Semantics: All at Sea Over Who is a Seaman!

Lunch N Learn

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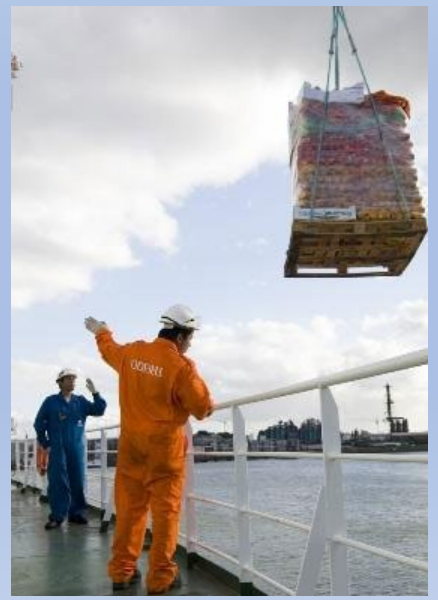
Who is (and is not) a Seaman?



Fair Labor Standards Act vs. Jones Act?

Jones Act:

- **Employment related connection to a vessel – both substantial in duration and nature – inquiry expanded under *Sanchez***

FLSA:

- **Requires that employees who work over 40 hours/week must be paid time and a half**

FLSA Exemption:

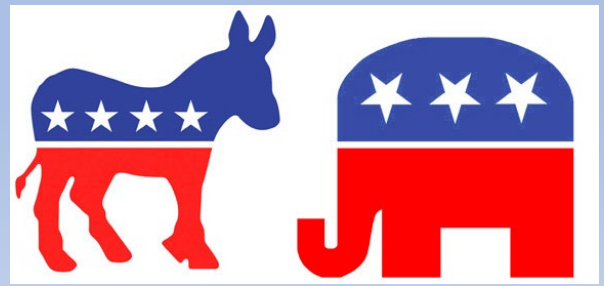
- **"Any employee employed as a Seaman"**

Who is a Seaman under the FLSA?

- FLSA does not define "Seaman"

- Courts look to the Department of Labor regulations

- Great weight vs. Courts have the ultimate say



Key Regulation - 29 C.F.R §783.31

- **Employee is a Seaman if: (1) subject to the authority, direction, and control of the master; and (2) the employee's service is primarily offered to aid the vessel as a *means of transportation*, provided that the employee does not perform a *substantial* (guide-post of 20%) amount of different work**

- **Cook is usually a Seaman because he usually cooks for Seamen – *Martin v. Bedell* - 1992**

- **Not much jurisprudence interpreting this regulation**

Key Cases:

- ***Coffin v. Blessey* Marine Servs – 2014**
- ***Owens v. SeaRiver Maritime* - 2001**
- ***Dole v. Petroleum Treaters, Inc.* - 1989**
- ***Walling v. W.D. Haden Co* – 1946**

Adams v. All Coast – FLSA Collective Action

- In *Adams*, over 50 ordinary and able-bodied Seamen, deckhands, mates, and cooks opted into the lawsuit
- Alleged that their crane work was industrial work as it did not aid the vessel as a means of transportation
- Because they allegedly performed that work more than 20% of their time, they were not exempt Seamen under the FLSA and were owed overtime

Developments at the U.S. Supreme Court – *Encino Motor Cars v. Navarro* and *New Prime v. Oliveira*

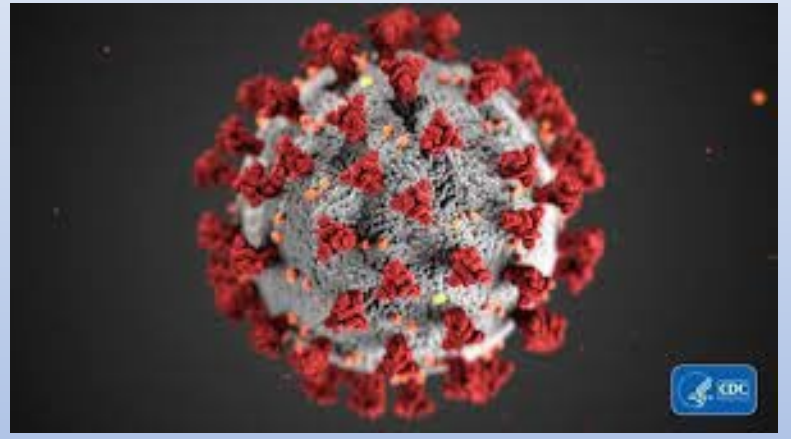
- ***Encino*** **– FLSA exemptions must be given a "fair reading"; they should not be "narrowly construed."**
- ***New Prime*** **– It is a fundamental canon of statutory construction that words generally should be interpreted as taking their ordinary…meaning…when Congress enacted the statute**

