No. 04-1519

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

MEGAN McLAUGHLIN,

Plaintiff-Appellant

v.

BOSTON HARBOR CRUISE LINES, INC. and
MODERN CONTINENTAL CONSTRUCTION COMPANY, INC.

Defendants-Appellees

On Appeal from the United States District Court
for the District of Massachusetts

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT MEGAN McLAUGHLIN

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BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFF-APPELLANT MEGAN McLAUGHLIN

STATEMENT OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as amicus curiae in support of plaintiff-appellant Megan McLaughlin. McLaughlin filed a complaint seeking overtime compensation from her employer, Boston Harbor Cruise Lines and Modern Continental ("Harbor Cruises" or "employer"), under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq. ("FLSA" or "Act"). See 29 U.S.C. 207 (overtime compensation). Harbor Cruises filed a motion to dismiss, arguing that McLaughlin did

not raise a sufficient claim showing that she is not exempt from the FLSA's overtime requirement under 29 U.S.C. 213(b)(6), which exempts "any employee employed as a seaman." The district court granted the employer's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (failure to state a claim upon which relief can be granted).

The Secretary's interest in this case derives from the fact that the district court, in dismissing the case, failed to apply the Secretary's longstanding interpretation of the seaman exemption at 29 C.F.R. Part 783, which interprets "seaman" to include only those workers aiding in the transportation or navigation of the vessel. As discussed below, this Court's precedent, as well as that of the majority of the courts of appeals which have addressed this question, supports the Secretary's interpretation of the seaman exemption.

STATEMENT OF THE ISSUE

Whether the district court erred in dismissing the complaint on the ground that McLaughlin was "employed as a seaman" under 29 U.S.C. 213(b)(6) and the Secretary's applicable regulations at 29 C.F.R. Part 783, and thus was exempt from the overtime requirement of the FLSA, when McLaughlin alleged that for more than 90% of her workday she engaged in activities not related to the operation or navigation of the commuter vessel.

STATEMENT OF THE CASE

A. Statement of Facts

Megan McLaughlin alleged in her complaint that she was employed by Harbor Cruises and worked as a "deckhand on a commuter boat." (Appendix ("App.") at 8-9). She claimed that for more than 90% of her workday, she engaged in activities not related to the navigation of the commuter vessel; rather, she took passengers' tickets, loaded and unloaded passengers, collected fares, stood at the dock to ensure safe exiting of passengers, and swept the boat and dock areas. (Id.). The Plaintiff's Opposition to the Defendant's Motion to Dismiss states that she also cleaned the interior and exterior of the boat and the adjacent dock areas. (Id. at 29). McLaughlin stated that she was not actively engaged in the operation or navigation of the vessels upon which she worked, and did not perform any duties related to the navigation of the vessels, such as charting courses or monitoring radar. (Id. at 8-9).

McLaughlin further alleged that she frequently worked more than 40 hours per week, and was not paid overtime in accordance with section 7 of the FLSA, 29 U.S.C. 207. (App. at 9). In fact, she typically worked 60 hours and 80 hours per week during the winter months and summer months, respectively. (Id.).

B. The District Court's Decision

The district court granted Harbor Cruises's motion to dismiss for failure to state a claim upon which relief can be granted, see Fed. R. Civ. P. 12(b)(6), "substantially for the reasons advanced in the defendants' papers." (App. at 41). Harbor Cruises's motion contended that a deckhand on a commuter boat is an exempt "water transportation worker" under 29 U.S.C. 213(b)(6). (Id. at 14-15). Harbor Cruises essentially argued that the Secretary's Interpretive Bulletin incorporates by reference case law exempting all personnel employed aboard ferries, and there are no reported cases concluding that commuter boat deckhands are non-exempt under the FLSA. (Id. at 15).

