

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

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

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Defendant /Appellee

BRIEF OF APPELLANT

I. INTRODUCTION

Fishermen are notorious liars—from the size and quantity of fish caught to what was promised in payment for catching those fish. That’s part of the reason Congress passed 46 U.S.C. §10601 in 1988. Written employment contracts are now required for fishermen on fishing boats of 20 gross tons or more, whether the fishermen are working for a lay (share of the catch, or “crewshare”) or a fixed wage. Required of inclusion in those contracts, is the “period of

effectiveness” for the employment. Appellant asserts that fishermen may not be fired during the “period of effectiveness” without ‘cause’—a good reason. In other words, the employment-at-will doctrine does not apply to fishermen during the contractual term. Surprisingly, there are no reported cases on this issue in almost 30 years after passage of 46 U.S.C. §10601. This Court is asked to answer the following question: Does 46 U.S.C. §10601 abrogate employment-at-will for fishermen during the “period of effectiveness” in their contracts of employment?

II. ASSIGNMENT OF ERROR

The trial court erred in granting summary judgment to Fishing Company of Alaska (FCA) to the effect that employment is still ‘at will’ during the “period of effectiveness” included in contracts of employment for fishermen required by 46 U.S.C. §10601.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

During the “period of effectiveness” in contracts of employment for fishermen, is ‘cause’ required for discharge from that employment? 46 U.S.C. §10601.

III. STATEMENT OF THE CASE

Appellant Michael McPherson is a resident of Missouri who was hired to work as Assistant Engineer aboard the FCA vessel F/T Alaska Spirit in Alaska for 90 days. He alleges that he was fired for no good reason 18 days into the 90-day contract. Complaint, Clerk's Papers (CP) 1-2. Mr. McPherson was given an Employment at Will Contract to sign. A copy of that contract is Ex. 1 to FCA's Cross-Motion for Summary Judgement, CP 32-42.

The Contract at page 2, CP 33, states that if an employee quits at sea (during the contractual term) he/she will be confined to quarters until the vessel hits port. At pages 6-7 of the Contract, it is stated that the employee will be charged a penalty of \$50 per day until the employee leaves the vessel, and/or \$1000 in liquidated damages. CP 37-38. Lest FCA argue that \$50 per day is merely the expense of room and board while an employee is not working, note that at page 4 of the contract only \$20 per day is paid as maintenance in the event of injury. CP 35. There are no penalties listed for the *employer* if FCA decides to fire the employee during the contractual term for no good reason. Id.

Both parties filed cross-motions for summary judgment on the applicability of the employment-at-will doctrine. Judge Leroy

McCullough of King County Superior Court granted summary judgment to FCA, validating employment-at-will language in the contract of employment. *See* Verbatim Report of Proceedings (RP) at Appendix. Mr. McPherson appeals.

IV. SUMMARY OF ARGUMENT

Written contracts of employment for fishermen have been required since 1988. 46 U.S.C. §10601. Included in the contracts is a “period of effectiveness”. Appellant asserts that the doctrine of at-will employment is not applicable during the “period of effectiveness” and that ‘cause’ is required for discharge from employment during the contractual term.

V. ARGUMENT

A seaman’s right to wages owed to him has traditionally received substantial legal protection, perhaps greater than the protection received by any other class of workers.

Seattle-First National Bank v. F/V Lady Lynne, 98 F.3d 1195,1197 (9th Cir. 1996)

A. Explanatory Background

“Employment at will” means that “an employer may terminate the employment of an employee at will with or without cause....” Davis, Maritime Law Deskbook at p. 501 (2010). 46 U.S.C.

§10601 requires that employment contracts for fishermen contain a “period of effectiveness” for the employment. What is the purpose of including such language in the statute if employment is still ‘at will’? The requirement of a contractual term would be meaningless if employers could ignore it and fire employees for no reason during the “period of effectiveness” simply by putting ‘employment at will’ in the contract of employment. No rational person would travel from Missouri to Alaska to work only 18 days after he had been promised 90 days of employment. Appellant asserts that this proposition is so obvious that in more than 25 years since passage of §10601 there are no reported cases on whether ‘employment at will’ still abides during the “period of effectiveness” for employment contracts.

B. Fishing is traditionally Undertaken by the Season

Commercial fishing is traditionally undertaken by the season. Vitco v. Joncich, 980 F.Supp. 945, *affirmed*, 234 F.2d (9th Cir. 1956). See Davis, Maritime Desk Book at p.195 (2010). During oral argument, Judge McCullough recognized the traditional work associated with fishing. He talked about fishermen doing pre-season work for free on the strength of a promise of getting paid for the upcoming fishing season. RP at pp. 11-12(Appendix at pp. 12-13). The importance of this aspect of commercial

fishing cannot be overstated. Fishermen rely on the “period of effectiveness” for employment contracts to make sure they will be employed for the entirety of a particular fishing season. As recognized by Judge McCullough, in some fisheries it is common for deckhands to perform uncompensated pre-season work such as net repair and vessel fit-out in reliance upon an agreed crewshare for the entirety of the upcoming season. For example, an experienced deckhand waiting for the lucrative summer salmon season in Southeast Alaska, is offered a job aboard a salmon seiner. He signs an employment contract lasting until the end of salmon season—about two months—at a crewshare of 10% of the catch after deductions for food, fuel, and bait. Before the season starts he is required to work for free for two weeks to get the boat ready for the upcoming season. He sleeps aboard and gets chow for free, but is paid no wages. The boat heads to the fishing grounds. Ten days into the season the vessel owner fires the deckhand because the owner’s brother-in-law wants the job. If employment is “at will” during the “period of effectiveness”—the salmon season—the deckhand will have no recourse and the vessel owner would have been perfectly within his rights. Is this fair?