Adams- District Court

- Written discovery and depositions reflected allegations that the plaintiffs operated the crane between 20% and 90% of the time
- Further revealed that the crane was used solely to transport people, supplies, and equipment
- All Coast moves for Summary asserting that it does not matter if plaintiffs operate the crane 100% of time because it is a service that aids the vessel as a means of transportation (affidavit and expert report!)
- Judge Milazzo grants Summary Judgment – She does not address *Encino* directly but in a footnote asserts that the decision bolters her opinion

Adams- Fifth Circuit

- Parties file briefs, Covid happens and Court requests (not requires) that the parties agree to submit letter briefs instead of waiting for future oral argument
- Never get notice of the panel; decision comes down nearly a year and half after Judge Milazzo's decision, and her decision is reversed
- Petition for rehearing en banc with amicus support from OMSA, NOIA, and the AMA; petition is denied and Edith Jones and Jennifer Elrod dissent



Majority Opinion

- District Court's opinion runs contrary to the regulations and the decisions interpreting the regulations
- 29 C.F.R. 783.32 – Assisting in the loading and unloading of freight at the beginning or end of the voyage is not connected with the operation of the vessel as a means of transportation
- Dictionary Definitions – After surveying numerous applicable definitions, court places most emphasis on a definition referring to a Seaman as one skilled in navigation
- Examined the key cases and determined that the case was more like *Walling* and *Dole* – crane operation is industrial work

Adams Seems Similar to *Coffin* and Distinguishable from *Owens*

	Coffin v. Blessey Marine Servs., Inc. 771 F.3d 276 (5th Cir. 2014)	***Adams v. All Coast***	***Owens v. Sea River Maritime, Inc.*** 272 F.3d 698 (5th Cir. 2001)
The Plaintiffs were full time, vessel-based crewmembers, who worked, ate, and slept on the vessel and were answerable to the captain.	**Yes**	**Yes**	**No.** The Plaintiffs were members of a land-based strike team.
The vessels upon which the Plaintiffs worked were "attended" by a crew.	**Yes**	**Yes**	**No.** The Plaintiffs worked on unattended tramp barges.
The Plaintiffs performed unloading and loading duties as members of the vessel's crew.	**Yes**	**Yes**	**No**
The Plaintiffs' loading and unloading duties served purposes related to both seaworthiness and aiding the vessel as a means of transportation.	**Yes.** This Court found that loading and unloading duties served the vessel as a means of transportation and could compromise the seaworthiness of the vessel.	**Yes.** Plaintiffs' testimony and the opinion of Expert Todd Pellegrin reflect that the crane operation served the vessel as a means of transportation and impacted the vessel's seaworthiness.	**No**
The Plaintiffs' loading and unloading duties were integrated with their seaman duties.	**Yes**	**Yes**	**No**

Minority Opinion

- Two dissenting judges – Judge Edith Jones and Judge Jennifer Elrod

- Circuit has flouted the Supreme Court's directive in *Encino* – plaintiffs are licensed marines who live and work on the vessel at the captain's direction and continue traditional vessel work even when jacked up

- Majority artificially compartmentalize the work between sailing and operating cranes and analogizing crane operation to industrial work

