fill out a crew [often] commanded commensurately smaller shares." *Id.*

5. *See generally* H.C. HUNTER, HOW ENGLAND GOT ITS MERCHANT MARINE (1935).

6. *Putnam*, 236 F.2d at 570. "The law has jealously protected [seamen and has traditionally guaranteed] prompt payment of wages." *Id.* "The services of the ship's company is the maritime service, which is entitled to the highest consideration and the greatest favor; and the jurisdiction of the Admiralty in cases of mariners' wages is settled by a course of decisions of unbroken authority during centuries." *Id.* at n.26 (citation omitted).

7. S.E. MORISON, THE MARITIME HISTORY OF MASSACHUSETTS: 1783-1860, at 18 (1921).

8. *See generally* R.H. DILLON, SHANGHAIING DAYS (1961) (presenting historical overview of seamen's lifestyle and quest for human rights during the nineteenth and twentieth centuries).

9. *See* S.E. MORISON, *supra* note 7, at 353.

machine shops, railroads, and Western pioneering.[10] Shipowners maintained or depressed wages, however, in spite of this new competition.[11] Along with poor wages and dangerous work conditions, seamen were subjected to barbaric forms of punishment for minor transgressions, and endured the suspension of personal liberties until the end of the voyage.[12] U.S. shipmasters found themselves unable to attract U.S. workmen, and U.S. flagged ships became manned by an international workforce comprised of habitual drunkards, among others.[13] To secure sufficient sailors for voyages, shipmasters were forced to employ the services of "crimps."[14]

Crimps operated boarding houses where sailors could stay while ashore.[15] There, they were given food, lodging, and spending money.[16] When sailors could not repay these debts, they would be forced by the crimps, who received advances on the sailors' wages, to serve on ships.[17] Crimping was a part of the life of every port until the practice was banned in the early 1900s.[18]

Shanghaiing was also routinely used to meet the excess

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10. *See id.*

11. *See id.*

12. *Id.* at 352, 356-57. Discipline was more severe in the maritime industries than in other industries. *Id.* at 352. Moreover, seamen could not easily seek redress for wrongs that they suffered. *Id.* Massachusetts District Court Judge Sprague remarked that

> [s]eamen, in general, have little confidence in the justice of those whom circumstances have placed above them, and there is too much ground for this feeling. If a seaman is wronged by a subordinate officer, and makes a complaint to the master, it too often happens that he not only can obtain no hearing or redress, but brings upon himself further and greater ill treatment; and an appeal to an American consul against a master is oftentimes no more successful, pre-occupied, as that officer is likely to be, by the representations and influence of the master.

Swain v. Howland, 23 F. Cas. 483, 485 (D.C. Mass. 1858) (No. 13, 661).

13. S.E. MORISON, *supra* note 7, at 354-55.

14. *Id.* at 354.

15. *Id. See generally* R.H. DILLON, *supra* note 8, at 179-299 (discussing shanghaiing "industry" in San Francisco, world capital of shanghaiing at turn of nineteenth century).

16. P. SIMPSON, CITY OF DREAMS: A GUIDE TO PORT TOWNSEND 242 (1986). Max Levy was a notorious crimp in Port Townsend, Washington. *Id.* When his lodgers were unable to pay their bills for room, board, tobacco, and liquor, Levy would effectively sell them into servitude to shipowners "for a fee of thirty dollars per head, plus up to a three months advance on each sailor's wages." *Id.*

17. *Id.*

18. *Id.*

demand for seamen.[19] When not enough sailors were available through legal means to fill a ship's crew, crimps would send their runners to waterfront bars and brothels.[20] The methods employed for shanghaiing could involve a few free drinks or drugged liquor.[21] The victims were transported through "shanghai tunnels" that led to the waterfronts.[22] Through these tunnels, unconscious men were taken to waiting skiffs.[23]

Slowly, a social conscience emerged.[24] Flogging was legally prohibited by the mid 1800s,[25] although the law was often ignored and captains continued to wield belaying pins, marlin spikes, or bare fists.[26] In 1885, sailors began to organize under the International Workmen's Association, thus beginning a long battle for civil rights.[27] By the early twentieth century, legislation was in place that addressed the safety, health, and welfare needs of seamen.[28] A shortage of maritime manpower continues to be of great concern in modern times. U.S. law therefore continues to protect able seamen, including fishermen, and to secure certain and prompt payment of wages or other compensation.[29]

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19. *Id.* at 242-43. Shanghaiing was the "practice of drugging a seaman or plying him with drink to the point of stupefaction and then shipping him out against his will." M.J. NORRIS, *supra* note 1, § 10:12, at 373. Shanghaiing was officially outlawed in 1906. Act of June 28, 1906, ch. 3583, §§ 1-3, 34 Stat. 551.

