

No. 75059-3-1

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

MICHAEL MCPHERSON,

Plaintiff – Appellant,

v.

FISHING COMPANY OF ALASKA,

Defendant – Respondent.

BRIEF OF RESPONDENT FISHING COMPANY OF ALASKA

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I. INTRODUCTION

There is nothing inherently contradictory in a contract that tells an employee what his pay will be for his first 90 days of employment and an “at-will” provision in that contract.

Mr. McPherson cites no statutory language and no case to support his proposition that 46 USC § 10601 did away with the centuries old practice of at-will employment in the fishing industry, and instead relies on hypothetical situations that are not germane to the case at hand. Mr. McPherson asks this Court to reach a conclusion that is: (1) contrary to the plain language of 46 U.S.C. § 10601; (2) contrary to the decision of any other Court in this nation; and (3) contrary to the intent of the drafters of 46 U.S.C. § 10601.

For these reasons, Fishing Company of Alaska respectfully requests that this Court affirm the decision of the Trial Court and find that under 46 U.S.C. § 10601 employment at-will is not prohibited during the “period of effectiveness.”

II. STATEMENT OF THE CASE

On September 25, 2015, Mr. McPherson entered into a fishing agreement with Fishing Company of Alaska (hereinafter “FCA”). CP 32-42. This agreement was expressly titled “**Employment At-Will Contract**” (emphasis added) (hereinafter “the agreement”).CP 32. The

agreement was for a period of 90 days, and for that period, if he worked, Mr. McPherson was to be paid at a rate of \$200.00 per day. CP 42. In addition to the title of the agreement which stated that it was an “at-will” agreement, the agreement contained the following provisions:

Employee acknowledges and agrees that he/she is employed at will, which means that the Employee’s employment may be terminated at any time, with or without notice and with or without cause, by either the Employer, Owner or the Employee. All decisions regarding rehire, continued or future employment are at the Employer’s sole discretion.

...

Employee is employed at-will under the terms of this Contract. Accordingly, the Master of the Vessel, or the Employer may terminate the Employee at any time, with or without notice and with or without cause.

CP 32, 36-37. Mr. McPherson signed the agreement, indicating that he was aware of, and consented to, its terms. CP 42. Prior to the end of the period of his agreement, Mr. McPherson’s employment with FCA was terminated.

Mr. McPherson filed the present suit on December 9, 2015, alleging that there is no “employment at will” during the “period of effectiveness” required by 46 U.S.C. § 10601 governing employment contracts for fishermen. CP 1-2.

On January 6, 2016, Mr. McPherson filed a motion seeking a declaration from the Trial Court that the employment at-will doctrine does

not apply during the “period of effectiveness” in fishing agreements for fisherman under 46 U.S.C. § 10601. CP 3-6. In response, FCA filed a cross-motion for summary judgment regarding at-will employment during the period of effectiveness in fishing agreements and requested that the Trial Court find that under 46 U.S.C. § 10601 employment at-will is not prohibited during the “period of effectiveness.” CP 15-30.

On March 18, 2016, the Trial Court heard oral argument on this issue, and the Honorable LeRoy McCullough granted FCA’s cross-motion for summary judgment. CP 142-144. In granting FCA’s cross-motion, Judge McCullough stated,

I believe that the holding in the *Joaquim* case is the one that governs for a couple of reasons. One is it seems to me that the history is that people should have the freedom to go in and out of a contract, that if contract wanted that to be different, they could have said that. They didn’t.

It seems to me that the *Reader’s Digest* case, which is out of the Seventh Circuit, clearly states that there is a difference between an expectation and a guaranteed right and that the parties can contract to say that the person can be terminated at will, even if there is a term of 12 months stated, as long as it’s clearly specified who has the freedom to end, to exit the contract. From a policy perspective, it seems like the case is that it protects not only the employee, but it also protects the employer, that with an at-will contract, either can separate out.

...

And so I think that it was interesting that the *Joaquim* did cite to *Brekken v. Reader’s Digest*. And I’m going to read for the record just this statement from *Joaquim v. Royal Caribbean Cruises*. “Under general contract principles, if

the language of the contract is clear, the question whether a contract is of definite duration is a legal matter for the court. A contract may be either one for fixed duration or terminable at will. Where the contract includes a termination clause, classification of the contract will depend on the language of the termination clause. If the clause imposes a condition on termination, the contract may be classified as one for fixed duration. If, however, the contract imposes no condition on the employer's power to terminate" – and that's the situation here by the language in the contract – "the contract will be classified as one terminable at will, regardless of other language specifying a definite period of duration." And that's when they cite the *Brekken v. Reader's Digest* case.