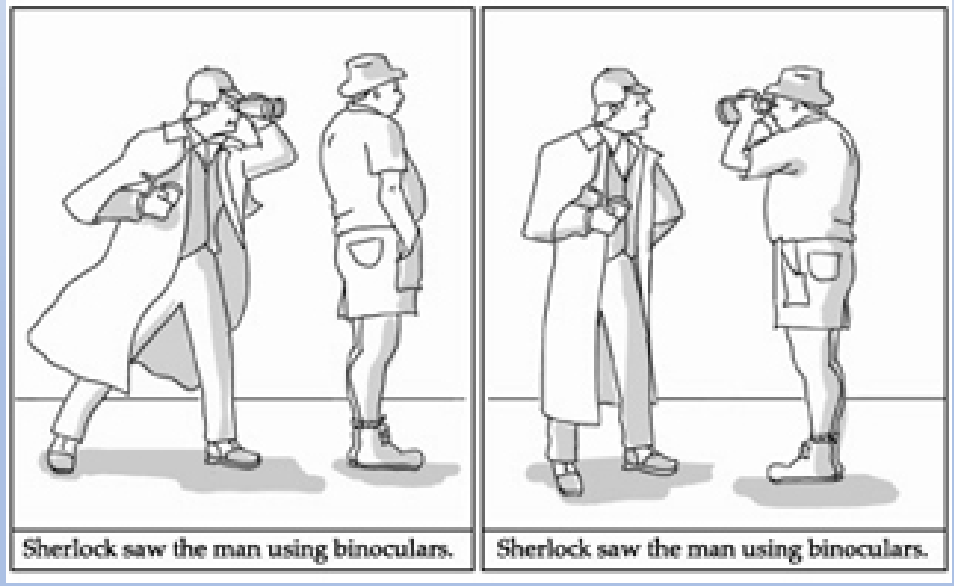
- Without cranes liftboats serve no transportive purpose

Semantics!

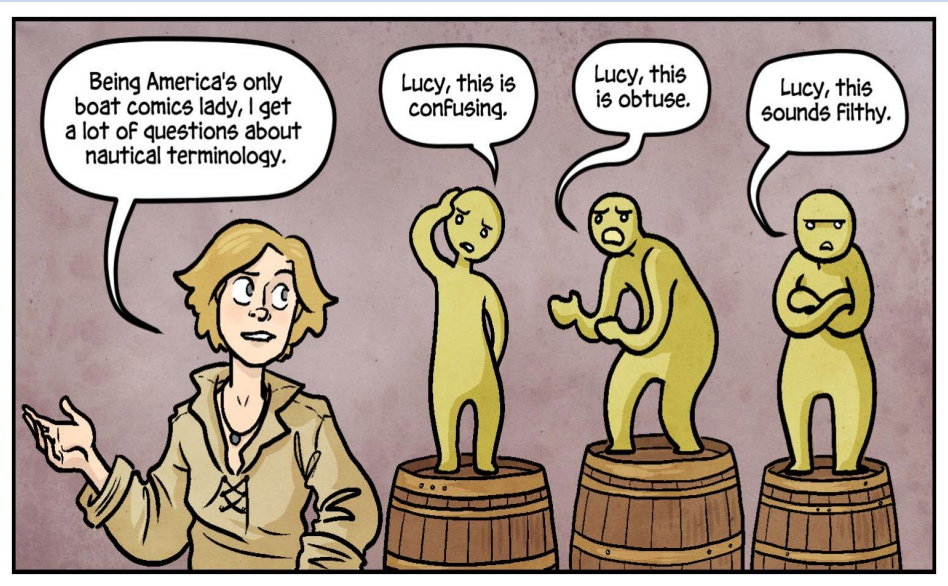
- 29 C.F.R. 783.32 – Freight is defined as goods transported by bulk – not what a liftboat transports

- What is the "beginning and end" of a liftboat voyage if liftboats often stay on location for months?

- A fair reading of 783.32 suggests that the regulation was intended to apply stevedores working at terminals loading and unloading ocean cargo ships



More Semantics!



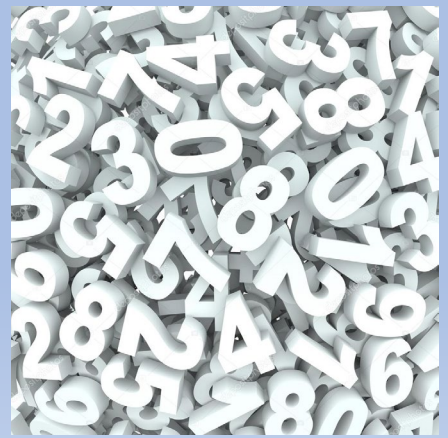
- Nautical? Where does that come from?
  - ➢ The regulation identifies work that aids the vessel as a means of transportation
  - ➢ The regulation does not require that the work be nautical
- Misplaced emphasis on employees being skilled in navigation – arguably only the master/captain. Those employees are not even in the class
- One can exercise skill in navigation from a shore-based location! Prior *Helix* Decision – textualism