20. P. SIMPSON, *supra* note 16, at 242-43. "The next morning, a few hapless farmhands and loggers would probably catch their first view of Cape Flattery's west face [from the sea]." *Id.*

21. *Id.* at 243. The "victims were carefully picked: Professional sailors were always the first choice, soldiers next, local residents and Indians were almost always avoided." *Id.*

22. *Id.*

23. *Id.* A notoriously foul operation was run in Washington state by a crimp named Limey Dirk. *Id.* Dirk was an infamous shanghaier. *Id.* Eventually, local sailors organized a boycott of Dirk's establishment. *Id.* When the boycott was found to be an insufficient method for quelling their anger, sailors began gathering outside Dirk's every night to throw stones through his windows. *Id.* In response, "Dirk would charge outside, a pistol in each hand, shooting at anything that moved. Fortunately, he was a lousy shot and did not hit anyone." *Id.* The sailors' campaign unfortunately did not succeed in driving Dirk out of business. *Id.*

24. R.H. DILLON, *supra* note 8, at 10-11. Dillon noted that "the emphasis upon punishment in shipboard discipline metamorphasized slowly into a paternalism." *Id.*

25. *See* M.J. NORRIS, *supra* note 1, § 23:1, at 641.

26. *See* R.H. DILLON, *supra* note 8, at 9-13.

27. *Id.* at 321-22.

28. *Id.* at 11.

29. *See* Putnam v. Lower, 236 F.2d 561, 570 (9th Cir. 1956). Lay fishermen may secure a lien against a vessel and its catch to ensure receipt of wages and compensa-

B. *Seamen's Wages*

Wages of seamen are favored in the laws of many nations because of the peculiar and perilous way in which they are earned.[30] The maritime industry was traditionally a hazardous vocation in which a seaman had to contend with the dangers of the natural elements, crude navigational instruments, and the strict requirements of the ship's discipline.[31] The law also favored seamen's wages because of the inherent inequality in bargaining power between seamen and shipowners.[32] According to Justice Story,

> [s]eamen are generally necessitous, ignorant of the nature and extent of their own rights and privileges, and for the most part incapable of duly appreciating their value . . . . Hence it is, that bargains between them and shipowners, the latter being persons of great intelligence and shrewdness in business, are deemed open to much observation and scrutiny; for they involve great inequality of knowledge, of forecast, of power, and of condition. Courts of Admiralty, on this account, are accustomed to consider seamen as peculiarly entitled to their protection.[33]

In 1920, the U.S. Congress passed the Merchant Marine Act of 1920 (the "Jones Act"),[34] which provides that any sea-

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tion. *See* Old Point Fish Co. v. Haywood, 109 F.2d 703, 704-05 (4th Cir. 1940); *The Carrier Dove*, 97 F. 111, 112 (1st Cir. 1899).

30. *See supra* note 29.

31. *See* M.J. NORRIS, *supra* note 1, § 30:34, at 454.

32. Brown v. Lull, 4 F. Cas. 407 (C.C.D. Mass. 1836) (No. 2,018).

33. *Id.* at 409. Seamen are often characterized as the "favorites" of admiralty courts. *Id.* "In a just sense they are so, so far as the maintenance of their rights, and the protection of their interests against the effects of the superior skill and shrewdness of masters and owners of ships are concerned." *Id.* Courts of admiralty act as liberal courts of equity and often nullify stipulations found in shipping articles that derogate from the rights and privileges of seamen. *Id.* Seamen are viewed as "wards of Admiralty" and as such "the courts of admiralty vigilantly guard against any encroachment upon their rights." *Putnam*, 236 F.2d at 569-70.

34. 46 U.S.C. § 688 (1988). The Jones Act provides that

> [a]ny 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, and in such action 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; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury.