SUMMARY OF ARGUMENT

The Secretary's interpretation of the seaman exemption, which has been in effect for 65 years, requires that the employee perform "service which is rendered primarily as an aid in the operation of [the] vessel as a means of transportation, provided he performs no substantial amount of work of a different character." 29 C.F.R. 783.31. This Court, in Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346 (1st Cir.), cert. denied, 326 U.S. 760 (1945), applied an analysis that parallels the Secretary's interpretation. It did so by examining, inter alia, the relevant legislative history of the

FLSA, which indicates that Congress understood the term "seaman" to refer to "water transportation workers." This Court rejected the employer's argument that the FLSA seaman exemption includes "groups of employees whose work is not directly connected with navigation and transportation by water." Id. at 348. Specifically, this Court concluded that the work of the dredgemen at issue was "essentially connected with excavation and not with navigation," 149 F.2d at 349, and thus was not the work of exempt seamen under the FLSA, although the workers would be covered as seamen under the Jones Act, 46 U.S.C. 688. In essence, this Court concluded that Congress did not intend the language "employed as a seaman" in the FLSA to be given anything other than "its commonly accepted meaning," i.e., aiding in the transportation or navigation of the vessel. 149 F.2d 348-49. Both the Fifth and Ninth Circuits, which have examined the exemption more recently, explicitly adopted the Secretary's "aid to transportation test." See, e.g., Dole v. Petroleum Treaters, 876 F.2d 518 (5th Cir. 1989); Donovan v. Nekton, Inc., 703 F.2d 1148 (9th Cir. 1983).

Just as this Court, in Bay State Dredging, specifically rejected the argument that the FLSA seaman exemption should be construed identically to other statutes that use the term "seaman," other courts have followed suit. See, e.g., Petroleum Treaters, 876 F.2d at 520-23. Maritime statutes like the Jones

Act have a different purpose than the FLSA, and "each statute's protections are to be construed as broadly as possible." Id. at 522-23. The FLSA's purpose is to provide "a fair day's pay for a fair day's work." Id. at 523 (internal quotations omitted). Thus, under the FLSA, exemptions are to be narrowly construed to minimize the number of workers who lose the Act's protections. Id. In this regard, it is significant that the exemption is written in terms of "employed as a seaman," rather than just "seaman" or some other way that makes the nature of the employer's business the determining factor. Compare, e.g., 29 U.S.C. 213(b)(3) ("exempting any employee of a carrier by air").

It is also of some significance that a 1946 Senate Committee on Education and Labor Report, in which Congress considered a bill to cover seamen under the minimum wage provisions, tracked the Secretary's interpretation of the seaman exemption closely, stating that such exemption "applies to those employees engaged in service which is rendered primarily as an aid in the operation of a vessel as a means of transportation." Furthermore, in 1961, when Congress amended the FLSA with respect to the seaman's exemption, it did not change the Secretary's interpretation.

The Supreme Court's decision in McDermott International, Inc. v. Wilander, 498 U.S. 337 (1991), does nothing to upset this analysis. There, the Supreme Court stated, in the context

of the Jones Act, that "'seaman' is a maritime term of art," and "[i]n the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning," which the Court concluded does not contain an aid to navigation test. Id. at 342, 353. The case law indicates that there is precisely such a "contrary indication" in regard to Congress's use of the term "seaman" in the FLSA. The legislative history indicates that, consistent with the statutory purposes, Congress intended the term "seaman" under the FLSA to mean an individual who aids in the transportation or navigation of the vessel. Moreover, there was no clearly established meaning of the term "seaman" when the FLSA was enacted in 1938.

In this case, the district court failed to apply the Secretary's longstanding interpretation of the seaman exemption and thus improperly dismissed the case. The complaint clearly raises a cognizable claim under the FLSA. Therefore, the case should be remanded to the district court to make complete factual findings and then to apply the Secretary's interpretation of the seaman exemption to those facts.