The other cases that were submitted certainly would suggest the same ruling consistent with *Joaquim*. Maybe the legislature fixes the answer. I don't know. But based on the record before me and the court's reading, the court will grant the cross-motion by the defendant.

Appellants Appendix A-2 at p.17-19. Following the grant of summary judgment in favor of FCA, Mr. McPherson filed the present appeal.

III. SUMMARY OF ARGUMENT

A provision of a contract setting forth the salary that a person is to be paid during their first 90 days of employment is not inconsistent with an "at-will" provision in the employment contract.

Mr. McPherson has failed to cite to a single legal authority that adopts his argument that 46 U.S.C. § 10601 prohibits at-will employment. The plain language of 46 U.S.C. § 10601 says nothing concerning the

prohibition of at-will employment. No court has found that 46 U.S.C. § 10601 prohibits at-will employment in the commercial fishing industry. In a similar federal case, Judge Pechman found that at-will employment in the commercial fishing industry is permissible under 46 U.S.C. § 10601. Nothing in the legislative history of the statute contemplates the prohibition of at-will employment in the commercial fishing industry.

Thus, FCA respectfully requests that this Court affirm the decision of the Trial Court and find that under 46 U.S.C. § 10601 employment at-will is not prohibited during the “period of effectiveness.”

IV. ARGUMENT

A. Standard of review

“The standard of review on appeal of a summary judgment order is de novo; that is, the appellate court conducts the same inquiry as the trial court.” *Mahoney v. Shinpoch*, 107 Wash. 2d 679, 683, 732 P.2d 510, 512 (1987)(citing *Del Guzzi Constr. Co. v. Global Northwest Ltd., Inc.*, 105 Wash.2d 878, 719 P.2d 120 (1986); *Hartley v. State*, 103 Wash.2d 768, 774, 698 P.2d 77 (1985)). Both the law and the facts will be reconsidered by the appellate court. *Brouillet v. Cowles Pub. Co.*, 114 Wash. 2d 788, 791 P.2d 526, 60 Ed. Law Rep. 638, 17 Media L. Rep. (BNA) 1982 (1990).

B. Federal maritime law governs this claim brought under a federal maritime statute

This case concerns the application of a federal statute which governs a maritime employment issue, the employment of fisherman on a vessel. Thus, the substantive maritime governs the present action.

This Court, in *Hoddevik v. Arctic Alaska Fisheries Corp.*, 94 Wn. App. 268, 970 P.2d 828, 830, *review denied*, 138 Wn.2d 1016 (1999), *cert. denied*, 528 U.S. 1155 (2000) held that the State may not make changes in “substantive maritime law” when a case is brought in state court:

For cases that can be brought in state court under the “saving the suitors” clause, a state may ‘adopt such remedies, and ... attach to them such incidents, as it seems fit’ so long as it does not attempt to make changes in the ‘substantive maritime law.’

Id. at 273 (*citing American Dredging Co. v. Miller*, 510 U.S. 443, 447, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)). The *Hoddevik* court went on to state that “state courts must follow substantive maritime law in such cases.” *Id.* at 273 (*citing Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23, 106 S. Ct 2485, 91 L.Ed.2d 174 (1986)). Thus, *Hoddevik* held that a state court may not provide a remedy which “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its

international and interstate relations.” *Id.* at 273, (citing *Miller*, 510 U.S. 447; *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 529, 61 L.Ed. 1086 (1917)).

Thus, this Court’s decision must comport with, and not disturb the uniformity of, the substantive maritime law.

It is undisputed that, “under general maritime law, a seaman is an employee-at-will and may be discharged for any or no reason.” *Meaige v. Hartley Marine Corp.*, 925 F.2d 700, 702 (4th Cir. 1991) (citing *Smith v. Atlas Off-Shore Boat Serv.*, 653 F.2d 1057 (5th Cir.1981)), *see also Findley v. Red Top Super Markets, Inc.*, 188 F.2d 834, 837 n. 1 (5th Cir.1951); *Baetge-Hall v. Am. Overseas Marine Corp.*, 624 F. Supp. 2d 148, 155 (D. Mass. 2009); *Briley v. U.S. United Barge Line, LLC*, No. 5:10-CV-00046-R, 2012 WL 2344460, at *6 (W.D. Ky. June 20, 2012); *Schupman v. Port Imperial Ferry Corp.*, No. 99 CIV. 3597 (SWK), 2001 WL 262687, at *2 (S.D.N.Y. Mar. 15, 2001); *Kasper v. Oglebay Norton Co.*, No. 3:97 CV 7701, 1998 WL 229597, at *1 (N.D. Ohio Feb. 18, 1998).