Id.

man who suffers personal injury or death has a remedy against his employer for injuries suffered in the course of his employment.[35] A three-part test was developed to determine seaman status in order to apply the Jones Act.[36] First, the vessel must have been in navigation at the time of the alleged incident.[37] Second, the plaintiff must have been on board primarily to aid in the vessel's navigation.[38] Third, the plaintiff must have had a more or less permanent connection with the vessel.[39]

Historically, a fisherman under a lay share arrangement, injured in the course of his services on board, has been regarded as a seaman and his lay share has counted as wages.[40]

In 1902, the U.S. Supreme Court observed that under the Laws of Oléron,[41] sailors injured by their own misconduct could only be cured at their own expense, and could be discharged.[42] If, however, a seaman were hurt or wounded while acting in accordance with the shipmaster's order or by commands from any of the ship's company, or simply fell sick in the service of the ship, the seaman should be cured and provided for at the shipowner's expense.[43]

In such a case, the vessel and her owners were liable to the extent of the seaman's wages and maintenance and cure, provided as the voyage continued.[44] The U.S. Supreme Court, in The Osceola, also stated that a shipowner is liable to seamen

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35. *Id*; *see* Solomon v. Bruchhausen, 305 F.2d 941, 943 (2d Cir. 1962), *cert. denied*, 370 U.S. 951 (1963) (discussing congressional policies favoring seamen's wage claim suits and ensuring liberal access to federal courts); *see also* Santana v. United States, 572 F.2d 331, 335 (1st Cir. 1977) ("Admiralty suits for personal injury are conducted with extraordinary solicitousness for the seaman.").

36. *See* M.J. NORRIS, *supra* note 1, § 30:7 at 346.

37. *See id.*

38. *See id.* The U.S. Supreme Court recently concluded that a person need not aid in navigation to be a "seaman." McDermott Int'l, Inc. v. Wilander, 111 S. Ct. 807, 812-17 (1991).

39. *See* M.J. NORRIS, *supra* note 1, § 30:7, at 346.

40. *See* Welch v. Fallon, 181 F. 875, 878 (D. Mass. 1909) (citing *The Carrier Dove*, 97 F. 111 (1st Cir. 1899)).

41. Laws of Oléron, *reprinted in* 30 F. Cas. 1171 [hereinafter Laws of Oléron].

42. *The Osceola*, 189 U.S. 158, 161 (1902) (citing article VI of the Rules of Oléron). Article VI provides that shipowners are liable for an injured seaman's injuries or illness if suffered during the seaman's service to the ship. Laws of Oléron, *supra* note 41, at 1174.

43. The Osceola, 189 U.S. at 169.

44. *Id.* at 175.

for injuries resulting from the unseaworthiness of the ship.[45] Moreover, a sailor was not bound to continue serving on an unseaworthy ship and could leave without penalty or consequences to his earned wages.[46] Additionally, any contract of service implies that the ship shall be seaworthy.[47]

The admiralty has also created laws which provide a means of securing wages.[48] The wages of seamen are therefore preferred to all other creditors except for expenses of justice and, possibly, salvage.[49] A seaman's lien upon the ship and its freight will attach to the last plank.[50] The admiralty endeavors to see seamen paid over the other creditors of the ship because they are considered to be wards of the admiralty.[51]

An exception to this rule will occur when there has been a desertion.[52] Desertion consists of quitting the ship and service by a sailor, without leave and against his duty, and without an intent to return.[53] Desertion is justified for sickness, unwhole-

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45. *Id.*

46. M.J. NORRIS, *supra* note 1, § 8:36, at 260.

47. *Id.*

48. *See, e.g.*, 46 U.S.C. §§ 533, 593, 594 (1988) (providing statutory causes of action for fishermen to recover wages and shares of freight).

49. M.J. NORRIS, *supra* note 1, § 20:12, at 594-98 (presenting ranking of maritime liens).

50. *Id.* at § 20:7, 584. "Courts of admiralty have long regarded seamen as their wards and have accorded to them the highest consideration for their wage claims. In the views of Mr. Justice Story and Lord Stowell their claims for wages are sacred liens, and as long as a plank of the ship remains, the seaman is entitled, against all other persons, to the proceeds as security for his wages." *Id.* (citations omitted).