Some in the fishing industry assert that the deckhand’s remedy is quantum meruit compensation—usually expressed as an hourly wage—for the previously uncompensated pre-season labor. That’s fine for the vessel

fit-out and work on the nets, but it's too late for the deckhand to sign on with another seiner and he's missed the salmon season. He had justifiably relied, to his detriment, on the "period of effectiveness" in the employment contract and passed up other jobs. He's also lost a good portion of his income for the entire year.

Although fishing is still traditionally conducted by the season, the Ninth Circuit has upheld shorter trip-to-trip contracts for purposes of unearned wages in the case of injury. *See, Day v. American Seafoods*, 557 F.3d 1056 (2009). Incorporating the employment-at-will doctrine into employment contracts for fishermen might undermine what little protection fishermen have of receiving unearned wages for the entire contractual term in situations of injury.

C. *Joachim v. Royal Caribbean Cruises* is Not Binding on this Court and can be Distinguished

Both the trial court below and federal Judge Marsha Pechman in unreported related proceedings (*see infra*) primarily relied on the case of *Joachim v. Royal Caribbean Cruises*, 899 F.Supp. 600 (S.D.Fla. 1993), *vacated and remanded on other grounds*, 1995 A.M.C. 2762 (11th Cir. 1995) (unpublished). Even if *Joachim* was binding authority on this Court, which it is not, the case can be distinguished and is not even persuasive.

1. The Employee in *Joachim* was a Busboy, Not a Fisherman

Joachim was a busboy on a cruise ship with a one-year contract of employment that specified no 'cause' was required for discharge. 1995 A.M.C. 1372 at 1373-74. Fishing, by contrast, is usually conducted by the season. Maritime Law Desk Book, *supra* at p. 195.

2. Congress has extended Special Protection for Fishermen in their Contracts of Employment with Vessel Owners

Title 46 of the U.S. Code is replete with statutes protecting seamen, including commercial fishermen. It is noteworthy that this case involves statutory construction whereas the Joachim case involved interpretation of a contract.

3. The Busboy in *Joachim* would Not have been Penalized had he Quit during the contractual Term of Employment

The busboy in Joachim would not have been penalized had he decided to quit during the one-year contractual term of employment. By contrast, had Mr. McPherson quit the FCA vessel during the 90-day contractual term, he would have been charged \$50 per day and/or \$1000 in liquidated damages, and confined to quarters until the vessel hit port.

Employment at Will Contract, CP 33, 37-38. Had the busboy been punished for quitting before the contractual term, the result in Joachim would have been different:

If the (termination) clause (in the employment contract) imposes a condition on termination, the contract may be classified as one for a fixed duration.

1995 A.M.C. at 1375.

4. The Employer was Penalized in *Joachim*—two months of wages--for Dismissing the Employee during the contractual Term of Employment

Mr. McPherson's contract contained no disincentive for FCA to terminate the employment earlier than the end of the stated term. By contrast, the employer in the Joachim case *was* penalized for early termination.

The employment agreement may also be terminated without a particular reason, *provided* the employee is paid two (2) months basic minimum wages.

Id. at 1995 A.M.C. at 1376 (emphasis shifted to a different section of the quoted language to demonstrate that termination was conditional on the employer paying a wage penalty).

5. The Joachim court looked to the State Law of Illinois for Guidance

Like this Court and the trial court below, the federal trial court in the Joachim case was grappling with a case of first impression. 1995 A.M.C. at 1375. The Joachim court recognized that admiralty law governs the interpretation of employment contracts, id. at 1374, but looked to state law for guidance in that contract interpretation.

(T)he Court must turn to general principles of contract law to formulate a rule.

1995 A.M.C. at 1375. That federal district judge in Florida relied on two cases decided in turn with reliance upon Illinois law. Brekken v. Reader's Digest, 353 F.2d 505 (7th Cir. 1965); Goldberg v. Bramson Publishing Co., 685 F.2d 224 (7th Cir. 1982). When ruling in favor of FCA in this case, Judge McCullough also cited the case relying on Illinois law, Brekken, *supra*. RP 16. It is noteworthy that in reaching his decision in the court below, Judge McCullough also referred to the leading case on this issue in Washington, discussed *infra*, Thompson v. St. Regis Paper Co., 102 Wn.2d 219 (1984). RP 10.

D. This Court should look to the State Law of Washington for Guidance.

Because there are no reported cases construing 46 U.S.C. §10601 on this particular point, the Court should look to state law for guidance. *See, Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219 (1984). Thompson involved a situation of indefinite employment and no written contract. “Generally an employment contract, *indefinite as to duration*, is terminable at will by either the employee or the employer.” *Id.* (emphasis added). The state Supreme Court ruled an employment contract “is terminable only for cause if there is an implied agreement to that effect.” *Id.* Where a fisherman’s contract is *definite in duration* for a specified term, there is an implied agreement that ‘cause’ is required to terminate the employment during the “period of effectiveness”.

A contractual period of effectiveness “may create an atmosphere where employees *justifiably rely* on the expressed policy...(in an employment handbook, and the employer thus) creates an atmosphere of job security...” *Id.*, 102 Wn.2d at 230 (emphasis in original). *See also, Gagliardi v. Denny’s Restaurants*, 117 Wn.2d 426 (1991).

E. Proceedings in the Trial Court below

Oral argument before Judge Leroy McCullough of King County Superior Court on cross-motions for summary judgment was held on March 18, 2016. Judge McCullough ruled that the Joachim case, *supra*, governs. Employment can still be at will if that is clearly stated in the contract of employment drafted under 46 U.S.C. §10601. RP 18. The judge quoted the Joachim case:

If the clause (in an employment contract) imposes a condition on termination, the contract may be classified as one for fixed duration.

RP 19. FCA's cross-motion for summary judgment was granted, with the trial court relying on the Joachim case. RP 20.

