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November 2, 2016
Court of Appeals
Division I
State of Washington
No. 75059-3-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

MICHAEL MCPHERSON,

Plaintiff-Appellant,

v.

FISHING COMPANY OF ALASKA,

Defendants-Respondents

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Legislative History of 46 U.S.C. §10601

46 U.S.C. §10601 was enacted into law on September 9, 1988. The legislative history is silent on the reason for including the required “period of effectiveness” for employment contracts in the statute. Fishing Company of Alaska (hereinafter FCA) cites to the “centuries old practice of at-will employment in the fishing industry...” Brief of Respondent at p.

1. If anything, silence about why a “period of effectiveness” was all of a sudden inserted into the wage statute for fishermen can only mean that this ‘centuries old practice’ was no longer in effect during the agreed period of employment. The predecessor statute had no such language. *See* 46 U.S.C. §531 (replaced by §10601) as discussed in FCA’s brief at p. 20. “At the time of the resolution’s (§10601) 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.” Brief of Respondent at p. 21. Why was that language inserted if it had no meaning?

B. The Intent of Congress.

FCA complains, “McPherson’s brief is entirely devoid of any discussion of the legislative history surrounding the enactment of 46 U.S.C. §10601...” Brief of Respondent at p. 23. That is because the intent of Congress is so obvious that the issue was never discussed during adoption of the legislation. Why put in “period of effectiveness” if it was meaningless? “The language of the statute (§10601) is clear...” Brief of Respondent at p. 10. McPherson agrees. Why include “period of effectiveness” if employment is still ‘at will’?

C. Federal Judges Coughenour, Pechman and the case of *Joachim v. Royal Carribbean.*

At pp. 17-19, FCA asserts that Judge Coughenour's decision had no bearing on the issue before this Court. Judge Coughenour recognized that a §10601 contract is a "for cause employment contract" despite the at will clause in McAllister's contract of employment he was ruling on. See discussion in Brief of Respondent at pp. 17-19.

In upholding the 'at will' provision in a later ruling on the same contract, Judge Peckman relied on *Joachim v. Royal Caribbean Cruises Ltd.*, 899 F.Supp.600 (S.D. Fla. 1993). Brief of Respondent at p. 17. Judge Pechman—and later Judge McCullough of King County Superior Court-- failed to apply the reasoning of *Joachim* to the facts of the instant case and the language in McPherson's contract of employment with FCA. At p. 14 of Respondent's brief, FCA states that McPherson "fails to make a clear argument" about why the fact that he would have been penalized if he'd quit before fishing the contractual term is relevant. Yet at p.12 of Respondent's brief it is stated: "if the (termination) clause imposes a condition on termination, the contract may be classified as one of fixed duration." If McPherson had terminated the contract before the end of the 90-day term, he would have been fined and confined to quarters.

Employment at Will Contract, CP 32-42. Such a penalty for the busboy in Joachim would have resulted in a different ruling in that case.

D. Public Policy

Part G of 46 U.S.C. §10101 et seq. is entitled “Protection and Relief”. Protection and relief for whom—seamen or vessel owners? FCA would have this Tribunal believe that it is vessel owners to whom Congress wanted to provide ‘protection and relief’.

FCA’s argument about the meaning and purpose of the statute in question makes more sense when it is turned on its head. McPherson here revises a portion of the Brief of Respondent at p. 23:

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

Id. (revised)

E. ‘Fishing Conducted by the Season’ is very Relevant to this case, as it bears on the Meaning of the Statute.

FCA complains that McPherson’s reference to pre-season fit-out is irrelevant to this case. Brief of Respondent at p. 27. FCA is correct in that McPherson was hired mid-season and did not

engage in any pre-season fit-out work, However, this aspect of fishing is *very relevant* to the intent of Congress when enacting the statute at issue. It is exactly because fishing is traditionally conducted by the season that a “period of effectiveness” is particularly important to fishermen. Losing a job mid-season often means loss of income for the remainder of that season.

CONCLUSION

FCA’s argument makes no sense. The fishing company claims that the required “period of effectiveness” can be rendered meaningless simply by the insertion of ‘employment at will’ into fishermen’s contracts. That reasoning would allow vessel owners to also exclude “the terms of any wage, share, or other compensation...” simply by stating that a fisherman’s compensation will not be determined until after the season is over. *See* 46 U.S.C. §10601(b)(2). That is not acceptable. Nor is it acceptable to fire a fisherman during the “period of effectiveness” of his employment without cause.

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Respectfully submitted this 2nd day of November 2016.

LAW OFFICE OF JOHN MERRIAM

s./J. Merriam

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Attorney for Michael McPherson,

Plaintiff/Appellant

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DECLARATION OF SERVICE BY MAIL

Pursuant to 28 U.S.C. § 1746 (1976), John Merriam declares as follows:

On November 2, 2016 I caused to be filed and served true and correct originals and/or copies of Appellant's Reply Brief submitted herein to:

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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 2nd day of November at Seattle, Washington.

LAW OFFICE OF JOHN MERRIAM

s./J. Merriam

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