

# Taking Care of Business and Working Overtime? Why Classification of Offshore Workers *Matt-ers*

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# What is the Jones Act?

Merchant Marine Act, 46 U.S. Code § 30104 - Personal injury to or death of seamen

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

Incorporated Federal Employers Liability Act

# What is the Jones Act?

## Jones Act seamen:

- Not covered under state workers' compensation law or the Longshore and Harbor Workers Act, 33 U.S. Code §901 et al.
- Generally entitled to file suit in state court
- Entitled to a jury trial
- Generally, entitled to be paid Maintenance and Cure if injured
- Not entitled to claim punitive damages except for willful and wanton failure to pay Maintenance and Cure

# Who is a Jones Act seaman?

A seaman is not “necessarily a man with a tattoo, who walks with a rolling gait, wears bell-bottom trousers and handles, reefs and steers the vessel.” *Marine Drilling Co. v. Autin*, 363 F.2d 5791 (5th Cir. 1966)



- Must be a captain or crewmember of a “vessel in navigation”
- Must contribute to the mission of the vessel
- Must spend at least 30% of time on vessel or fleet of vessels

## ***Sanchez v. Smart Fabricators of Texas, L.L.C. – Fifth Circuit 2021***

- Sanchez was employed by a land-based welder and worked on two jack-up barges.
- He worked on the first barge for 48 days while the barge was jacked up and level with the dock.
- The job on the second barge was set for 13 days and was located on the OCS. Sanchez was injured on the 11<sup>th</sup>.
- File suit as a Jones Act seaman.
- Fifth Circuit held that Sanchez was not a seaman because he did not satisfy the substantial nature requirement.

# *Sanchez v. Smart Fabricators of Texas, L.L.C. – The Test*

## Supreme Court precedent:

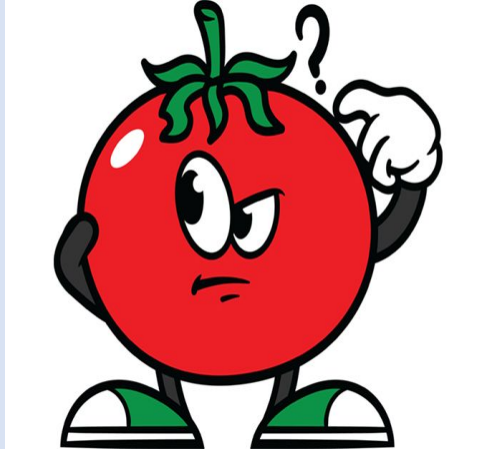
- (1) Does the worker contribute to the function of the vessel, either directly or indirectly working to maintain the vessel in a condition to accomplish its mission?
- (2) Is there a substantial connection to the vessel, meaning substantial duration and substantial nature?

In *Sanchez*, the Fifth Circuit added some additional inquiries into the substantial nature determination:

- (a) Does the worker owe his allegiance to the vessel, rather than simply to a shore-side employer?
- (b) Is the work sea-based or involve seagoing activity?
- (c) Is the workers' assignment to a vessel limited to the performance of a discrete task after which the worker's connection to the vessel ends, or does the worker's assignment include sailing with the vessel from port to port or location to location?

# Jones Act Seamen and Fair Labor Standards Act

Completely different definitions of seamen – All FLSA seamen are probably Jones Act seamen but not all Jones Act seamen are FLSA seamen.



Tomato?

- *Nix v. Hedden* – Supreme Court held that although botanically a fruit, in common language it was a vegetable, so it's a vegetable.
- But Tennessee and Ohio have tomato as the state fruit.

Same word – different context, different meaning.

# What is the Fair Labor Standards Act?



- A minimum wage, currently \$7.25 an hour
- Premium pay for overtime work at a rate of 1.5, or an additional 0.5, times the regular rate of pay for over 40 hours worked in a single workweek, for those who are not otherwise exempt from premium pay
- Certain recordkeeping, including accurate time records
- Limitations on the employment of minors



# Common Exemptions



- **Executive**
- **Administrative**
- **Professional**
- **Outside sales**
- **Computer**
- **Highly compensated employee**



# Bizarre Exemptions

- Processors of maple sap into sugar (other than refined sugar) or syrup
- Switchboard operators employed by an independently owned public telephone company which has not more than seven hundred and fifty stations
- Outside buyers of poultry, eggs, cream, or milk, in their raw or natural state
- Employees of an establishment which is a motion picture theater