C. The plain language of 46 U.S.C. § 10601 makes no reference to the prohibition of at-will employment

In full, 46 U.S.C. § 10601 provides as follows:

(a) Before proceeding on a voyage, the owner, charterer, or managing operator, or a representative thereof, including the master or individual in charge, of a fishing vessel, fish processing vessel, or fish tender vessel shall make a fishing agreement in writing with each seaman employed on board if the vessel is

(1) at least 20 gross tons as measured under section 14502 of this title, or an alternate tonnage measured under section 14302 of this title as prescribed by the Secretary under section 14104 of this title; and

(2) on a voyage from a port in the United States.

(b) The agreement shall—

(1) state the period of effectiveness of the agreement;

(2) include the terms of any wage, share, or other compensation arrangement peculiar to the fishery in which the vessel will be engaged during the period of the agreement; and

(3) include other agreed terms.

46 U.S.C. § 10601 (emphasis added). Thus, under 46 U.S.C. § 10601, a master or individual in charge and the owner of a fishing vessel of at least 20 gross tons must sign a written agreement with each seaman employed onboard the vessel stating the period of effectiveness, the terms of any wages, share, or other compensation arrangement, and any other agreed term. 46 U.S.C. § 10601. *See also Flores v. American Seafoods Co.*, 335 F.3d 904, 2003 AMC 1853 (9th Cir.2003); *Harper v. U.S. Seafoods LP*, 278 F.3d 971, 2002 AMC 650 (9th Cir.2002); *TCW Special*

Credits v. Chloe Z, Fishing Co., Inc., 129 F.3d 1330, 1998 AMC 504 (9th Cir.1997). This allows the fisherman to know what he will be paid for the time period covered by the agreement. In this case, Mr. McPherson knew what his rate of pay would be for the first 90 days of his employment. He also knew, if he read the contract, that he could be discharged at any time. Nothing express or implied in the contract said that he would be employed for 90 days.

There is nothing contained in the statute prohibiting the creation of an at-will employment relationship during the period of effectiveness. The statute specifically anticipates “other agreed terms”, which necessarily includes the ability of the parties to insert terms creating an at-will employment relationship. 46 U.S.C. § 10601(b)(3).

As a matter of simple statutory construction, the Ninth Circuit has found that “§§ 10601 and 10602 are perfectly clear facially.” *Seattle-First Nat. Bank v. Conaway*, 98 F.3d 1195, 1197-98 (9th Cir. 1996). When Courts are “handed language of that clarity, [the] analysis can begin and end right there.” *Id.* “Canons of statutory construction dictate that if the language of a statute is clear, [courts] look no further than that language in determining the statute's meaning.” *Id.* (citing *United States v. Lewis*, 67 F.3d 225, 228 (9th Cir.1995); *Sullivan v. Stroop*, 496 U.S. 478, 482, 110 S.Ct. 2499, 2502–03, 110 L.Ed.2d 438 (1990)); *United States v. Ron Pair*

Enter., Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1031, 103 L.Ed.2d 290 (1989); *see also United States v. Neville*, 985 F.2d 992, 995 (9th Cir.), *cert. denied*, 508 U.S. 943, 113 S.Ct. 2425, 124 L.Ed.2d 646 (1993); *Brock v. Writers Guild of America, West, Inc.*, 762 F.2d 1349, 1353 (9th Cir.1985); *Church of Scientology of Calif. v. United States Dep't of Justice*, 612 F.2d 417, 421 (9th Cir.1979). “At least that is true where what seems to be the plain meaning of the statute does not lead to ‘absurd or impracticable consequences.’” *Seattle-First Nat. Bank*, 98 F.3d at 1197-98 (citing *Church of Scientology*, 612 F.2d at 421; *United States v. Missouri Pac. R.R.*, 278 U.S. 269, 278, 49 S.Ct. 133, 136, 73 L.Ed. 322 (1929)); *see also Tovar v. United States Postal Serv.*, 3 F.3d 1271, 1274 (9th Cir.1993); *Heppner v. Alyeska Pipeline Serv. Co.*, 665 F.2d 868, 872 (9th Cir.1981).

The language of the statute is clear. 46 U.S.C. § 10601 contains no language prohibiting at-will employment in the “period of effectiveness.” This lack of language regarding at-will employment does not lead to an absurd or impracticable consequence. Instead it leads to what has been the standard practice in the commercial fishing industry since 46 U.S.C. § 10601 became law – at-will employment. The concept of a “period of effectiveness” which informs a seaman of what his pay will be for the first

90 days of his employment and an “at-will” provision are not in any way inherently contradictory.

Thus, the plain language of the statute provides no basis for Mr. McPherson’s assertion that there can be no employment at will during the “period of effectiveness” as required by 46 U.S.C. § 10601.