ARGUMENT

THE DISTRICT COURT FAILED TO APPLY THE SECRETARY'S LONGSTANDING INTERPRETATION OF THE FLSA SEAMAN EXEMPTION, WHICH REQUIRES THAT THE EMPLOYEE AID IN THE TRANSPORTATION OR NAVIGATION OF THE VESSEL

A. Statutory and Regulatory Framework

The FLSA, at 29 U.S.C. 213(b)(6), exempts from overtime "any employee employed as a seaman."[1] The Secretary's interpretive regulations ("Interpretive Bulletin" or "IB") provides a definition of "employed as a seaman":

> [A]n employee will ordinarily be regarded as "employed as a seaman" if he performs, as a master or subject to the authority, direction, and control of the master aboard a vessel, service which is rendered primarily as an aid in the operation of such vessel as a means of transportation, provided he performs no substantial amount of work of a different character.

29 C.F.R. 783.31.[2] The IB at 29 C.F.R. 783.37 defines "substantial" to mean more than 20% of the time in a workweek.[3]

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[1] The exemption originally encompassed both the minimum wage and overtime pay requirements. In 1961, Congress amended the exemption and extended minimum wage protection to employees employed as seamen on American vessels. Pub. L. No. 87-30, 75 Stat. 65, 72-73 (May 5, 1961). See 29 C.F.R. 783.0, 783.30.

[2] The definition applies to vessels navigating inland waters as well as ocean and coastal vessels. See 29 C.F.R. 783.31.

[3] The Secretary's interpretation of the statutory seaman exemption is entitled to deference in accordance with that interpretation's consistency and power to persuade. See United States v. Mead Corp., 533 U.S. 218, 227-28 (2001); Christensen v. Harris County, 529 U.S. 576, 587 (2000); Skidmore v. Swift & Co., 323 U.S. 134, 139 (1944); Bryson v. Shumway, 308 F.3d 79, 87 (1st Cir. 2002). See also 29 C.F.R. 783.3, 783.4. As will be shown infra, the Secretary's seaman exemption meets the

The Interpretive Bulletin at 29 C.F.R. 783.32 defines "seaman" to include crew members such as "sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards, if, as is the usual case, their service is of the type described in § 783.31," i.e., as an aid in the operation of the vessel as a means of transportation.[4] An employee employed as a seaman does not lose his exempt status if he performs incidental work not connected with the operation of the vessel as a means of transportation, such as assisting with loading and unloading freight at the beginning or end of a voyage, if such amount of work is not substantial. See 29 C.F.R. 783.32.

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criteria for Skidmore deference. See also Udall v. Tallman, 380 U.S. 1, 16 (1965) (particular deference for an agency interpretation that is contemporaneous with the statute's enactment).

[4] A 1946 Senate Committee on Education and Labor Report, in which Congress considered a bill to cover seamen under the minimum wage provisions, closely tracked the IB and explicitly adopted the test contained therein:

> Exemption of seamen under the Fair Labor Standards Act applies to those employees engaged in service which is rendered primarily as an aid in the operation of a vessel as a means of transportation. The exemption extends to employees of the crew such as sailors, engineers, radio operators, firemen, pursers, surgeons, cooks, and stewards, if their service is of the type described.

S. Rep. No. 1012, Part 2, Supplemental Report of the Committee on Education and Labor, accompanying S. 1349, 79th Congress, 2d Sess. at 102 (March 14, 1946), reprinted in Fair Labor Standards Act Amendments (Proposed) 1945-1946, Senate Hearings and Report.

Employment "as a seaman" depends on the work actually performed, "not on what it is called or the place where it is performed." 29 C.F.R. 783.33. Thus, an individual working aboard a vessel is not employed as a seaman unless his or her "services are rendered primarily as an aid in the operation of the vessel as a means of transportation, as for example services performed substantially as an aid to the vessel in navigation." Id. Stevedores and roustabouts traveling aboard a vessel from port to port, whose principal duties require them to load and unload the vessel in port, are not "employed as seamen" even though they may perform seamen-qualifying duties from time to time during the voyage. Id. Concessionaires and their employees aboard a vessel are not "employed as seamen," in part because "their services are ordinarily not rendered primarily as an aid in the operation of the vessel as a means of transportation." 29 C.F.R. 783.34. Similarly, "deck hands" of launches whose dominant work is industrial activity are not seamen. Id. Although barge tenders are usually considered "seamen," employees of barges and lighters who primarily perform duties such as loading and unloading, or custodial service, are not "seamen." See 29 C.F.R. 783.36.[5]