# EXEMPT vs. NON-EXEMPT

## Why is exempt vs. non-exempt status so important?



**The most common and costly mistake made by employers is the misclassification of employees as being exempt from the overtime provisions**

# 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**



# Misclassification by Land...

- ***Sammy Mozingo v. Oil States Energy Services L.L.C.***  
– 29 plaintiffs opted out and filed their own suit in the WD PA – case dealt with highly compensated exemption
- In 2017 and 2018, 8 plaintiffs eventually went to trial in separate week-long jury trials of 4 plaintiffs each
- Juries awarded damages in excess of \$1,000,000, and the court awarded attorneys fees in excess of \$2,000,000 and costs of over \$100,000
- Oil States paid over 3.3 million because of a classification mistake



# Recent Costly Settlements



- **\$35 million: *Merino v. Wells Fargo & Co.*, (July 9, 2019).** The court granted preliminary approval to settle a class action involving 38,000 bank tellers alleging the company failed to pay proper overtime compensation.
- **\$26 million: *Sanchez v. McDonald's Restaurants of California Inc., Calif. Super. Ct.*, (Nov. 22, 2019).** The parties sought settlement approval in a class action involving thousands of workers alleging a failure to pay proper wages for hours worked
- **\$16.5 million: *Carter v. XPO Logistics Inc.*, (Oct. 18, 2019).** The court granted final approval to settle minimum-wage and overtime claims involving allegations of misclassifying delivery drivers

# Moving Offshore – there is another exemption

- The FLSA exempts “Any employee employed as a Seaman”
- FLSA does not define “Seaman”
- Jones Act Seaman may not necessarily be an FLSA Seaman
- Courts look to the Department of Labor regulations





# Recent Developments at the Fifth Circuit

- ***Halle v. Galliano Marine*** – 2015 E.D. La, single plaintiff ROV operator filed suit, alleging he was non-exempt and due overtime
- District Court granted the employer's motion for summary judgment, but the Fifth Circuit reversed
- The panel focused on issues regarding whether Halle was subject to the Captain's direction and noted that Halle did not assist in navigation in determining that there were issues that precluded summary judgment



# 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

- Further discovery 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
- Judge Milazzo grants Summary Judgment – She does not address *Encino* directly but in a footnote asserts that the decision bolters her opinion



# Fifth Circuit reverses and denies a Petition for Rehearing En Banc - 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

# Minority Opinion

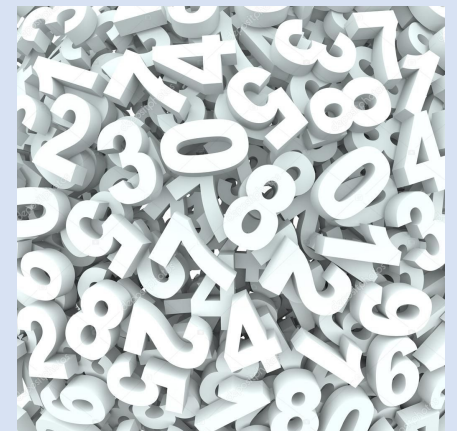
- **Two dissenting judges – Judge Edith Jones and Judge Jennifer Elrod**
- **Circuit has flouted the Supreme Court’s directive in *Encino* – plaintiffs are licensed mariners who live and work on the vessel at the captain’s direction and continue traditional vessel work even when jacked up**
- **Majority artificially compartmentalize the work between sailing and operating cranes and analogizing crane operation to industrial work**
- **Without cranes liftboats serve no transportive purpose**





# Current Legal Consequences

- **Crane operation as a matter of law is not Seaman's work**
- **If any one crewmember operates the crane more than 20% of the time during a work week, the employee is non-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**





# 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

# 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 went forward with oral argument on December 9 –Judge Elrod is on the three- judge panel assigned to hear the case

# Which way will the Wind Blow?



# Offshore Wind Workers?



- Are they subject to the direction of the master
- What are the workers doing?
- Are they spending more than 20% of their time engaged in work that does not “aid the vessel as means of transportation” – can be a difficult analysis
- What impact could *Encino* have?

# What can you do?



**Strategies, Solutions, Game Plans?**

**Questions and Thoughts?**