F. Related proceedings in the federal Western District of Washington and the Ninth Circuit Court of Appeals

Proceedings in the federal courts are not part of the record on appeal here. Rather, what is presented below is what was presented to Judge McCullough in the cross-motions for summary judgment proceeding. *See*, Plaintiff's Reply and Opposition to Defendant's Motion for Summary Judgment and Ex. 4 thereto (from March 2014 issue of *Trial News*). CP 113-130.. FCA is invited, as it was in the trial court below, to

correct any inaccuracies in the following account of proceedings in the two federal trial courts and the Ninth Circuit.

Companion cases were filed in the federal Western District of Washington in 2012. The undersigned represented the plaintiffs in both cases. The defendants in both cases, E & E Foods et al., were represented by the same firm that represents FCA in the instant case. McAllister v. E & E Foods, et al., No. C12-1541 (W.D. Wash.); Rector v. E & E Foods, et al., No. C12-1527 (W.D. Wash.). There were multiple proceedings in the trial court cases initially assigned to Judge Pechman (Rector) and Judge Coughenour (McAllister). Judge Pechman ultimately upheld employment-at-will in a contract of employment governed by 46 U.S.C. §10601:

Because the durational term in a contract is not necessarily inconsistent with an at will relationship, striking Defendant's affirmative defense (of employment at will) is not warranted.

Rector v. E & E Foods, et al., No. C12-1527 (W.D. Wash. 2012).

The companion cases, filed at the same time,, were assigned to different judges despite being identified in the respective coversheets as related cases that should have been assigned to the same judge from the outset according to the local federal rules. This discrepancy was ultimately recognized and Judge Coughenour transferred the McAllister case to Judge Pechman. While the McAllister case was still assigned to Judge

Coughenour, defendants moved to dismiss the case for failure to state a claim. In denying the motion, Judge Coughenour stated that McAllister “alleges the existence of a for-cause employment contract and the breach thereof.” E & E Foods then filed Answers in both cases including the affirmative defense of an employment at will contract. Plaintiffs in both cases thereupon filed a motion to strike employment-at-will as an affirmative defense pursuant to F.R.C.P. 12(f). Before either federal judge had ruled on these motions, Judge Coughenour belatedly realized that the McAllister case was related to the Rector case and directed the clerk to reassign McAllister to Judge Pechman. 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.

Judge Pechman, who now had both cases, denied the motions to strike employment-at-will as an affirmative defense. Plaintiffs in both cases appealed to the U.S. Court of Appeals for the Ninth Circuit under the statute allowing interlocutory appeals in admiralty cases, 28 U.S.C. §1292(a)(3). The two plaintiffs argued for interlocutory review because there was no way to prevail on a wrongful discharge claim if employment under §10601 was at will. In each appeal it was stated: “If the Ninth

Circuit affirms the trial court’s ruling on the employment-at-will doctrine, plaintiff will take a voluntary dismissal of this case.”

After plaintiffs filed interlocutory appeals, defendants moved to amend the Answers to drop the affirmative defense of employment-at-will. Plaintiff opposed the motions as untimely and a blatant attempt to pull the rug out from under the just-filed appeals—an attempt to prevent the Ninth Circuit from ruling on employment-at-will during the “period of effectiveness” for fishermen’s contracts. “Why,” the plaintiffs asked rhetorically, “Did defendants oppose plaintiff’s earlier motion to strike the affirmative defense of employment-at-will if they intended to withdraw the defense anyway? Why did the defendants wait until after the appellate court filing fee (\$455 for each case) was paid and two or more motions in the Ninth Circuit were filed, before withdrawing this affirmative defense?” Plaintiffs argued that if the trial court sua sponte ruled that employment at will was the law—whether or not pled affirmatively by defendants—it could find that the plaintiffs had not proven wrongful discharge because defendants did not need just cause for discharge. Judge Pechman granted defendants’ motion to withdraw employment-at-will as an affirmative defense.

McAllister disappeared and ultimately had judgement entered against him for failure to prosecute the case. The Rector case proceeded

with a flurry of motions in both the trial court and at the Ninth Circuit. Rector filed another motion to stay proceedings in the trial court pending appellate review in the Ninth Circuit. “If employment-at-will remains a viable defense during the “period of effectiveness” of 46 U.S.C. §10601, plaintiff cannot prevail on his case.” Rector argued that further proceedings in the trial court were futile and pointless. Judge Pechman denied the motion.

In the Ninth Circuit, the Rector defendants filed a motion asking the appellate court to dismiss the appeal for lack of jurisdiction, claiming that “the district (trial) court has made no final determination affecting the rights and liabilities of the parties with regard to the issue of at will employment.” Rector resisted the motion, arguing that liability had already been finally determined when the trial judge ruled that employment-at-will was still a valid defense despite the language of §10601.

The Rector defendants filed another motion asking the Ninth Circuit to take judicial notice that the trial court had granted defendants’ motion to withdraw employment-at-will as an affirmative defense and had denied plaintiff’s motion to stay proceedings in the trial court pending appellate review. The Ninth Circuit never ruled on that motion, granting instead the defendants’ motion to dismiss the appeal as premature. The

appellate court held that interlocutory appeal in admiralty cases is allowed “only when the order appealed from determines the rights and liabilities of the parties.” The appeal was dismissed.

At that point, Rector realized that given Judge Pechman’s earlier rulings, there was no way he could prevail in the case. Rector settled for fifty cents on the dollar and the case was dismissed.

It was obvious from the proceedings in the federal courts that another company facing a case similar to this one did everything in its power to prevent the Ninth Circuit from deciding the issue at bar regarding employment-at-will

VI CONCLUSION

This is an issue of first impression. On which side of the 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?

Respectfully submitted this 7th day of Sept, 2016.