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[5] The IB was amended in 1943 to reflect that barge tenders are considered seamen unless they do a substantial amount of nonexempt work. See Interpretative Bulletin No. 11, Wage and Hour Administration, U.S. Department of Labor (July 1943),

The IB was first issued on April 29, 1939. See Interpretative Bulletin No. 11, Wage and Hour Administration, U.S. Department of Labor, reprinted in Wage and Hour Manual (BNA 1940). The provision defining "substantial" to mean 20% was added in 1948. See 13 Fed. Reg. 1376-77 (March 17, 1948). Although there have been additions to, and restructuring of, the original IB, the basic test for seaman status has not changed.

B. This Court and most other courts of appeals have utilized an aid to transportation or navigation test to determine whether the FLSA seaman exemption applies.

1. This Court, in addressing whether dredge workers were exempt seamen under the FLSA, applied an analysis that parallels the Secretary's interpretation. See Walling v. Bay State Dredging & Contracting Co., 149 F.2d 346 (1st Cir.), cert. denied, 326 U.S. 760 (1945). Specifically, this Court rejected the argument that the term "seaman" in the FLSA exemption should be interpreted to include "groups of employees whose work is not directly connected with navigation and transportation by water." Id. at 348. It ruled that both the terms of the FLSA and the purposes underlying that statute support this conclusion. The court thus observed that the FLSA:

> originated in a bill for the benefit and protection of workers in commerce generally, as set forth in its

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reprinted in Wage and Hour Manual (BNA 1944). See also Gale v. Union Bag & Paper Corp., 116 F.2d 27 (5th Cir. 1940), cert. denied, 313 U.S. 559 (1941).

> preamble, and anything cut out of its coverage is not in aid of the purpose of the legislation, but the reverse. Consequently, it is not only necessary to construe the exception strictly, but it is important to ascertain, if possible, whether or not, in this particular statute, Congress used the language "employed as a seaman" in any other than its commonly accepted meaning.

Id. at 349.

This Court also reviewed the legislative history of the FLSA "seaman" exemption. The FLSA, as originally proposed, did not contain an exemption for seamen. Seamen's unions appeared before the Joint Committee on Education and Labor and requested an exemption for seamen because they felt that their interests were already protected by the Maritime Commission in accordance with section 301 of the Merchant Marine Act of 1936, 49 Stat. 1985 (June 29, 1936).[6] The committee chairman explained on the Senate floor that the FLSA bill was amended with respect to maritime workers to avoid conflict with other legislation regulating wages and hours. See Bay State Dredging, 149 F.2d at 350 (citing 81 Cong. Rec. 7875 (July 30, 1937)). Significantly,

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[6] Section 301 regulated wages and hours over merchant seamen as follows:

> The Commission is authorized and directed to investigate the employment and wage conditions in ocean-going shipping and, after making such investigation and after appropriate hearings, to incorporate in the contracts authorized under titles VI and VII of this Act minimum-manning scales and minimum-wage scales and reasonable working conditions for all officers and crews employed on all types of vessels receiving an operating-differential subsidy.

this Court concluded that the committee chairman and the witness "agreed upon the expediency of the amendment and upon the reason. It is apparent that in the hearing both the witness and the member of the committee used the term 'seamen' with its common meaning, referring solely to water transportation workers." Id. at 350 (emphasis added).[7]

Finally, in concluding that the word "seaman" did not include the dredge workers at issue because their work was "essentially connected with excavation and not navigation," this Court stated generally that "[t]he line of demarcation between seamen and non-seamen is not distinctly drawn, and probably cannot be. It depends a good deal upon the facts in each case, especially upon the character of the work that is principally engaged in." Bay State Dredging, 149 F.2d at 349, 351-52. This

