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FIFTH CIRCUIT SCRUTINIZES SEAMAN EXEMPTION TO FLSA OVERTIME REQUIREMENTS

US Fifth Circuit reverses summary judgment in favor of employer in overtime wage case involving a vessel-based offshore worker under the Fair Labor Standards Act—Marine employers should rely on the definitions of "seaman" developed under FLSA cases and related Department of Labor Regulations instead of definitions developed in Jones act personal injury litigation.

Halle v Galliano Marine Service, LLC[1] involves an offshore worker that both worked and lived onboard a remotely operated vehicle (ROV) support vessel and who was employed as a "ROV Technician and ROV Supervisor." ROV support vessels are specialty vessels designed to transport and support the deployment, operation, and return of ROVs.

ROVs are tools used to support offshore drilling operations and perform underwater maintenance and repair services.[2] Halle made an overtime wage claim against his employer arguing that he was a non-seaman for the purposes of the Federal Labor Standards Act (FLSA). The District Court granted summary judgment in favor of the employer because Halle was clearly a vessel-based employee that operated and maintained the ROV support vessel's ROVs, which it concluded was essential to the "mission of the support vessel" and that the ROVs constituted "vessel appurtenances."[3] The District Court also found that summary judgment was warranted because Halle would inform the ROV support vessel captain of where to direct the vessel and therefore "affected the safe navigation of the vessel."[4]

1 No. 16-30558 (5th Cir. Apr. 19, 2017)

2 The District Court referred to ROVs as "tools used to provide offshore services, including: blowout prevention backup for offshore drilling operations, inspection of subsea structures, turning subsea valves, realigning underwater connections, and placing marking beacons on the seafloor." Halle v. Galliano Marine Serv., LLC, Case No. 2:15-cv-05648-EEF-MBN, Doc. 22 at 1–2 (E.D. La. Feb. 25, 2016) (Fallon, J.).

3 *Id. at 9.*

4 *Id.*

The Fifth Circuit disagreed. Reversing the lower court, the Fifth Circuit clarified the legal standards applicable in seamen's overtime wage cases, and remanded the case back to the District Court for further proceedings.

FLSA-exempt seamen & Jones Act seamen are different concepts

At the outset, the Fifth Circuit emphasized the distinctions between a FLSA-exempt seaman and a Jones Act seaman. The Jones Act is a remedial statute passed to give crewmembers a remedy against their employers that they did not have at common law, while the seaman exemption to the FLSA is a statutory exception to a law designed to protect employees, requiring strict and narrow construction against the employer. This is why an injured employee will argue for seaman status to take advantage of the Jones Act, but—somewhat quizzically—against seaman status when making a claim for overtime wages.

This distinction is not novel. What is novel, however, is that the Fifth Circuit has now gone further than ever before to directly state that "it is error for a court to resolve an FLSA case by resorting to legal standards, such as the definition of a 'seaman' or an 'appurtenance,' from Jones Act caselaw."[5] This arguably alters how all seamen overtime wage claims will be handled in the future.

So what is a FLSA-Exempt seaman?

The FLSA requires employers to provide overtime pay to any employee who works more than forty hours a week unless a statutory exemption applies.[6] The exemption at issue simply states that the overtime requirements do not apply to "any employee employed as a seaman."[7] There is no further definition within the FLSA. In the past, the Fifth Circuit has looked to the Department of Labor's (DOLs) regulations to help address this question. Indeed, the DOL regulations, although not binding, are "entitled to great weight."[8] Thus, any defense to a seaman's overtime wage claim should be supported by reference to the DOL regulations.

In the Fifth Circuit, an employer must establish two criteria in order for the seaman exemption to the FLSA to apply: "(1) the employee is subject to the authority, direction, and control of the master; and (2) the employee's service is primarily offered to aid the vessel as a means of transportation, provided, that the employee does not perform a substantial amount of different work."[9] This is a highly fact-dependent test and the court must "evaluate an employee's duties based upon the character of the work he actually performs and not on what it is called or the place where it is performed."[10]

The employer failed to meet the summary judgment standard on both prongs

The Fifth Circuit offered little guidance with respect to the first prong, other than to note that there were competing affidavits on the issue of whether Halle, while onboard the ROV supply vessel, was "subject to the authority, direction, and control of the master".[11] Procedurally, if the summary judgment record contains only two competing affidavits, summary judgment cannot be granted from a purely factual perspective. From a practical standpoint, marine employers litigating these overtime wage cases must recognize the need for developing competent summary judgment evidence through deposition testimony and discovery on this prong.