LAW OFFICE OF JOHN MERRIAM



JOHN MERRIAM, WSBA #12749
Attorney for Michael McPherson,
Deckhand/Plaintiff/Appellant

DECLARATION OF SERVICE BY MAIL

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

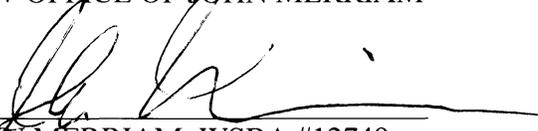
On 9/7/16, I caused to be filed and served true and correct originals and/or copies of Appellants' Trial Brief submitted herein, by depositing the same in the United States mail, first class, postage prepaid, to:

<p><i>Counsel for Defendants/Respondents/Cross-Appellants</i></p> <p>Michael A. Barcott, Esq. Holmes Weddle & Barcott Wells Fargo Center 999 Third Avenue, #2600 Seattle WA 98104-4001 mbarcott@hwb-law.com</p>	<p><i>Via Email and First Class U.S. Mail</i></p>
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I declare under penalty of perjury that the foregoing is true and correct.

Dated this 7th day of Sept., at Seattle, Washington.

LAW OFFICE OF JOHN MERRIAM


 JOHN MERRIAM, WSBA #12749
 Attorney for Michael McPherson,
 Deckhand/Plaintiff/Appellant

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CHAPTER 106—FISHING VOYAGES

Sec.

10601. Fishing agreements.
 10602. Recovery of wages and shares of fish under agreement.
 10603. Seaman's duty to notify employer regarding illness, disability, and injury.

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§ 10601. Fishing agreements

(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.

[(c) Redesignated (b)]

(Added Pub.L. 100-424, § 6(a), Sept. 9, 1988, 102 Stat. 1591, and amended Pub.L. 104-324, Title VII, § 739, Oct. 19, 1996, 110 Stat. 3942; Pub.L. 107-295, Title IV, § 441(a), (b), Nov. 25, 2002, 116 Stat. 2131.)

1988 Acts. House see 1988 U.S. Code News, p. 2149.

1996 Acts. Senate and House Conference Report 104-854, see 1996 U.S. Code News, p. 4239.

2002 Acts. House Report No. 107-777, see 2002 U.S. Code News, p. 11.

Amendments

2002 Amendment. Pub.L. 107-295, § 441(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), (w), (x), (y), (z), (aa), (ab), (ac), (ad), (ae), (af), (ag), (ah), (ai), (aj), (ak), (al), (am), (an), (ao), (ap), (aq), (ar), (as), (at), (au), (av), (aw), (ax), (ay), (az), (ba), (bb), (bc), (bd), (be), (bf), (bg), (bh), (bi), (bj), (bk), (bl), (bm), (bn), (bo), (bp), (bq), (br), (bs), (bt), (bu), (bv), (bw), (bx), (by), (bz), (ca), (cb), (cc), (cd), (ce), (cf), (cg), (ch), (ci), (cj), (ck), (cl), (cm), (cn), (co), (cp), (cq), (cr), (cs), (ct), (cu), (cv), (cw), (cx), (cy), (cz), (da), (db), (dc), (dd), (de), (df), (dg), (dh), (di), (dj), (dk), (dl), (dm), (dn), (do), (dp), (dq), (dr), (ds), (dt), (du), (dv), (dw), (dx), (dy), (dz), (ea), (eb), (ec), (ed), (ee), (ef), (eg), (eh), (ei), (ej), (ek), (el), (em), (en), (eo), (ep), (eq), (er), (es), (et), (eu), (ev), (ew), (ex), (ey), (ez), (fa), (fb), (fc), (fd), (fe), (ff), (fg), (fh), (fi), (fj), (fk), (fl), (fm), (fn), (fo), (fp), (fq), (fr), (fs), (ft), (fu), (fv), (fw), (fx), (fy), (fz), (ga), (gb), (gc), (gd), (ge), (gf), (gg), (gh), (gi), (gj), (gk), (gl), (gm), (gn), (go), (gp), (gq), (gr), (gs), (gt), (gu), (gv), (gw), (gx), (gy), (gz), (ha), (hb), (hc), (hd), (he), (hf), (hg), (hh), (hi), (hj), (hk), (hl), (hm), (hn), (ho), (hp), (hq), (hr), (hs), (ht), (hu), (hv), (hw), (hx), (hy), (hz), (ia), (ib), (ic), (id), (ie), (if), (ig), (ih), (ii), (ij), (ik), (il), (im), (in), (io), (ip), (iq), (ir), (is), (it), (iu), (iv), (iw), (ix), (iy), (iz), (ja), (jb), (jc), (jd), (je), (jf), (jg), (jh), (ji), (jj), (jk), (jl), (jm), (jn), (jo), (jp), (jq), (jr), (js), (jt), (ju), (jv), (jw), (jx), (jy), (jz), (ka), (kb), (kc), (kd), (ke), (kf), (kg), (kh), (ki), (kj), (kk), (kl), (km), (kn), (ko), (kp), (kq), (kr), (ks), (kt), (ku), (kv), (kw), (kx), (ky), (kz), (la), (lb), (lc), (ld), (le), (lf), (lg), (lh), (li), (lj), (lk), (ll), (lm), (ln), (lo), (lp), (lq), (lr), (ls), (lt), (lu), (lv), (lw), (lx), (ly), (lz), (ma), (mb), (mc), (md), (me), (mf), (mg), (mh), (mi), (mj), (mk), (ml), (mn), (mo), (mp), (mq), (mr), (ms), (mt), (mu), (mv), (mw), (mx), (my), (mz), (na), (nb), (nc), (nd), (ne), (nf), (ng), (nh), (ni), (nj), (nk), (nl), (nm), (nn), (no), (np), (nq), (nr), (ns), (nt), (nu), (nv), (nw), (nx), (ny), (nz), (oa), (ob), (oc), (od), (oe), (of), (og), (oh), (oi), (oj), (ok), (ol), (om), (on), (oo), (op), (oq), (or), (os), (ot), (ou), (ov), (ow), (ox), (oy), (oz), (pa), (pb), (pc), (pd), (pe), (pf), (pg), (ph), (pi), (pj), (pk), (pl), (pm), (pn), (po), (pp), (pq), (pr), (ps), (pt), (pu), (pv), (pw), (px), (py), (pz), (qa), (qb), (qc), (qd), (qe), (qf), (qg), (qh), (qi), (qj), (qk), (ql), (qm), (qn), (qo), (qp), (qq), (qr), (qs), (qt), (qu), (qv), (qw), (qx), (qy), (qz), (ra), (rb), (rc), (rd), (re), (rf), (rg), (rh), (ri), (rj), (rk), (rl), (rm), (rn), (ro), (rp), (rq), (rr), (rs), (rt), (ru), (rv), (rw), (rx), (ry), (rz), (sa), (sb), (sc), (sd), (se), (sf), (sg), (sh), (si), (sj), (sk), (sl), (sm), (sn), (so), (sp), (sq), (sr), (ss), (st), (su), (sv), (sw), (sx), (sy), (sz), (ta), (tb), (tc), (td), (te), (tf), (tg), (th), (ti), (tj), (tk), (tl), (tm), (tn), (to), (tp), (tq), (tr), (ts), (tu), (tv), (tw), (tx), (ty), (tz), (ua), (ub), (uc), (ud), (ue), (uf), (ug), (uh), (ui), (uj), (uk), (ul), (um), (un), (uo), (up), (uq), (ur), (us), (ut), (uu), (uv), (uw), (ux), (uy), (uz), (va), (vb), (vc), (vd), (ve), (vf), (vg), (vh), (vi), (vj), (vk), (vl), (vm), (vn), (vo), (vp), (vq), (vr), (vs), (vt), (vu), (vv), (vw), (vx), (vy), (vz), (wa), (wb), (wc), (wd), (we), (wf), (wg), (wh), (wi), (wj), (wk), (wl), (wm), (wn), (wo), (wp), (wq), (wr), (ws), (wt), (wu), (wv), (ww), (wx), (wy), (wz), (xa), (xb), (xc), (xd), (xe), (xf), (xg), (xh), (xi), (xj), (xk), (xl), (xm), (xn), (xo), (xp), (xq), (xr), (xs), (xt), (xu), (xv), (xw), (xx), (xy), (xz), (ya), (yb), (yc), (yd), (ye), (yf), (yg), (yh), (yi), (yj), (yk), (yl), (ym), (yn), (yo), (yp), (yq), (yr), (ys), (yt), (yu), (yv), (yw), (yx), (yz), (za), (zb), (zc), (zd), (ze), (zf), (zg), (zh), (zi), (zj), (zk), (zl), (zm), (zn), (zo), (zp), (zq), (zr), (zs), (zt), (zu), (zv), (zw), (zx), (zy), (zz).