D. Case law does not support the proposition that 46 U.S.C. § 10601 prohibits at-will employment

The case law surrounding the question of whether employment at-will is permissible during the “period of effectiveness” of an employment agreement is sparse. However, most relevant to the case at hand, the Southern District of Florida found that a maritime employment contract containing a period of effectiveness could be terminated at-will depending on the language of the termination clause. *Joaquim v. Royal Caribbean Cruises, Ltd.*, 899 F. Supp. 600, 602-03 (S.D. Fla. 1993) *rev'd in part, vacated in part sub nom. Joaquim v. Royal Caribbean Cruises*, 52 F.3d 1071 (11th Cir. 1995). As stated by the Court in *Joaquim*,

Under general contract principles, if the language of a contract is clear, the question whether a contract is of definite duration is a legal matter for the court. *See, e.g., Olsen v. Allstate Ins. Co.*, 759 F.Supp. 782, 786 (M.D.Fla.1991); *see also Vienneau v. Met. Life Ins. Co.*, 548 So.2d 856 (Fla.App. 4th Dist.1989) (“The construction of a written document, such as an employment contract, presents a question of law for the court, if its language is clear and unambiguous.”). A contract may be either one for

fixed duration or one terminable at will. 9 Samuel Williston, Williston on Contracts § 1017 (3rd Ed.1967). Where the contract includes a termination clause, classification of the contract will depend on the language of the termination clause. If the clause imposes a condition on termination, the contract may be classified as one for fixed duration. See 3A Arthur L. Corbin, Corbin on Contracts § 647 (1960). If, however, the contract imposes no condition on the employer's power to terminate, the contract will be classified as one terminable at will, regardless of other language specifying a definite period of duration. *Gollberg v. Bramson Pub. Co.*, 685 F.2d 224 (7th Cir.1982); *Brekken v. Reader's Digest Special Products, Inc.*, 353 F.2d 505 (7th Cir.1965) (employment contract providing for a twelve month term of duration nevertheless held terminable at will because of language in the contract authorizing either party to terminate the contract upon written notice).

899 F. Supp. at 602-03. In *Joaquim*, the Court held that an employment contract with an express fixed duration (12 month period) of employment was nevertheless terminable at will because the contract contained a provision empowering the company to terminate the contract for any reason. This is precisely the situation in the case at hand. Mr. McPherson's fishing agreement with Fishing Company of Alaska was for a fixed duration (90 days), and contained language stating that it could be terminated for any reason.¹ Pursuant to the decision in *Joaquim*, this creates an at-will employment contract.

¹ As previously noted, Mr. McPherson's Employment at Will Contract contained the following language:

Employee acknowledges and agrees that he/she is employed at will, which means that the Employee's employment may be terminated at

The *Joaquim* decision from the Southern District of Florida was vacated in part and remanded by the Eleventh Circuit Court of Appeals. The decision from the Eleventh Circuit in vacating and remanding provides further support for FCA's argument that at-will employment is not prohibited during the "period of effectiveness under 46 U.S.C. § 10601. In analyzing the employment contract at issue in that case, the Eleventh Circuit held that "[t]he contract unambiguously provides that the term of employment will expire in twelve months... The unambiguous terms of the contract provide that the contract is terminable at will." *Joaquim*, 52 F.3d 1071. Thus, the Eleventh Circuit affirmed the position of the District Court and found that an employment contract with an express fixed duration (12 month period) of employment was nevertheless terminable at will. *Id.* The Eleventh Circuit vacated and remanded solely "[b]ecause the record does not contain information about the length of the voyage or the amount Joaquim has been paid." *Id.* Thus, the decision of

any time, with or without notice and with or without cause, by either the Employer, Owner or the Employee. All decisions regarding rehire, continued or future employment are at the Employer's sole discretion.

...

Employee is employed at-will under the terms of this Contract. Accordingly, the Master of the Vessel, or the Employer may terminate the Employee at any time, with or without notice and with or without cause.

the Trial Court and the Eleventh Circuit in *Joaquim* supports FCA's position.

In his brief, Mr. McPherson's attempts to distinguish *Joaquim* in a number of ways. First, he argues that the employee in *Joaquim* was a busboy, and not a fisherman. Second, Mr. McPherson highlights that Congress has extended special protection for fisherman. Defendants agree with Mr. McPherson's statement regarding the occupation of the plaintiff in *Joaquim*, and Defendants agree that Title 46 of the U.S. Code is replete with statutes protecting seamen.

However, Mr. McPherson's attempt to distinguish *Joaquim* from the present action based on these facts misses entirely the point of FCA's argument. FCA contends, and *Joaquim* supports, that a maritime employment contract with a fixed term of effectiveness can have an at-will component, and that nothing about 46 U.S.C. § 10601 overrides this principle.