[7] The Interpretive Bulletin reflects the legislative history that the exemption is meant to apply to water transportation workers. See 29 C.F.R. 783.29. It is telling that the union representative who appeared at the hearings believed that under the FLSA there would be jurisdiction over "classes of workers who are engaged in transportation," and he was concerned about "workers engaged in transportation by water." Joint hearings before Senate Committee on Education and Labor and House Committee on Labor, 75th Congress, 1st Session, p. 546. This lends support to the conclusion that congressional intent at the time the FLSA was enacted was to use the term "seaman" to refer to someone actually aiding in the act of navigation or transportation.

statement is particularly difficult to reconcile with the Rule 12(b)(6) dismissal of the present case by the district court.[8]

In Mitchell v. Stinson, 217 F.2d 210, 215 (1st Cir. 1954), a case involving the exemption at 29 U.S.C. 213(b)(4) for employees employed in canning fish, this Court agreed with the following language from Walling v. W.D. Haden, 153 F.2d 196, 199 (5th Cir.), cert. denied, 328 U.S. 866 (1946), with respect to the seaman's exemption:

> The words of the exemption are: "Employees employed as seamen." The italicized words mean something; they are not mere tautology. They warn us to look to what the employees do, and not to rest on a mere matter of a name, or the place of their work. The entire [Fair Labor Standards] Act is pervaded by the idea that what each employee actually does determines its application to him. He himself must be engaged in commerce, or in producing goods for commerce, to come under the Act; and in most of the exemptions, as in this one, what he does is expressly made the test of exclusion.

This Court in Stinson stated that whether the seaman exemption applies is not determined by the business of the employer, but rather by the capacity in which the particular employee was acting. It compared the seaman exemption to 29 U.S.C.

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[8] Subsequent to Bay State Dredging, two district courts within the First Circuit have issued decisions recognizing the narrow construction of the seaman exemption under the FLSA. See Marshall v. Woods Hole Oceanographic Institution, 458 F. Supp. 709, 719 (D. Mass. 1978) (citing Bay State Dredging in support of denial of exemption for scientific crew aboard oceanographic research vessel); Cuascut v. Standard Dredging Corp., 94 F. Supp. 197, 206 (D. P.R. 1950) (exemption denied for captains and deckhands aboard launches since work "was not maritime in nature or performed in furtherance of transportation").

213(b)(3), which exempts "any employee of a carrier by air." In that exemption, the nature of the employer's business is dispositive. See 217 F.2d at 214-215.

2. During the 1940s and 1950s, most courts of appeals relied on the Interpretive Bulletin to define the seaman exemption under the FLSA. See, e.g., Martin v. McAllister Lighterage Line, 205 F.2d 623, 625 (2d Cir. 1953) (court's allowance of the seaman exemption for scow captains based in large part on the IB); Knudsen v. Lee & Simmons, Inc., 163 F.2d 95, 96 (2d Cir. 1947) (relying on IB to deny the seaman exemption to bargee on a lighter who spent the majority of his time working with cargo or acting as a signal man); Sternberg Dredging Co. v. Walling, 158 F.2d 678, 681 (8th Cir. 1946) (Secretary's interpretation "entitled to weight"; seaman exemption was denied with regard to dredge workers); Walling v. Great Lakes Dredge & Dock Co., 149 F.2d 9, 11 (7th Cir.) (court considered the IB along with the legislative history in concluding that dredging employees were not exempt seamen), cert. denied, 326 U.S. 760 (1945); Anderson v. Manhattan Lighterage Corporation, 148 F.2d 971, 973 (2d Cir.) (court gave Secretary's interpretation "considerable weight" and also considered legislative history in denying exemption with respect to captains of lighters transferring cargo), cert. denied, 326 U.S. 772 (1945). But see Weaver v. Pittsburgh Steamship Co.,