With respect to the second prong, whether an employee's service is primarily offered to aid the vessel as a means of transportation, the Fifth Circuit emphasized that "the critical issue" is "determining whether the 'primary purpose' of the particular individual's work is safe navigation of the ship."[12] In other words, evidence on this prong must be developed to show how a marine employee aids the vessel's navigational function and/or contributes to the vessel's safe operations. This seems to be a retreat back to the prior "hand, reef, and steer" definition of a true

5 *Halle v. Galliano Marine Serv., LLC,* Case No. 16-30558 at 5 (5th Cir. Apr. 19, 2017).

6 29 U.S.C. §§ 207, 213; Coffin v. Blessey Marine Servs., Inc., 771 F.3d 276, 279 (5th Cir. 2014).

7 29 U.S.C. § 213(b)(6).

8 *Halle v. Galliano Marine Serv., LLC,* Case No. 16-30558 at 4 n.3 (5th Cir. Apr. 19, 2017) (quoting *Coffin,* 771 F.3d at 279).

9 Coffin, 771 F.3d at 281 (citing 29 C.F.R. § 783.31). Although not subject to "strict application," the general rule is that an employee's "work other than seaman work becomes substantial if it occupies more than 20 percent of the time worked by the employee during the workweek." Id. at 279 – 80 (citing 29 C.F.R. §783.37).

10 Id. at 280 (citing 29 C.F.R. § 783.33).

11 *Halle v. Galliano Marine Serv., LLC*, Case No. 16-30558 at 5–6 (5th Cir. Apr. 19, 2017). In this case, the employer offered an affidavit that Halle was subject to the direction and orders of the Captain but Halle attested that he a was not and reported to a shore-side supervisor. Although Halle's claim may seem preposterous, the issue here was that there was still a competing fact issue and no way for the District Court to rule in favor of the company on the evidence presented.

12 *Id. at 7.*

"seaman's" duties formerly used in Jones Act personal injury litigation, but the emphasis on vessel safety should not be overlooked. One of the deciding factors in the *Coffin* case, which was referred to favorably throughout the opinion, was the fact that in that case the marine employer "produced undisputed evidence" demonstrating that the vessel-based tankerman at issue performed duties that ensured the barge's safe and efficient operations.[13] This is still clearly the law. Marine employers defending these seaman overtime wage claims should therefore develop evidence that shows that the employee's work duties relate directly to safe vessel operations.

What does the future hold?

Much to the disappointment of marine employers, we anticipate that *Halle v Galliano Marine Service* will be read as an invitation to plaintiff's lawyers to sign up and bring more overtime wage claims on behalf of seamen. In many ways, this opinion is a retreat from the *Coffin* case—a hard-fought battle where the Fifth Circuit held that the vessel-based tankerman was a seaman for the purposes of the FLSA and therefore exempt from overtime wages. That being said, we stress that these cases are highly fact-driven and this particular opinion stems from a motion for summary judgment that was filed just three months after the original complaint and that was supported with a single, six-page affidavit. When placed into context, the combination of a flimsy summary judgment record and the inescapable reality that the employer bears the burden of proving the applicability of the FLSA seaman exemption, this result becomes more understandable. Indeed, it is still possible that after remand, further evidence will be developed that does support a finding of FLSA-exempt seaman status at trial.

This latest FLSA opinion certainly raises questions about vessel-based workers who do not "hand, reef, or steer" and, as a result, are arguably not primarily engaged in assisting a vessel's transportation or navigation function. For example, this opinion might be construed to lend support to lawyers representing temporary riding crews or other third-party workers employed on a special purpose vessel separate and apart from the navigational crew. Marine employers should continue to carefully consider FLSA issues and their potential exposure to overtime wage claims as a result of such arrangements. When faced with defending such a claim, employers should work closely with counsel to help ensure that sufficient evidence is developed to show that the seaman is subject to the command and control of the vessel Master and that his duties contribute to the transportation and overall safety of the vessel before moving for summary dismissal.

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13 *Coffin*, 771 F.3d at 282–284.

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