51. Putnam v. Lower, 236 F.2d 561, 570 (9th Cir. 1956). "Fishermen, although possessing wages and customs peculiar to their business, are nonetheless seamen, and in general receive the same protection. Therefore, despite compensational differences, lay fishermen or sharesmen possess a right similar to that enjoyed by regular seamen, to lien the vessel and catch on board to secure their compensation." *Id.*

> A seaman has long been regarded as a ward of the admiralty, and his claim for wages has been called many times a 'sacred claim.' He has been allowed to enforce it either by suit against (1) the owners of the vessel, or (2) against the master personally, or (3) by process against the ship in a court of admiralty jurisdiction for the enforcement of the lien given him by the maritime law.

The Samuel Little, 221 F. 308, 310 (2d Cir. 1915); *see* M.J. NORRIS, *supra* note 1, § 20:7, at 584.

52. *See* Coffin v. Jenkins, 5 F. Cas. 1188 (C.C.D. Mass. 1844) (No. 2,948) (holding desertion causes forfeiture of all wages owed to deserting seaman).

53. *Id.* at 1190; M.J. NORRIS, *supra* note 1, § 8:7, at 240.

some food, cruel treatment, deviation, or unseaworthiness.[54] The reason for leaving, of course, must be sound and substantial.[55] Seamen who do not desert, however, have no absolute guarantee that they will receive their full lay shares.[56] Under shipping articles for a fishing voyage, seamen become entitled to shares only in so much cargo as is brought safely to the home port.[57] As a result, should any of the cargo become lost during the voyage, seamen are only entitled to receive their portions out of the remainder which arrives home in safety.[58]

The ancient solicitude of admiralty courts for those who labor on the sea has continued through the twentieth century.[59] When doubts or ambiguities exist about maintenance and cure, they are resolved in favor of the seaman.[60] There is no set-off, defense for contributory negligence, fellow servant rule, or doctrine of assumption of risk to diminish or bar recovery.[61] Only willful misbehavior or a deliberate act of indiscretion will deprive the seaman of this protection.[62]

In cases where a seaman has signed articles of employment, the length of the stated term for the voyage within the employment contract will determine the amount of recovery in

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54. *See Coffin*, 5 F. Cas. at 1190; M.J. NORRIS *supra* note 1, § 8:20, at 250 (Cruelty of Ship's Officers); *id.* § 8:29, at 255 (Bad or Insufficient Food); *id.* § 8:30, at 256 (Failure to Provide Medical Attention); *id.* § 8:35, at 259 (Deviation); *id.* § 8:36, at 260 (Unseaworthiness).

55. *Coffin*, 5 F. Cas. at 1190. If the seaman "has a strong excuse, founded on gross misconduct or harsh usage . . . the party is, therefore, more in the situation of a victim than of a sinner," and the desertion may be excused. *Id.* at 1192; *see* M.J. NORRIS, *supra* note 1, § 8:19, at 249.

56. Reed v. Hussy, 20 F. Cas. 441 (S.D.N.Y. 1836) (No. 11,646).

57. *Id.*

58. *Id.*

59. *See* Putnam v. Lower, 236 F.2d 561, 570 n.26 (9th Cir. 1956); Weiss v. Central R.R. of N.J., 235 F.2d 309 (2d Cir. 1956) (according plaintiff-seaman traditional privileges and status although only briefly employed aboard ferry boat with lodging and second job on shore).

60. *See, e.g.*, Aguilar v. Standard Oil Co., 318 U.S. 724 (1943) (holding in cases of uncertain liability, ambiguity should be construed in favor of seaman).

61. *See id.* at 731. In the interest of marine commerce and the safety of seamen, maritime nations have traditionally held shipowners responsible for the well-being of seamen. *Id.* at 727-28. A shipowner is liable for the maintenance and cure of an injured or ill seaman. *Id.* at 730. This liability is not "predicated on the fault or negligence of the shipowner" but rather the shipowner is liable as "an incident of the marine employer-employee relationship." *Id.* This obligation to provide cure and maintenance is so broad that acts short of gross misconduct by the seaman will not relieve the shipowner of liability. *Id.* at 730-31.