Subsec. (b). § 441(b)(2), (3), struck and redesignated for (b). Prior to being struck, the agreement also by the owner of the vessel.

Subsec. (c). § 441(b)(2), redesignated (c) as (b).

1996 Amendment. Pub.L. 104-324, § 739, relating to measurement of tonnage under section 14302 or 14502 of this title.

Effective and Application

2002 Acts. Pub.L. 107-295, § 441(c), Nov. 25, 2002, as amended Pub.L. 107-295, § 137(a), Jan. 23, 2002, provided that: "An agreement that complies with the requirements of section 10601(a) of title 46, United States Code, [subsec. (a) of this section], as amended, is hereby deemed to be in compliance with the requirements of section 10601(b) of this title."

American Digest System
Seamen 6.
Key Number System

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

MICHAEL MCPHERSON,)	No. 15-2-29866-6 KNT
)	
Plaintiff,)	COA No. 75059-3-I
)	
v.)	
)	
FISHING COMPANY OF ALASKA,)	DISK ENCLOSED
)	
Defendant.)	
)	

VERBATIM REPORT OF PROCEEDINGS

THE HONORABLE LEROY MCCULLOUGH, JUDGE, PRESIDING
MARCH 18, 2016

APPEARANCES:

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King County Superior Court Cause No. 15-2-29866-6 KNT

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1 March 18, 2016, 10:04:26

2 COURT: Good morning.

3 MR. MERRIAM: Good morning, Your Honor.

4 COURT: The first person to file the motion for the
5 declaration will please introduce the case for the
6 record.

7 MR. MERRIAM: John Merriam for the plaintiff, Your
8 Honor. Your Honor, I'm sort of hard of hearing. May we
9 approach?

10 COURT: Yes. So you're Mr. Merriam? Your name
11 again?

12 MR. MERRIAM: John Merriam for Mike McPherson.

13 COURT: Alright.

14 And you, sir, are?

15 MR. BARCOTT: Mike Barcott, Your Honor.

16 COURT: Alright. So Mr. Merriam, you filed a
17 motion.

18 MR. MERRIAM: Well, Your Honor, if Your Honor's, if
19 the court has read the briefing, I think the issue is
20 real simple and straightforward. There's apparently no
21 controlling authority, so I just ask the court to use
22 common sense. I mean, when it says "a period of
23 effectiveness," I don't think a fishing company can just
24 ignore that and fire a guy for wearing a green shirt.
25 That's my argument in a nutshell, Your Honor.

1 COURT: Thank you. Lots of materials, but I did
2 read those, and I want to thank you both. A lot of
3 material. But for the record, it's Michael McPherson,
4 plaintiff, versus Fishing Company of Alaska. The case
5 number is 15-2-29866-6 KNT.

6 So Mr. Merriam, we still need you to go ahead and
7 sort of just summarize your position and make your
8 record. You're representing Mr. McPherson?

9 MR. MERRIAM: Correct.

10 COURT: And would agree, the two sides would agree
11 that the facts are not in dispute?

12 MR. MERRIAM: The only thing in dispute, Your
13 Honor, will come down the road, whether there's cause or
14 not for firing, depending on how this court rules today.

15 COURT: Alright. And so -- because I need to make
16 the record, I'm going to summarize some things and
17 you're going to tell me whether or not this is a correct
18 summary. Your client signed on to work with the Fishing
19 Company of Alaska. Is that right?