Mr. McPherson further attempts to distinguish *Joaquim* by highlighting the fact that the busboy in *Joaquim* would not have been penalized had he decided to quit during his term of employment, whereas Mr. McPherson would have faced some penalty had he decided to quit during his term of employment. Mr. McPherson has failed to make a clear argument as to why this is a relevant factor given the clear and

unambiguous language creating an at-will employment relationship in Mr. McPherson's "At-Will Employment Contract" with FCA.

Providing further support for FCA's argument in the present appeal, the Seventh Circuit, in *Brekken v. Reader's Digest Special Prod., Inc.*, found that an employment contract providing for a twelve month term of duration nevertheless was terminable at will because of language in the contract authorizing either party to terminate the contract upon written notice. 353 F.2d 505. There, the Seventh Circuit stated that "[a]n employment contract for a stated term, which is expressly terminable by either party upon notice, must be recognized as a valid contract and its provisions must be given effect. *Brekken*, 353 F.2d at 506 (citing *Repsold v. New York Life Ins. Co.*, 216 F.2d 479, 486 (7th Cir. 1954); *Brown v. Fed. Life Ins. Co.*, 353 Ill. 541, 545, 187 N.E. 484, 485 (1933))

Thus, case law provides no basis for Mr. McPherson's assertion that there can be no employment at will during the "period of effectiveness" as required by 46 U.S.C. § 10601. Indeed, case law supports FCA's position that 46 U.S.C. § 10601 allows for at-will employment.

E. In a similar federal proceeding, Judge Pechman found that at-will employment is permitted under 46 U.S.C. §10601

Mr. McPherson’s brief contains approximately five pages of discussion regarding the opinions of two local federal judges who were presented with this issue in two previous cases that were later consolidated – *Rector v. E&E Foods, et. al.*, No. C12-1527 (W.D. Wash. 2012) and *McAllister v E&E Foods, et. al.*, No. C12-1541 (W.D. Wash. 2012).² While FCA realizes that these decisions were not reported and are not binding precedent on this Court, a more thorough discussion of Judge Pechman and Judge Coughenour’s opinions is proper because Mr. McPherson’s brief has failed to provide sufficient context for these opinions.

In these cases, counsel for Mr. McPherson attempted to make the same argument that he is currently presenting to this Court – that 46 U.S.C. § 10601 precludes at-will employment during the “period of effectiveness”.

² In the two companion cases cited to in Plaintiff’s brief (*Rector* and *McAllister*) both Plaintiffs (Mr. Rector and Mr. McAllister) were represented by Plaintiff’s counsel in the case at hand, and the Defendants were represented by Defense counsel’s firm.

Judge Pechman was faced with a motion to strike the Defendants affirmative defense of at-will employment under Fed. R. Civ. P. 12(f). CP 43-46. In denying the motion, Judge Pechman stated that,

Plaintiff cites no authority indicating a durational term in a contract precludes an at-will employment relationship. Instead, Plaintiff asserts ‘the language of § 10601 is so clear that no reported cases have been needed to interpret it.’ The Court disagrees. **The language of § 10601 does not, on its face, preclude at-will employment.** 46 U.S.C. § 10601; *See Joaquim v. Royal Caribbean Cruises, Ltd.*, 899 F.Supp. 600, 602 (S.D. Fla 1993) *rev’d in part, vacated in part sub nom. Joaquim v. Royal Caribbean Cruises*, 52 F.3d 1071 (11th Cir. 1995)(finding a maritime employment contract containing a period of effectiveness could be terminated at-will depending on the language of the termination clause.) **Because a durational term in a contract is not necessarily inconsistent with an at-will relationship, striking Defendants affirmative defense is not warranted.**

CP 46 (emphasis added). Judge Pechman concluded that the argument being made in the case at hand is without merit.

Judge Coughenour was faced with a motion to dismiss or alternatively for a more definite statement. CP 47-51. In granting in part the motion, as cited in part in Mr. McPherson’s brief, Judge Coughenour stated,

Defendants argue that McAllister has failed to allege sufficient facts to support his claim for breach of contract. The Court disagrees. McAllister alleges the existence of an employment contract for 100 days at a rate of \$175.00 per day. He alleges that he worked 34 days into the 100 day contract and that he was acting within the course and scope

of his duties as a deckhand/cook at all times (and thus there was no cause for firing him). And he alleges that after 34 days of work, Defendants breached their duty under the contract by firing him without good cause. By virtue of the allegations, McAllister alleges the existence of a **for-cause employment contract**, and a breach thereof.

CP 49-50 (emphasis added). Judge Coughenour did not address the issue of whether 46 U.S.C. § 10601 precluded at-will employment. Judge Coughenour simply stated that the complaint in that case was sufficient to avoid a Rule 12(b)(6) dismissal as it alleged a breach of a “for-cause” employment agreement. Mr. McPherson has specifically stated that he has no such claim. CP 5. Judge Coughenour did not address whether at-will employment was permissible. CP 47-51.