153 F.2d 597, 598-602 (6th Cir.) (court relied on broad definition of seaman found in other statutes in allowing exemption for ship's fireman during the "lay up" period at the conclusion of navigation season), cert. denied sub nom. Rymarkiewicz v. Pittsburgh Steamship Co., 328 U.S. 858 (1946)[9]; Walling v. Keansburg Steamboat Co., 162 F. 2d 405, 407-08 (3d Cir. 1947) (court relied heavily on the Sixth Circuit's decision in Weaver in applying the exemption to repairmen who worked on boats year-round, including during the mooring period; those who performed repair work only during the layup period were not exempt).[10]

3. Both the Fifth and the Ninth Circuits, which have considered the FLSA seaman exemption more recently, also have adopted the Secretary's interpretation. See Owens v. Seariver Maritime, Inc., 272 F.3d 698, 702 n.5 (5th Cir. 2001) (emphasizing its reliance on the Department's IB, with the exception of applying the 20% rule on a week by week basis, and

[9] In Woods Lumber v. Tobin Co., 199 F.2d 455 (6th Cir. 1952) (per curiam), however, the Sixth Circuit affirmed the district court's refusal to apply the seaman exemption to employees, including cooks, who worked on derrick boats. See Tobin v. Woods Lumber Co., 20 Labor Cases (CCH), § 66,640 (W.D. Tenn. 1951).

[10] The Third Circuit, however, also noted that it agreed with the principle articulated by the First Circuit in Bay State Dredging, that the exemption encompasses "only those nautical employees who are considered 'seamen' as the term is ordinarily used." Keansburg Steamboat Co., 162 F.2d at 407.

denying exemption with respect to an employee who spent substantial portion of his time loading and unloading barges), cert. denied, 535 U.S. 1073 (2002); Martin v. Bedell, 955 F.2d 1029, 1035-36 (5th Cir.) (court relied on IB in concluding that "in some cases a seagoing cook may not be a seaman," and remanded the case for a determination of whether the cooks spend more than 20% of their time preparing food for non-crew members), cert. denied, 506 U.S. 915 (1992); Pacific Merchant Shipping Association v. Aubry, 918 F.2d 1409, 1412 (9th Cir. 1990) (in a preemption case, the court used the IB in discussing the FLSA seaman exemption), cert. denied, sub nom. Tidewater Marine Service, Inc. v. Aubry, 504 U.S. 979 (1992); Worthington v. Icicle Seafoods, Inc., 796 F.2d 337, 338 (9th Cir. 1986) (case remanded because district court failed to apply the Secretary's interpretation of the seaman exemption to industrial maintenance employees on barges); Donovan v. Nekton, Inc., 703 F.2d 1148, 1151 (9th Cir. 1983) (marine and electronic technicians aboard oceanographic research vessels were not exempt "seamen" because their duties did not aid the operation of the vessel as a means of transportation). In Dole v. Petroleum Treaters, Inc., 876 F.2d 518, 520-21 (5th Cir. 1989), a particularly instructive case, the Fifth Circuit explained that the Secretary's interpretation of the seaman exemption, which applies an aid to transportation test, was consistent with

the court's analysis in Haden. Haden, which was cited approvingly by this Court in Stinson, 217 F.2d at 215 (see page 14, supra), held that workers on dredge boats performed industrial rather than maritime work, thereby precluding application of the seaman exemption. See 153 F.2d at 199. The court in Petroleum Treaters stated that the Secretary's "aid to transportation" test was entitled to "great weight," and because it was a contemporaneous construction of the statute consistently applied, it was entitled to "great respect." 876 F.2d at 521. The court further stated that the Secretary's interpretation "calls for an examination of the nature of the work actually performed by the employees and of the comparative amount of seamen versus nonseamen duties." Id. at 522. This analysis is "consistent with the entire FLSA's underlying theme that 'what each employee actually does determines its application to him.'" Id. (quoting Haden, 153 F.2d at 199).