20 MR. MERRIAM: Correct.

21 COURT: And your client signed something like an
22 employment agreement?

23 MR. MERRIAM: Correct.

24 COURT: And that employment agreement said that he
25 would be working for how many days?

1 MR. MERRIAM: Ninety days, Your Honor.

2 COURT: For 90 days. And that agreement is in the
3 record. And I'm holding up what's listed as an
4 employment at-will contract.

5 MR. MERRIAM: Correct.

6 COURT: In this at-will contract, there's a section
7 called "Duration of Employment." And again, I'm just
8 holding this up as both counsel are at the bench.
9 There's another section down here that says "at-will" on
10 page 2 of 11. Is that correct?

11 MR. MERRIAM: Correct.

12 COURT: Mr. Merriam, then your position is that
13 even though this document is listed as an at-will
14 contract, in effect, it should be considered as a for-
15 cause contract when you consider what the statute was
16 trying to do?

17 MR. MERRIAM: As a matter of law, Your Honor, I'm
18 claiming the at-will language is a legal nullity.

19 COURT: Based on the interpretation of the federal
20 statute?

21 MR. MERRIAM: Correct.

22 COURT: And your strongest case of all of the cases
23 you submitted to the court, which one would you say is
24 the one that should give the court most pause?

25 MR. MERRIAM: Well, Judge Coughenour sort of ruled

1 in my favor, but not directly. Your Honor, there are no
2 cases directly on point, and Mr. Barcott doesn't have
3 any either.

4 COURT: Understood.

5 MR. MERRIAM: I contend. So yeah, I have no case
6 to rely on other than what I claim Judge Coughenour was
7 in the process of doing when the case got removed to
8 Judge Pechman.

9 COURT: In your opinion, who then would have the
10 burden of showing whether it's an at-will or for-cause
11 provision?

12 MR. MERRIAM: I don't know if the burden of proof
13 would be appropriate here, Your Honor, because we're
14 talking about an issue of law. So it's for Your Honor
15 to decide what the law is, and I don't think burdens
16 come in. Mr. Barcott can argue with that, but that's my
17 position.

18 COURT: And based on your understanding of the
19 legislative history, is there any presumption of at-will
20 versus cause in the history, in the legislation or
21 anything, any presumption at all?

22 MR. MERRIAM: I claim there is, and for the reasons
23 opposite to what Mr. Barcott is arguing, that putting in
24 "a period of effectiveness," you effectively overrule
25 the employment at-will doctrine, which was then in

1 effect.

2 COURT: Alright. Anything else then before I go to
3 Mr. Barcott?

4 MR. MERRIAM: That's it for me, Your Honor.

5 COURT: Thank you so much, Mr. Merriam.
6 Counsel.

7 MR. BARCOTT: Thank you, Your Honor. Actually, I
8 do agree with Mr. Merriam on burden of proof. My
9 understanding is there is no dispute that, on its face,
10 this is an at-will contract and the question is, as a
11 matter of law, is that permissible. So I think this is
12 a legal question, not one where there are facts involved
13 and a burden in dispute.

14 Mr. Merriam and I have been litigating against each
15 other for 20 or 25 years. He's a passionate advocate
16 for the rights of seamen, and I appreciate that. But
17 his passion doesn't make him right, and on this one,
18 unfortunately, he's just wrong.

19 We've laid it out in our briefs and it's clear Your
20 Honor has read and understands the briefs, and I don't
21 intend to reconstruct those. But our view -- a 30,000
22 foot view, if you will, Your Honor -- is a period of
23 effectiveness is there so that if this fisherman is
24 working during that time period, he knows what he's
25 going to be paid. And that's the reason for the

1 statute, so there's no question that a person knows what
2 they're going to be paid. But nothing about that
3 statute precludes an at-will provision and, of course,
4 the statute allows "other agreed terms."

5 So the question is, is there anything inconsistent
6 with our understanding. And the case law, Your Honor,
7 Mr. Merriam says there are no cases on point. In fact,
8 Judge Pechman's case, the Rector case, is precisely on
9 point. Now, it's federal court and, of course, it's not
10 controlling here, but Judge Pechman I think is a fairly
11 well thought of jurist in this town, and she got it
12 right. She said there's nothing inconsistent between a
13 period of effectiveness and at-will employment.

14 And then the Joaquim case from the Fifth Circuit,
15 cited in our brief, both the trial court and the
16 appellate court. There, it was a one-year period of
17 effectiveness and it was deemed an at-will contract with
18 a two-month buyout provision, which was a subsidiary
19 issue, but the Fifth Circuit and the district court
20 there made that quite clear.

21 There's nothing in the language of the statute that
22 prevents at-will. And our view of the legislative
23 history, Your Honor, Mr. Merriam actually has put the
24 point quite well: Did the legislature, did Congress here
25 overturn centuries of practice, centuries of practice of

1 at-will employment, without a word of that finding its
2 way into the statute or legislative history? So it is
3 the absence of anything on an issue so monumental that
4 precisely makes our point. There's nothing in the
5 statute that --

6 COURT: So when I'm talking about legislative
7 history and presumptions, then you're suggesting that,
8 in the absence of something to the contrary, the rule is
9 people ought to be able to contract --

10 MR. BARCOTT: Absolutely. Absolutely. It's --

11 COURT: --at, at will, if you will. And so that
12 the employee as well as the employer should be able to
13 exit the contract. That's the presumption?

14 MR. BARCOTT: That's the presumption. That's
15 exactly right. I mean, Your Honor, forever, employment
16 at-will was the rule in this country, and it's only in
17 the 20th century that for-cause even began to be
18 discussed. That Congress would have been doing away
19 with centuries of practice without stating it in the
20 statute or a word of it in the legislative history is
21 just counterintuitive. Of course that's not what
22 Congress intended.