The only support that Mr. McPherson attempts to find in these two cases is that,

Appellant here asserts that Judge Coughenour recognized that ‘cause’ for discharge was required to terminate an employment contract during the ‘period of effectiveness’, and would have stricken employment at will as an affirmative defense had the two cases been assigned to him instead of Judge Pechman.

Appellant’s Brief at p. 14. Mr. McPherson has failed to provide a shred of evidence to support this statement. Instead, he has simply presented a counterfactual situation to this Court, and is asking this Court to infer what Judge Coughenour would have done had he been assigned

the two cases instead of Judge Pechman. Such a counterfactual hypothetical provides no support for his argument in this appeal.

Contrary to what is implied by Mr. McPherson's brief, Judge Pechman and Judge Coughenour addressed different issues. Only Judge Pechman's analysis and ruling are relevant to the case at hand, and Judge Pechman unequivocally stated that "the language of § 10601 does not, on its face, preclude at-will employment" and "a durational term in a contract is not necessarily inconsistent with an at-will relationship."

F. Nothing in the legislative history of 46 U.S.C. § 10601 indicates that the drafters of the legislation intended to eliminate at-will employment in the commercial fishing industry

Contrary to what is suggested in Mr. McPherson's brief, written contracts had been part of fishermen's rights for almost two centuries prior to the enactment of 46 U.S.C. §10601 in 1988.

"Statutory protection of the seafarer's right to a written contract dates back to one of the first acts of Congress, and 46 U.S.C. § 10601 descends from that venerable tradition." *Harper*, 278 F.3d at 974 (*citing Seattle–First Nat'l Bank*, 98 F.3d at 1196). In 1792, Congress provided that cod fishermen would be entitled to a statutory share of the fishing vessel's proceeds "unless the skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print,

with every fisherman employed therein ... which agreement shall be endorsed or countersigned by the owner.” Act of February 16, 1792, ch. 6, § 4, 1 Stat. 229, 231. The legislation went on to provide “[t]hat where an agreement or contract shall be so made and signed,” the vessel would be liable for six months to the fishermen for their share. *Id.* § 5. This protection was extended to mackerel fishermen in 1865, March 3, 1865 Extension Act, 13 Stat. 535, and the statute was codified as R.S. 4391 (1878). *See Caffray v. The Cornelia M. Kingsland*, 25 F. 856, 859 (S.D.N.Y.1885). This provision was then codified at 46 U.S.C. § 531 the immediate predecessor to § 10601. As amended over the years, § 531 read, just prior to its repeal in 1988:

The master of any vessel...shall, before proceeding on such fishing voyage, make an agreement in writing with every fisherman who may be employed therein...Such agreement shall be indorsed or countersigned by the owner of such fishing vessel or his agent.

46 U.S.C. § 531. On March 26, 1987, H.R. Res. 1841 was introduced (the resolution that would eventually become 46 U.S.C. § 10601), and was titled “A bill to establish guidelines for timely compensation for temporary injury incurred by seamen on fishing industry vessels and to require additional safety regulations for fishing industry vessels. H.R. Res. 1841, 100th Cong. (as introduced). The resolution was referred to the Committee on Merchant Marine and Fisheries for further

review and consideration. *Id.* At the time of the resolution's introduction, it contained no language regarding fishing agreements, periods of effectiveness, or any other language comparable to what would eventually become 46 U.S.C. § 10601. *Id.*

On June 23, 1988, nearly 15 months after its introduction, the Committee on Merchant Marine and Fisheries produced the House Report on the resolution. H.R. REP. No. 100-729 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2149. In the 15 months between the resolution's referral to committee and the publication of the House Report, the Committee on Merchant Marine and Fisheries heard testimony from a number of individuals involved in the maritime industry regarding the contents of H.R. 1841. *See generally* U.S. Government Accountability Office (GAO) Legislative History of the Commercial Fishing Industry Vessel Safety Act of 1988, PL 100-424 LH. The members of the Committee also met on numerous occasions to discuss the contents of H.R. 1841 as well. *Id.* Throughout this entire 15 month period, the focus of these discussions and hearings was improving the safety policies and procedures in the commercial fishing industry. *Id.* There were no references made to whether the "period of effectiveness" prohibited "at-will" employment. *Id.* In fact, when the House Report was published, the language that would eventually become 46 U.S.C. § 10601 was not yet included in the

resolution. H.R. REP. No. 100-729 (1988), *reprinted in* 1988
U.S.C.C.A.N. 2149.