62. *See id.* at 731.

wages because the obligation to pay wages should be contemporaneous with the seaman's contractual responsibility.[63] If illness incapacitates a seaman during the voyage, the seaman is entitled to recover his wages to the end of his contract.[64]

II. *CASE LAW*

In *Enochasson v. Freeport Sulphur Co.*,[65] the U.S. District Court for the Southern District of Texas considered whether the right to wages is limited to the voyage in which the seaman fell ill. The court determined that "voyage" means not a passage to a particular port and return but, rather, the duration of the term of the employment.[66] Moreover, the court found that when articles of employment are involved, a seaman is bound to the ship by a sort of personal indenture.[67] The ship, in return, is bound to the seaman for his wages, maintenance, and cure.[68]

According to the *Enochasson* court, when a seaman is injured in the service of the ship without any fault on his part, he is entitled to recover his full wages for the trip or period for which he was employed.[69] The *Enochasson* court also stated that in determining termination of employment, the number of voyages during the term of a seaman's employment was immaterial.[70] These principles are applicable to modern seamen

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63. Enochasson v. Freeport Sulphur Co., 7 F.2d 674 (S.D. Tex. 1925) (granting maintenance and cure to incapacitated seaman for full length of employment contract); *cf.* Farrell v. United States, 336 U.S. 511 (1948) (denying award of lifetime maintenance to negligent seaman grievously injured during shore leave and limiting recovery to duration of employment contract).

64. *Enochasson*, 7 F.2d at 676.

65. 7 F.2d 674 (S.D. Tex. 1925).

66. *Id.* at 675.

67. *Id.*

> [A] seaman is to an extent bound to his ship in a kind of personal indenture, and the ship is in return bound to him for his wages, his maintenance, and his cure. That the obligations of this indenture are mutual, and continue through the term of the employment, and the question of how many particular voyages are made during that term, is wholly immaterial, just as was, in the case of indentured servants, the question of what or how many particular journeys they made on the business of their masters.

Id.

68. *Id.*

69. *Id.* at 676; *see* Longstreet v. Steamboat R.R. Springer, 4 F. 671, 672 (S.D. Ohio 1880).

70. Enochasson v. Freeport Sulphur Co., 7 F.2d 674, 675 (S.D. Tex. 1925). The

working for lay shares under oral agreements.[71]

The stages of voyages in the commercial fishing industry generally are not clearly defined, and courts have had to determine a beginning, a middle, and an end to voyages in cases where the dividing line between seasons was unclear.[72] For modern seamen in the commercial crab or salmon fishing industry, a voyage or season can consist of many short-term voyages, because the product must be delivered frequently to prevent spoilage.[73] Additionally, a crab season may involve the pursuit of several types of crab, during several crab "seasons," on several different voyages.[74]

In *Dacruz v. Knutsen,*[75] the employer alleged that the employment agreement was inapplicable to a red crab season and a blue crab season, and that the term finished immediately following the tanner crab season in the course of which Dacruz had been injured.[76] Testimony by the vessel owner's bookkeeper and the vessel's master asserted that the oral agreement covered all three crab seasons and ended at a scheduled salmon charter.[77] The trial court determined that the initial oral agreement implied that if Dacruz joined the vessel for the tanner season, he would also be employed for the following red and blue crab seasons.[78] Applying the long-standing principle that a seaman injured in the course of his employment is entitled to wages for the length of the voyage, the district court found that the duration of the voyage upon which Dacruz be-

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U.S. Supreme Court, in *Farrell v. United States*, concluded that the controlling factor in determining the length of employment is the extent of the voyage that could be demanded by the shipowner and that the seaman could not be required to reembark for additional voyages. Farrell v. United States, 336 U.S. 511, 520-21 (1949).

71. *See* DaCruz v. Knutsen, 1987 AMC 1675 (9th Cir. 1986).

72. *Id.*

73. *Id.*

74. *Id.* at 1676.

75. 1987 AMC 1675 (9th Cir. 1986).

76. *Id.* at 1676.

77. *Id.* at 1678. The court stated that

> the district court found that 'the implicit understanding was that if plaintiff joined the [ship] . . . during the tanner crab season, he would be employed on the vessel not only for that season but for the red and blue crab seasons as well . . . [and] is hence entitled to his earned and unearned wages through all three of the crab seasons in question.'

Id.

