

TRIAL NEWS

WASHINGTON STATE ASSOCIATION
for
JUSTICE

December 2012 Volume 48, Number 4

4

TRIAL NEWS

December 2012

Maritime law

Are Punitive Damages Available in Wage Claims for Fisherman?

by John Merriam

Unlike blue water seamen on foreign voyages, fishermen and processors have no remedy under federal maritime law that includes wage penalties. 46 U.S.C. sec. 10313(g) (daily double wage penalty does not apply to fishing vessels). Some courts have borrowed from state law wage penalty statutes to fill in this gap in the maritime law. For example, Washington's double wage statutes, RCW 49.52.050 and .070, were recognized as a penalty that was available to a fisherman in *Gruver v. Lesman*, 2005 A.M.C. 1434 (W.D. Wash. 2005). However, the Ninth Circuit ruled that vessel owners may draft enforceable employment contracts stating that the federal maritime law cannot be supplemented by state law remedies. *Flores v. American Seafoods*, 2003 A.M.C. 1853 F.3d. 904 (2003). Many, if not most, fishing companies now include such language in contracts of employment with fishermen and processors, prohibiting supplementation of maritime law with the law of any state or local jurisdiction. What disincentive is there for vessel owners to not cheat their fishermen?

The availability of punitive damages under the general maritime law was in a confused state until *Atlantic Sounding v. Townsend*, 557 U.S. ____, 129 S.Ct. 2561, 2009 A.M.C. 1521 (2009) (punitive damages may be awarded for the "willful and wanton" disregard of a vessel owner's obligation to pay maintenance and cure). See also, *Clausen v. Icicle Seafoods*, 174 Wn.2d 70, 2012 A.M.C. 660, cert. denied, ____, U.S. ____ (October 2012). The field is now wide open. Following the *Atlantic Sounding* decision, "the rule seems to be that punitive damages are available under the general maritime law except where they have been eliminated by statute." Schoenbaum, *Admiralty and Maritime Law*, sec. 5-18 (5th ed. 2011)

This author has tried three times to get a ruling on the availability of punitive damages in wage claims for fishermen -- twice in federal court and once in state court. In all three cases, the motions were denied without prejudice as premature. In federal court, Judge Lasnik refused to issue an advisory opinion. *Warner v. F/V Miss Corinne et al.*, C11-619RSL (W.D. Wash. Order of 10/26/11). U.S. Magistrate Judge Donohue ruled that even if the fisherman's motion was construed as being one brought pursuant to the Declaratory Judgment Act, 28 U.S.C. sec. 2201, the facts were not ripe and instructed the plaintiff to raise the issue "at a later stage of the proceedings." *Kappas v. Zenith Boat, LLC, et al.*, C11-411JPD (W.D. Wash. Order of 11/9/11). In King County Superior Court, Judge Heller ruled that the issue should be raised later in a summary judgment motion. *Leavens et al. v. F/V Ocean Harvester et al.*, No. 11-2-09540-1 (Order of 5/23/11).

In each of the three cases the vessel owner filed bankruptcy before the proceedings were ripe for a summary judgment motion.

Stay tuned . . .

John Merriam, WSAJ EAGLE member, is a former merchant seaman, now a sole practitioner at Seattle's Fishermen's Terminal who restricts his practice to the representation of claimants for maritime wages and injury.