The Fifth Circuit also explained that congressional inaction during the years following the issuance of the Secretary's interpretation indicates acquiescence in that interpretation. Petroleum Treaters, 876 F.2d at 522. In 1961, Congress amended the FLSA with respect to the seaman's exemption; however, Congress did not change the Secretary's longstanding interpretive definition of the term "seaman" at

that or any other time.[11] The Fifth Circuit relied on Lorillard v. Pons, 434 U.S. 575, 580 (1978), in which the Supreme Court stated that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." Id.[12]

4. In sum, the overwhelming weight of the case law, including in this Circuit, referencing the statutory text, legislative history, and purposes, supports the Secretary's longstanding interpretation of the "seaman" exemption to mean someone involved in aiding transportation or navigation.

C. The courts of appeals generally have read the FLSA seaman exemption narrowly while at the same time reading the term "seaman" broadly in the context of other statutes.

1. In following the Secretary's interpretation, the courts of appeals have generally rejected the argument that the term

[11] Congress extended the minimum wage provisions to employees employed as seamen on American vessels and added a definition of American vessel. See Pub. L. No. 87-30, §9, 75 Stat. 65, 72-73 (May 5, 1961) (provisions relating to sections 13(a)(14) and 13(b)(6) of Act); see also S. Rep. No. 145, 87th Cong., 1st Sess. 9, 32-33, 46, 50 (1961); H.R. Rep. No. 75, 87th Cong., 1st Sess. 5, 13-14, 31, 36, 40, 55-56 (1961); H.R. Rep. No. 327, 87th Cong., 1st Sess. 16-17 (1961) (Statement of the Managers on the Part of the House). The Secretary's regulation at 29 C.F.R. 783.30 discusses the 1961 amendments.

[12] See also Clean Harbors Environmental Services, Inc. v. Herman, 146 F.3d 12, 20 (1st Cir. 1998) (citing Lorillard, this Court stated that "Congress was surely aware of these administrative and judicial interpretations when it reenacted the STAA [Surface Transportation Assistance Act] without substantive change").

"seaman" is to be interpreted identically under the FLSA as it is in other statutes pertaining to seamen. See generally Knudsen, 163 F.2d at 96 (seaman in FLSA distinguished from seaman in Social Security Act regulations); Anderson v. Manhattan Lighterage Corp., 148 F.2d 971, 972-73 (2d Cir. 1945) (same); Sternberg Dredging, 158 F.2d at 680 (interpretation of "seamen" in remedial seamen statutes such as the Jones Act is not pertinent to the interpretation of that term under the FLSA seaman exemption). But see Weaver, 153 F.2d at 600-01 (court referred to other statutes to determine whether employee was a seaman under the Fair Labor Standards Act).

2. In Bay State Dredging, 149 F.2d at 351-52, this Court acknowledged that dredge workers are seamen under the Jones Act, but reversed the district court's dismissal of an FLSA overtime complaint because the "commonly accepted" meaning of "seaman," which Congress intended to incorporate into the FLSA, does not include dredge-workers.[13] This Court observed that "the term 'seaman,' used in various Acts, as well as the term 'members of

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[13] The court quoted Warner v. Goltra, 293 U.S. 155, 158 (1934):

> [W]hat concerns us here and now is not the scope of the class of seamen at other times and in other contexts. Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained.

149 F.2d at 349.

the crew', used in the Longshoremen's Compensation Act, 33 U.S.C.A. §901 et seq., are flexible terms, the meaning of which depends upon the circumstances in which they are used and the purpose of the particular statute in which they occur." Id. at 351-52. In this regard, this Court stated that "it is important to ascertain, if possible, whether or not, in this particular statute, Congress used the language 'employed as seaman' in any other than its commonly accepted meaning." Id. at 349 (emphasis added).