It was not until June 27, 1988, that the language that would eventually become 46 U.S.C. § 10601 was included in a draft of the resolution. H.R. Res. 1841, 100th Cong. (as amended on June 27, 1988). Ultimately, 46 U.S.C. § 10601 became law on September 9, 1988 as a part of Public Law 100-424, otherwise referred to as the “Commercial Fishing Vessel Safety Act of 1988.” Public Law 100-424, 102 Stat. 1585 (Sept. 9, 1988).

From the date H.R. 1841 was introduced through the date 46 U.S.C. § 10601 became law there was no discussion about the impact of the “period of effectiveness” on at-will employment in the commercial fishing industry. *See generally* U.S. Government Accountability Office (GAO) Legislative History of the Commercial Fishing Industry Vessel Safety Act of 1988, PL 100-424 LH. If Congress intended to eliminate at-will employment in the commercial fishing industry, at least one Senator, House Member, or other maritime professional involved in the passing of the legislation would have made at least one statement to that effect. This lack of discussion indicates that the drafters of this legislation had absolutely no intention to eliminate at-will employment in the commercial

fishing industry – instead, their focus was directed towards making the commercial fishing industry a safer work environment.

Mr. McPherson’s brief is entirely devoid of any discussion regarding the fact that the legislative history surrounding the enactment of 46 U.S.C. § 10601 contains no indications that it was the intent of the drafters to preclude at-will employment during the “period of effectiveness”.

Thus, the legislative history of the statute provides no basis for Mr. McPherson’s assertion that there can be no employment at will during the “period of effectiveness” as required by 46 U.S.C. § 10601.

G. Under Washington law, Mr. McPherson had an at-will employment relationship with FCA

Mr. McPherson urges this Court to look to the law of Washington in interpreting this federal maritime statute. As described above, FCA believes that the federal maritime law governs this federal maritime statute, and as described above, federal law is clear that 46 U.S.C. § 10601 does not prohibit at-will employment. However, even if this Court were to agree with Mr. McPherson and look to the law of Washington for guidance on this issue, Washington law dictates that this Court find the existence of an at-will employment relationship.

“The employment at will doctrine is a court developed doctrine drawn from a 19th century treatise on the subject of master and servant.”

Thompson v. St. Regis Paper Co., 102 Wash.2d 219, 225, 685 P.2d 1081, 1085 (1984) (citing H. Wood, *Master and Servant* 134, (2d ed. 1886)).

Citing the Wood treatise, in 1928, the Washington Supreme Court stated:

The law of the case seems to be well settled, that a contract such as this constitutes an employment for an indefinite period and that such a contract may be abandoned by either party at will without incurring any liability therefor.

Davidson v. Mackall-Paine Veneer Co., 149 Wash. 685, 688, 271 P. 878 (1928); *Accord, Webster v. Schauble*, 65 Wash.2d 849, 852, 400 P.2d 292 (1965); *Lasser v. Grunbaum Bros. Furniture Co.*, 46 Wash.2d 408, 281 P.2d 832 (1955). “Wood’s formulation, the ‘American rule’, became the rule governing termination of employees and employers could discharge employees for no cause, good cause or even cause morally wrong without fear of liability.” *Thompson*, 102 Wash. 2d at 226.

Thus, “[c]ommon law at-will employment has been the default employment rule in Washington since at least 1928.” *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wash. 2d 736, 754–55, 257 P.3d 586, 594–95 (2011) (citing *Ford v. Trendwest Resorts, Inc.*, 146 Wash.2d 146, 152, 43 P.3d 1223 (2002); *Davidson v. Mackall–Paine Veneer Co.*, 149 Wash. 685, 688, 271 P. 878 (1928)), *see also, Weiss v.*

Lonnquist, 173 Wash. App. 344, 351, 293 P.3d 1264, 1268 (Div 1. 2013);
Boring v. Alaska Airlines, Inc., 123 Wash. App. 187, 195, 97 P.3d 51, 54
(Div 1. 2004).

“In Washington, the general rule is that an employer can discharge an at-will employee for ‘no cause, good cause or even cause morally wrong without fear of liability.’” *Ford*, 146 Wash. 2d at 152, 43 P.3d at 1226 (citing *Thompson*, 102 Wash.2d at 226).

In support of his argument Mr. McPherson cites the *Thompson* decision from the Washington Supreme Court. However, *Thompson* in fact supports FCA’s position in the present appeal because as articulated by the court in *Thompson*,

An employment contract indefinite as to duration, is terminable at will by either the employee or employer. But such a contract is terminable by the employer only for cause if (1) there is an expressed or implied agreement to that effect or (2) the employee gives consideration in addition to the contemplated service.