78. *Id.*

came injured was to be measured by the three crab seasons.[79] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court decision.[80] Under *Dacruz*, it is apparent that a modern court will look to the facts surrounding the oral agreement in each case to find a termination point for the voyage.[81]

In *Mason v. Evanisivich*,[82] the seaman, Evanisivich, was injured while the vessel was in port being prepared for the sardine fishing season.[83] The defendants argued that Evanisivich's employment for the day had ended prior to his injury, that he had unnecessarily loitered on the vessel, and that when the injury occurred, he was no longer in the service of the ship.[84] The U.S. Court of Appeals for the Ninth Circuit, however, was persuaded by evidence of an oral agreement that implied that the master had ordered the seaman on board to prepare for the season.[85] The vessel owners also argued that they were only liable for the current night fishing periods and not the day fishing periods, which normally come later in the season.[86] The court rejected this limitation and derived the full period of employment from the facts surrounding the oral agreement. The court held that the seaman was in the service of the vessel and allowed recovery for all fishing periods that encompassed the sardine season.[87]

Similar circumstances were at issue in *Vitco v. Joncich*.[88] Vitco, the plaintiff, had worked for many years as a fisherman-cook when he was asked by Joncich to fish tuna on Joncich's ship, the *Pioneer*, during the ensuing season.[89] Vitco orally accepted Joncich's invitation.[90] While the *Pioneer* was on the first fishing trip of the season, Vitco suffered a series of heart attacks, which left him totally disabled for service during the period of employment.[91] Vitco brought an action to recover

79. *Id.*
80. *Id.*
81. *Id.* at 1677-78.
82. 131 F.2d 858 (9th Cir. 1942).
83. *Id.* at 859.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. 130 F. Supp. 945 (S.D. Cal. 1955).
89. *Id.* at 947.
90. *Id.*
91. *Id.*

maintenance and cure and wages through the end of his employment.[92]

In addressing the question of what constitutes the duration of the tuna season, the court found that in general, the calendar year constitutes the actual duration of the tuna fishing season.[93] Joncich, however, invoked a union contract which divided what is actually a single uninterrupted season into two.[94] To determine the actual employment period at issue, the court therefore looked to the circumstances that surrounded the oral agreement.[95]

The facts showed that it was common practice for the *Pioneer* to fish tuna "all-year-around."[96] In addition, when Joncich proposed that Vitco join the crew for the 1952 season, Joncich said "next year," and also that Vitco's share for the year would be as much as US$10,000.[97] Finally, the court found that Vitco's previous term of employment with Joncich had been for the full fishing season during an entire year.[98] Therefore, the court held that the circumstances required a finding that Vitco was in fact employed for the full tuna fishing season of the calendar year, the provisions in the union contract notwithstanding.[99] The court found that the oral agreement, affording Vitco a more favorable condition than the union contract's specified minimum, did not violate the collective bargaining agreement.[100]

Generally, courts have favored seamen as the wards of the admiralty and their wages have been protected.[101] Fishermen

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92. *Id.* at 946-48.

93. *Id.* at 952.

94. *Id.* The union contract provided in pertinent part that

> [w]hen crew members are hired, they are hired for the season and may be discharged only for good cause shown. For boats fishing tuna all-year-around, there shall be two tuna seasons within a year. One season shall commence on January 1st and end on the following June 30th, and the next tuna season shall commence on July 1st, and end on the following December 31st. When a boat arrives subsequent to the season termination date, the completion of the trip shall be deemed the end of the season.

Id.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *See supra* note 33 (discussing seamen status as wards of admiralty).

have received the same protections, even when under the lay share system.[102] In *Ekornas v. Nordic Fury, Inc.*, the U.S. District Court for the Western District of Washington defined the voyage rule in a fisherman's case involving lay shares and an oral employment agreement.[103] In *Ekornas*, the plaintiff was injured during a summer trawling season after being on board the boat for ten days.[104] He convalesced for 363 days and then returned to the boat.[105] After the summer trawl season ended, the boat returned to Seattle for three months.[106] During that time the crew was paid off and the boat underwent shipyard maintenance, including preparation for its return to Alaska.[107] The fisherman claimed unearned wages for the winter season engaged in by the vessel after the layover in Seattle.[108] The court found that fishermen work for shares for a period called a voyage or a season, depending upon the parties' agreement.[109] The fisherman, who was the son-in-law of the vessel owner, insisted that his oral agreement was for continuous employment, that the trawl season was year-round and extended into the winter season, and that the vessel engaged in fishing after the layover in Seattle.[110] The defendant argued that the voyage ended in September, immediately prior to the vessel's return to Seattle, and that the following winter trip was a separate voyage.[111]

The court held that the summer season was the voyage for which the fisherman was hired.[112] The summer season, it was held, terminated when the vessel returned to Seattle, and the fisherman's claim for the winter trawl season was denied.[113]

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102. *See* Putnam v. Lower, 236 F.2d 561, 570 (9th Cir. 1956); *see supra* note 51 (discussing traditional protections accorded lay fishermen).