23 And with that, Your Honor, that's essentially our
24 presentation.

25 COURT: What's Thompson v. St. Regis, what does

1 that contribute to this case?

2 MR. BARCOTT: Very little except the expression
3 that for there to be an at-will employment, it needs to
4 be clearly expressed, and if there's ambiguities, it is
5 not at-will; it's a state case, State Supreme Court case
6 of course. But since there is no argument about the
7 words of this contract, Thompson really doesn't shed
8 much light on anything.

9 COURT: But you both cited it. Terminable for
10 cause only if there's an implied agreement to that
11 effect. so. And that's kind of the essence of what
12 Thompson v. St. Regis talks about, right?

13 MR. BARCOTT: That's right.

14 MR. MERRIAM: For restricted contracts of
15 interminable duration, Your Honor.

16 COURT: Okay.

17 MR. MERRIAM: That's, that's where I think that
18 case supports my position.

19 COURT: But only if there's an implied agreement
20 that it is for cause. So is there an implied agreement
21 here?

22 MR. MERRIAM: I think there is, because when you
23 have a period of effectiveness, it's implied that to
24 overcome that period of effectiveness, the employee
25 wasn't performing his job well, and there you have for

1 cause.

2 COURT: Mr. Merriam, what's the effect then of
3 these various statements in the contract that spell out
4 at will, the at-will provision? What are we supposed to
5 do with that if the client signed that? What are we
6 supposed to do with that?

7 MR. MERRIAM: Those words are a legal nullity, Your
8 Honor. I've been, I've been practicing maritime law for
9 34 years, Your Honor, and I've conducted an informal
10 survey with the maritime bar, and it's amazing because
11 everybody on the plaintiff's side agrees with me and
12 everybody on the defendant's side agrees with Mr.
13 Barcott, so, I mean. You've got to decide, Your Honor.

14 COURT: I know.

15 MR. BARCOTT: I think that's your job. I haven't
16 seen that survey, Your Honor, but we probably will use
17 this case to sort that out through the courts of
18 appeals. Mr. Merriam and I have been this route before.
19 I do think it's clear though.

20 COURT: Let me ask a couple of other questions.
21 Some of the cases talk about protecting the seamen from
22 being taken advantage of, and they talk about sometimes
23 seamen having to do pre-work. And so my impression was
24 that the term of agreement of this set term was sort of
25 to keep the vessel company, if you will, from taking

1 advantage of people, having them do the ropes and
2 prepare the ship and all of that and then not getting
3 any money. So that was kind of what was going on there.

4 In this particular situation, is there any such
5 allegation that your client did any pre-work that needed
6 to be compensated?

7 MR. MERRIAM: No. Other than going from Missouri
8 to Dutch Harbor, Alaska, Your Honor, which is, forgive
9 the expression, a bit of the armpit of the western
10 hemisphere. It's a long way to go.

11 COURT: Which one is the armpit? Okay. Never
12 mind.

13 MR. MERRIAM: Your Honor, that is why your decision
14 today is so important because, as I used as an example
15 in the article I wrote of a guy who does a fit out for
16 this, you know, he works for free, and then starts a
17 lucrative fishing season, for instance, southeast Alaska
18 salmon, and then the owner's brother-in-law comes along
19 and says, "I want a job," so he says sayonara to the guy
20 who's done the preseason work. And if it's at will, he
21 can do that.

22 MR. BARCOTT: That is not the case we have here,
23 Your Honor. He showed up and he was paid and he worked
24 a short period of time and he was let go.

25 COURT: And that's one of the reasons I'm trying to

1 give you this opportunity to make a record because I do
2 believe that we'll be hearing about this some more.

3 Let's go to 46 U.S.C. 10601 which states in
4 relevant part, "Before proceeding on a voyage, the owner
5 shall make a fishing agreement in writing with each
6 seaman employed. The agreement shall (1) state the
7 period of effectiveness on the agreement; (2) include
8 the terms of any wage; and (3) include other agreed
9 terms."

10 Mr. Merriam, what's that section (3) mean, "include
11 other agreed terms"? That's what the federal statute
12 says. What did they have in mind with the other agreed
13 terms?

14 MR. MERRIAM: Food, fuel, and bait deductions, for
15 example. Some contracts make people pay for the
16 national fisheries routers, the observers. Some
17 contracts make them pay for insurance premiums. It does
18 not, (3) does not nullify (1).

19 COURT: Okay.

20 And Mr. Barcott, what do you think?

21 MR. BARCOTT: Well, Mr. Merriam is correct in what
22 he is describing. If Your Honor looks at the contract
23 in this case, there were eight pages of additional
24 terms: food, fuel, transportation, all of those kinds of
25 things. And it's simply our contention that the

1 question of whether this is an at-will or for-cause
2 contract is another such agreement, Your Honor.

3 COURT: Flores v. American Seafood. They talked
4 about whether or not this was, that was an adhesion
5 contract. Is this and adhesion, adhesive-type term, Mr.
6 Merriam?

7 MR. MERRIAM: It is not. The contract itself was
8 not adhesive. It's a question of who's interpreting
9 that contract.

10 COURT: Okay.

11 Mr. Barcott, what do you think?

12 MR. BARCOTT: I certainly agree with Mr. Merriam on
13 that. This was an arms-length contract.

14 COURT: Okay.

15 MR. BARCOTT: They negotiated terms, particularly
16 the pay rate on this. This is one of the ship's
17 officers. This is the chief engineer.

18 COURT: Okay.

19 MR. MERRIAM: Assistant.

20 MR. BARCOTT: Assistant. I'm sorry.

21 MR. MERRIAM: Your Honor, can I briefly address the
22 Joaquim decision that Mr. Barcott and Judge Pechman
23 relied on?