Thompson, 102 Wash. 2d at 233, 685 P.2d at 1089. Thus, under Washington law, an employment contract is terminable for cause only if there is an express or implied agreement to that effect, or if there is some form of consideration given (which is not argued herein). Mr. McPherson signed an employment contract which was titled “Employment At-Will Contract”, and which contained express provisions clearly describing what

it meant to create an at-will employment relationship. CP 32-42. Thus, under *Thompson*, and under Washington law, Mr. McPherson entered into an unambiguous employment at-will relationship with FCA.

Mr. McPherson further alleges, citing *Thompson*, that “a contractual period of effectiveness ‘may create an atmosphere where employees justifiably rely on the expressed policy...(in an employment handbook, the employer thus) creates an atmosphere of job security..’”

This statement does not accurately reflect what was said by the Washington Supreme Court in *Thompson*. In *Thompson*, the Court held that,

absent specific contractual agreement to the contrary...the employer's act in issuing an employee policy manual can lead to obligations that govern the employment relationship. Thus, the employer's reason for unilaterally issuing an employee policy manual or handbook, purporting to contain the company policy vis-a-vis employee relations, becomes relevant.

We are persuaded that the principal, though not exclusive, reason employers issue such manuals is to create an atmosphere of fair treatment and job security for their employees.

Thompson, 102 Wash. 2d at 229, 685 P.2d at 1087 (emphasis added).

Thus, *Thompson* discussed a situation in which there was no specific contractual “at-will” provision and the formal employee policy manual created by the employer created enforceable components of the

employment relationship. Neither part of this formulation exists in this case. There was a specific at-will provision and Mr. McPherson has provided no evidence related to any policy manual created by FCA. As such, this argument is not relevant to the present appeal.

Other than his hypotheticals, Mr. McPherson failed to provide any evidence to suggest that he relied in any fashion on his employment contract being anything other than an at-will agreement. Such reliance in the face of the specific at-will references would be unreasonable.

In sum, Mr. McPherson signed an express employment at will contract which contained express provisions detailing what was meant by an at-will employment relationship. He cites to no authority to support the argument that some unarticulated implied term of a contract can override the contract's express terms. Thus, under Washington law, Mr. McPherson entered into an at-will employment contract with FCA.

H. Mr. McPherson's argument related to work undertaken by seamen prior to the start of the fishing season is irrelevant to the present appeal

A significant portion of Mr. McPherson's brief to this Court discusses the fact that fishing is traditionally undertaken by season, and in some fisheries it is common for deckhands to perform pre-season work in anticipation of receiving a crew-share. FCA does not dispute this

discussion of how the industry works. However, any argument by Mr. McPherson that these facts have some relevance to the present appeal is misplaced. It is undisputed that Mr. McPherson was not terminated while performing pre-season work, and the issues of what compensation a deckhand performing uncompensated pre-season work is entitled is not relevant to the present appeal. There is no such claim here. Should this Court ever be presented with this issue, FCA recommends that it look to the decision in *TCW Special Credits v. Fishing Vessel Chloe Z.*, No. CV 96-00055, 1998 WL 886290 (D. Guam June 19, 1998), *aff'd in part, rev'd in part and remanded sub nom. TCW Special Credits v. Barandiaran*, 238 F.3d 431 (9th Cir. 2000) for guidance. Again though, this issue is nowhere to be found in the present action.

V. CONCLUSION

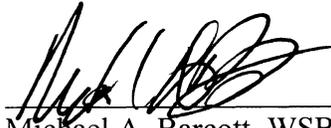
In sum, Mr. McPherson asks this Court to reach a conclusion that is: (1) contrary to the federal maritime law; (2) contrary to the plain language of 46 U.S.C. § 10601; (3) contrary to the decision of any other Court in this nation; (4) contrary to the intent of the drafters of 46 U.S.C. § 10601; and (5) contrary to Washington law.

Mr. McPherson's brief concludes with a question to this Court: "[o]n which side of this issue will this Court be counted: The side of seamen, wards of the admiralty court, or on the side of fishing companies

who claim the right to fire seamen for no reason at all after employment has been promised for a set term?” That articulation of the dispute herein might by an appropriate one before a legislative body. Here, FCA respectfully requests that this Court choose the answer not provided by Mr. McPherson, side with the law, and affirm the decision of the trial court and find that under 46 U.S.C. § 10601 employment at will in not prohibited during the “period of effectiveness.”

RESPECTFULLY SUBMITTED this 3rd day of October, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of October, 2016, I caused a true and correct copy of the **BRIEF OF RESPONDENT FISHING COMPANY OF ALASKA** to be served on the following in the manner indicated below:

*Via Hand Delivery/
Legal Messenger*

The Court of Appeals of the
State of Washington
Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Via e-service and First Class U.S. Mail

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DATED this 4th day of October, 2016



Holly H. Mote
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