103. Ekornas v. Nordic Fury, Inc., 1987 AMC 1277, 1280 (W.D. Wash. 1986).

104. *Id.* at 1277.

105. *Id.* at 1278.

106. *Id.*

107. *Id.* at 1279.

108. *Id.* at 1278.

109. *Id.* (citing Thompson v. *M/V Progress*, 1979 AMC 2686 (D. Or. 1978)).

110. *Id.* at 1278-79.

111. *Id.* at 1279.

112. *Id.* The court held that "[t]he 'voyage' did in fact end at the completion of the summer boat venture." *Id.* at 1280.

113. *Id.* at 1281. The court reasoned that

> [n]ormally, a fisherman such as plaintiff would have been employed for a season—the summer joint venture, the winter joint venture or both. But the

The court realized that most fishermen fish under oral agreements.[114] Furthermore, the court recognized that fishing is conducted by season and not by individual voyage. The court was thus faced with an indefinite employment period in a continuous year-round fishery.[115]

The court found that even a liberal application of the Jones Act would not tip the scales in favor of the fisherman under the facts of the case.[116] Although the trawl fishery was part of a continuous joint venture, the court found the three-month layover in Seattle sufficient to signify the end of the voyage, season, or fishing period.[117] Although the intent of the parties was for indefinite employment, the court found it illogical to suggest that the mere intent of the parties should govern.[118] The court suggested that holding otherwise would "open the floodgates to a deluge of litigation by fishermen" claiming under indefinite oral contracts.[119] The court distinguished *Thompson v.* M/V Progress,[120] which under different facts had allowed the intent of the parties to govern where bright line seasons are easily definable.[121] Although the fisherman attempted to characterize the two trawl seasons as trips within one large season, the court likened them to separate voyages with the return to home port creating an end to the voyage.[122] The court therefore denied the fisherman's motion for partial summary judgment on the additional wage claim and allowed his claim for the remainder of the summer season.[123]

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factual circumstances in this case are unique. Plaintiff was employed by his father-in-law, and was destined to an indefinite tenure fishing aboard the *Nordic Fury*, aspiring to someday becoming the skipper of the boat. There is little doubt the intent of the parties was that plaintiff would be employed until he quit or was fired, continuing the time-honored tradition of family-run boats in the fishing industry.

Id. at 1280.

114. *Id.*

115. *Id.*

116. *Id.* at 1279.

117. *Id.* at 1281.

118. *Id.*

119. *Id.*

120. 1979 AMC 2686 (D. Or. 1978).

121. Ekornas v. Nordic Fury, Inc., 1987 AMC at 1280; *Thompson*, 1979 AMC at 2691.

122. *Ekornas*, 1987 AMC at 1281.

123. *Id.*

In *Ekornas*, the underlying policy and balancing test were made clear. If the facts of a fisherman's case indicate an indefinite season and a potentially long-term employment under an oral contract, the court will look within the facts for a place to end the voyage. This fact-related search implies a policy-balancing test, aimed at avoiding the potentially abusive problem of fishermen claiming under oral agreements alleging lifetime employment on the one hand, and abiding by the remedial and broad nature of the Jones Act as it applies to the wards of admiralty on the other.

In 1978, the U.S. District Court for the District of Oregon decided *Thompson v.* M/V Progress.[124] The seaman in *Thompson* was injured while throwing a hook overboard to catch the floating trailer line connected to a crab pot.[125] In order to make the throw, the seaman stepped between a hydraulic pot launch and the boat's rail and was injured.[126] The court found the seaman partly negligent, but stated that under the Court's holding in The Osceola, he was entitled to his unearned wages regardless of negligence.[127] The seaman claimed that his wages extended from the tanner crab season, in which he was injured, into the king crab season that followed.[128] The vessel had traveled from Alaska to its home port in Oregon prior to the king crab season.[129] The court considered the testimony of the vessel master who stated that the seaman was hired for the tanner season and would be hired for the king crab season if his work were satisfactory.[130] The court found the intent of the parties controlling, because testimony established that the seaman's deck work had been good and examination of the oral agreement indicated that he would continue if his work were

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124. 1979 AMC 2686 (D. Or. 1978).