24 COURT: Go ahead.

25 MR. MERRIAM: If Your Honor has read it, it's

1 obvious that yes, there was a one-year period of
2 effectiveness, but it was -- and they could violate that
3 period of effectiveness if they gave the seaman two
4 months' pay. So there was a consequence for exercising
5 that at-will provision. I'm sure they could have, you
6 know, talked Mr. McPherson into going back to Missouri
7 if they gave him a couple weeks extra pay, two months,
8 whatever, but they didn't. They said goodbye after 18
9 days. "Just kidding. Just kidding about coming from
10 Missouri, Mr. McPherson, see you later."

11 MR. BARCOTT: So the record is clear, Your Honor,
12 and it's not part of this briefing, but it helps provide
13 the background facts. If we get to the for-cause part
14 of this case, it wasn't simply a goodbye -- and we'll be
15 putting on evidence. It's not part of this briefing,
16 but I think it's helpful for the court to understand
17 that Mr. McPherson was not just told goodbye for no good
18 reason.

19 MR. MERRIAM: That's disputed, Your Honor.

20 MR. BARCOTT: And that is disputed.

21 COURT: Okay.

22 MR. BARCOTT: And I'll readily grant that that's
23 disputed. But the Joaquim decision makes it very clear
24 that you can have a contract with a duration. In that
25 case, one year. And it is not inconsistent to have an

1 at-will provision. Now, there was a buyout provision in
2 that contract, but that's not the point. The point is
3 the court, the district court and the circuit court said
4 a contract for a fixed duration is not inconsistent with
5 at-will employment. The only wrinkle there was there
6 was a buyout provision when they chose to let him go.

7 COURT: And in the Joaquim, decision, they
8 referenced Brekken v. Reader's Digest. What about that
9 one?

10 MR. MERRIAM: Say that again, Your Honor.

11 COURT: They referenced the case of Brekken v.
12 Reader's Digest Special Products.

13 MR. MERRIAM: I confess that I did not look at that
14 case, Your Honor.

15 COURT: And according to Joaquim, the Brekken case
16 says, "Employment contract providing for a 12-month term
17 of duration nevertheless held terminable at will because
18 of language in the contract authorizing either party to
19 terminate the contract on written notice."

20 MR. MERRIAM: Then I have to distinguish it. That
21 contract's for a busboy, not a fisherman.

22 COURT: And that means what?

23 MR. MERRIAM: It means fisherman rely on periods of
24 time when certain fish are running; salmon, herring,
25 pollock, cod.

1 COURT: Okay.

2 MR. MERRIAM: And again, there's a statutory, I
3 claim statutory protection by Congress requiring a
4 period of effectiveness, which they don't have.

5 COURT: The Reader's Digest, counsel?

6 MR. BARCOTT: Your Honor, I'm going to make the
7 same confession that Mr. Merriam has made. I have not
8 gone that deeply into the cases, but I saw it cited in
9 the Joaquim case and saw the language, which is exactly
10 the language the Joaquim court used. And the point is
11 not he's a busboy or a fisherman; it is that as a matter
12 of law, a contract with a duration is not inconsistent
13 with employment at-will.

14 COURT: Well, I believe that the holding in the
15 Joaquim case is the one that governs, for a couple of
16 reasons. One is it seems to me that the history is that
17 people should have the freedom to go in and out of a
18 contract, that if Congress wanted that to be different,
19 they could have said that. They didn't.

20 It seems to me that the Reader's Digest case, which
21 is out of the Seventh Circuit, clearly states that there
22 is a difference between an expectation and a guaranteed
23 right and that the parties can contract to say that the
24 person can be terminated at will, even if there is a
25 term of 12 months stated, as long as it's clearly

1 specified who has the freedom to end, to exit the
2 contract. From a policy perspective, it seems like the
3 case is that it protects not only the employee, but it
4 also protects the employer, that with an at-will
5 contract, either can separate out.

6 So as you point out, Mr. Merriam, it's not really
7 an issue of adhesion. It's not that at all.

8 And so I think that it was interesting and
9 appropriate that the Joaquim did cite to Brekken v.
10 Reader's Digest. And I'm going to read for the record
11 just this statement from Joaquim v. Royal Caribbean
12 Cruises. "Under general contract principles, if the
13 language of a contract is clear, the question whether a
14 contract is of definite duration is a legal matter for
15 the court. A contract may be either one for fixed
16 duration or one terminable at will. Where the contract
17 includes a termination clause, classification of the
18 contract will depend on the language of the termination
19 clause. If the clause imposes a condition on
20 termination, the contract may be classified as one for
21 fixed duration. If, however, the contract imposes no
22 condition on the employer's power to terminate" -- and
23 that's the situation here by the language that's in the
24 contract - "the contract will be classified as one
25 terminable at will, regardless of other language

1 specifying a definite period of duration." And that's
2 when they cite the Brekken v. Reader's Digest case.

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

9 MR. BARCOTT: Thanks very much, Your Honor. Thanks
10 for the care you've taken on this.

11 COURT: Do you have an order to present?

12 MR. BARCOTT: This is the order we presented with
13 our motion. It's exactly the same.

14 COURT: Did you give counsel a chance to review it?

15 MR. BARCOTT: He saw it.

16 MR. MERRIAM: It's okay, Your Honor.

17 COURT: And did you sign this as saying --

18 MR. MERRIAM: I can sign it if you'd like.

19 COURT: Approved as to form, whatever language you
20 want to add. We understand that you both have
21 longstanding differences of opinion. I just need your
22 signature on that. Thank you for the extensive and
23 excellent briefing.

24 March 18, 2016, 10:28:06

25

1 I hereby certify that this is a true and correct report
2 of the proceedings conducted before Judge Leroy McCullough on
3 March 18, 2016 in the matter of Michael McPherson v. Fishing
4 Company of Alaska, King County Cause No. 15-2-29866-6 KNT. I
5 further certify I am in no way related to or employed by any
6 party or counsel and I have no interest in this matter.

7 Dated this 10th day of May, 2016.

8 *Rose Landberg*

9 Rose Landberg

10 Court-Approved Transcriptionist

11 AAERT Certified, No. CET-D 664

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