Current Legal Consequences

- Crane operation as a matter of law is not Seaman's work – this finding was not even requested by the plaintiffs

- If any one crewmember operates the crane more than 20% of the time during a work week, the employee is not exempt for that week

- To determine if a cook is exempt, you must consider the amount of time spent preparing meals for third parties versus vessel-based crewmembers who may be non- exempt for a week and for crewmembers who may be exempt for that week



Real World Consequences

- **Paperwork – time, money, and confusion**
- **Potential Additional lawsuits – court has stripped away a layer of the exemption, where does it stop?**
- **The oscillating, occasional Seaman – court's decision runs contrary to reasoning in *Sanchez v. Smart Fabricators* regarding an employee's ability to "oscillate" in and out of Jones Act Seaman status**
- **Could lead to surprising unearned wage claims/demands**

Something is *Cook-ing* at the Fifth Circuit

- ***McKnight v. Helix*** **(S.D. TX) – Cooks sued the employer, vessel operator alleging they were not exempt Seamen**
- **Prior to the *Adams'* opinion denying rehearing en banc, the judge granted summary judgment for Helix, finding that the cooks were Seamen**
- **Despite the *Adams*' opinion the case is going forward with oral argument on December 9 – interestingly, Judge Elrod is on the three-judge panel assigned to hear the case**

Where Does *Adams* Go From Here?

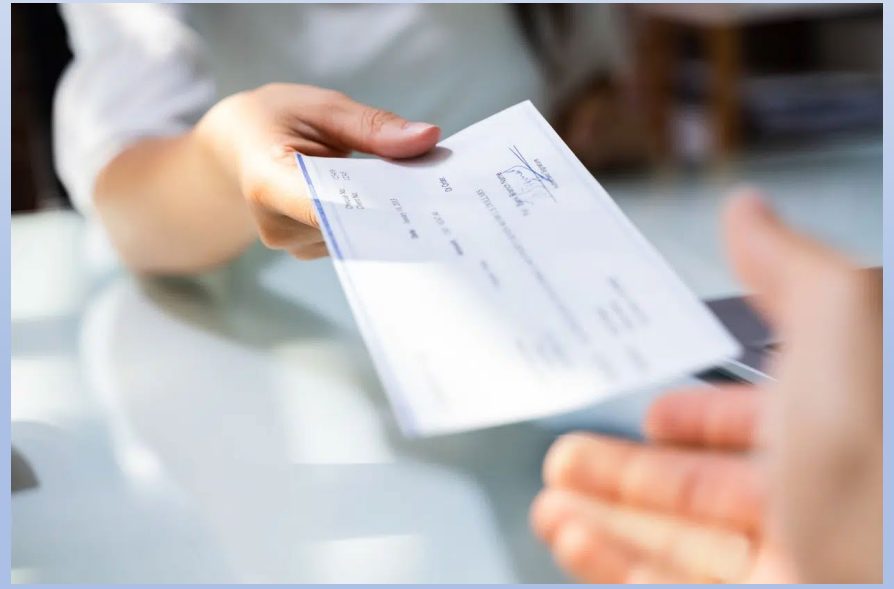
- **The case has been remanded with clear instructions as to whether the crane operation is Seaman's work and how to determine if a cook is an exempt Seaman**
- **Likely to be additional, more comprehensive and broader focused discovery on the key issues**
- **Jury *may* have the final say on the issue, but *McKnight* could potentially impact the issue as well**

What's the Damage???

- The FLSA provides for back pay ***and*** liquidated damages in that amount
- However, if the employer shows the violation was good faith and there was a reasonable basis for the violation, the court ***may*** award no liquidated damages
- If the violation was willful – employer showed reckless disregard for the requirements of the FLSA – the statute of limitations is three years!

Attorney's Fees!

- FLSA requires that the court allow an award of reasonable attorney's fees – plaintiff(s) must be the prevailing party
- Lodestar method is used – most critical factor is the degree of success obtained
- While a low damages award can be considered, it alone should not lead the court to reduce the award



What can you do?

Strategies, Solutions, Game Plans?

Questions and Thoughts?