125. *Id.* at 2688.

126. *Id.*

127. *Id.* at 2690; *see The Osceola*, 189 U.S. 158, 175 (1903).

128. *Thompson*, 1979 AMC at 2690.

129. *Id.*

130. *Id.* at 2691. The court explained that there are

> certain guideposts in interpreting the Jones Act. As remedial and welfare legislation, the Jones Act is to be liberally construed to protect the seaman and those dependent on his earnings. At the same time, the agreement between the parties established the terms on the plaintiff's employment. I must examine the circumstances surrounding the employment agreement.

Id. (citation ommitted).

satisfactory.[131] In fact, the seaman had performed diligently up to the time of injury and even attempted to continue working after the injury.[132] The court allowed the seaman wages through the king crab season, referring to the intent of the parties and the policies of the Jones Act.[133] The court was influenced by the testimony of the other crew members hired at the same time who established that they had fished through the king crab season and that the owner had paid for the seaman's flight to Kodiak to fish the season.[134]

In *Weason v. Harville*,[135] the trial court refused to award wages earned during the crab season to a seaman who had been injured during the shrimp season.[136] The trial court found that both the seaman and the owner had agreed that the seaman was initially hired for the shrimp season, stating that it is the seaman's burden to show the wages to which he may be entitled at the end of the voyage.[137] The court thus held that the seaman had failed to prove an oral employment contract for the king crab season.[138] The seaman claimed, however, to have had a modified oral agreement with the vessel master for the king crab season that extended the original shrimp season agreement.[139] The Supreme Court of Alaska agreed that the seaman had only been hired for the shrimp season.[140] The Alaska Supreme Court also noted that federal admiralty law applied even though the case had been brought in state court.[141]

The *Weason* court essentially refused to create a new contract when the parties had never really negotiated any new

131. *Id.*

132. *Id.* at 2692.

133. *Id.* at 2691.

134. *Id.*

135. 706 P.2d 306 (Alaska 1985).

136. *Id.* at 308.

137. *Id.* In *Weason*, the vessel master for the crab season had discussed the crab season with the seaman, but the discussions had not covered crew shares or ever materialized into a formal oral contract. *Id.* Since shares had not been discussed or firmly and finally negotiated, the court held that the seaman failed to prove the formation of a new contract. *Id.*

138. *Id.* at 309.

139. *Id.*

140. *Id.*

141. *Id.* at 308.

terms or finalized an agreement.[142] The owner had stated that the seaman was, in his opinion, an incompetent worker and that he had veto power over the master's crew choices.[143] The court determined that this made the existence of an agreement less likely.[144] The seaman thus failed to prove the oral agreement and was not paid for the king crab season.[145] If the seaman can establish a valid oral agreement, however, he will receive the benefit of the balancing test applied in *Ekornas* and *Thompson*.

CONCLUSION

In conclusion, the primary ingredients relevant for establishing a lay share claim for a season are:

(1) Proof of the oral agreement and the surrounding intent of the parties;

(2) Proof that the employment was for a season which continued and in which the seaman would have continued his employment; and

(3) Establishing the seaman's work as satisfactory in order to support an inference that he would have been allowed to continue.

In order to dispute a lay share claim for a season, a defendant must:

(1) Prove facts that show a termination point in the voyage;

(2) Prove facts that indicate that the seaman's work was not satisfactory and that the voyage period was to be shortened; and

(3) Prove facts that indicate that the vessel had settled with the crew and returned to the final port in the voyage, or facts which show a switch to a new fishery or season.

For the purpose of determining when the voyage ended, the factors most relevant to a reviewing court will be the facts surrounding the season. The facts surrounding the oral agree-

142. *Id.* at 309. The trial court found that "there was no share discussion, no real negotiation, therefore, the plaintiff failed in his burden of proof in establishing formation of a new contract for crab." *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

ment between the parties are also important when a claimant intends to extend his claim into a season which is somehow different from the one in which he was injured.

Finally, under oral agreements fishermen must be able to substantiate the facts surrounding the oral agreement. The suggested balancing test represents the current standard for analyzing oral fishing contracts.