3. In Petroleum Treaters, 876 F.2d at 520-23, the Fifth Circuit also specifically rejected the argument that the definition of "seaman" under the Jones Act applies to the term "seaman" in the FLSA section 13(b)(6) exemption.[14] The Fifth Circuit cited this Court's decision in Bay State Dredging, and explained that the Jones Act, which gives an injured seaman the right to seek damages at law where the injury was suffered in the course of employment, should be interpreted broadly to "maximize the scope of the remedial coverage." Petroleum Treaters, 876 F.2d at 522. On the other hand, the FLSA

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[14] Accord Owens v. Seariver Maritime, Inc., 272 F.3d 698, 702 (5th Cir. 2001), cert. denied, 535 U.S. 1073 (2002); Bedell, 955 F.2d at 1035 n.11; Haden, 153 F.2d at 198-99. Compare Brown v. Nabors Offshore Corp., 339 F.3d 391, 395 (5th Cir. 2003) (the Jones Act meaning of "seaman" applies to the Federal Arbitration Act, which excludes from coverage "contracts of employment of seamen," as contrasted with the narrower FLSA interpretation).

exemptions have been written narrowly "to minimize the number of employees who lose the Act's protections," since the purpose of the Act is "'to extend the frontiers of social progress' by 'insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.'" Id. at 523 (quoting A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945), in turn quoting Message of the President to Congress, May 24, 1934).

Moreover, as the Fifth Circuit explained in Petroleum Treaters, the FLSA legislative history never references the Jones Act. 876 F.2d at 523. Rather, the legislative history indicates that the term "seaman" was meant to have its "ordinary meaning," and to expand beyond this definition under the authority of a separate statute "would frustrate congressional intent." Id.

Finally, the Fifth Circuit stated in Petroleum Treaters that the structure and wording of the FLSA seaman exemption are significant. 876 F.2d at 523. Thus, when Congress enacted certain exemptions to the FLSA, it listed specific statutes as references for purposes of defining them, e.g., 29 U.S.C. 213(b)(1) (exemption controlled by the Motor Carrier Act of 1935); 213(b)(2) (exemption controlled by the Interstate Commerce Act); 213(b)(3) (exemption controlled by the Railway Labor Act). Had Congress intended that the definition ascribed to the Jones Act control the seaman exemption under the FLSA, it

would have so stated. Id. Additionally, as noted in Haden, the words "employed as a seaman" are significant -- "[i]t is not enough to consider a worker's status under other statutes as a basis for determining his status under the FLSA." Id. Thus, the FLSA seaman exemption must be read in the context of that particular statute.

D. The Supreme Court's decision in Wilander does not support a broader reading of the FLSA seaman exemption.

1. In McDermott International, Inc. v. Wilander, 498 U.S. 337, 342 (1991), the Supreme Court, in a Jones Act case, stated that:

> "[S]eaman" is a maritime term of art. In the absence of contrary indication, we assume that when a statute uses such a term, Congress intended it to have its established meaning. Our first task, therefore, is to determine who was a seaman under general maritime law when Congress passed the Jones Act.

498 U.S. at 342 (citations omitted). The Court upheld the Fifth Circuit's determination that, under the Jones Act, "the key to seaman status is employment-related connection to a vessel in navigation. . . . It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work." Id. at 354-55. See also Chandris v. Latsis, 515 U.S. 347, 368 (1995). Although Harbor Cruises did not advance this argument below, it may be argued, post-Wilander, that the "established meaning" of seaman at the time of the FLSA's enactment was broad, just as it was

when the Jones Act was passed in 1920. Such an argument, however, must fail.

2. Wilander does not address the FLSA, and we have demonstrated supra that there was a "contrary indication" by Congress when it used the term "seaman" in the FLSA. See Wilander, 498 U.S. at 341-42 (because Jones Act overruled a maritime decision, that Act can be assumed to use the term "seamen" in the same manner as admiralty courts). As described above, in both pre- and post-Wilander cases, the courts of appeals, looking to the text of the FLSA and the relevant legislative history and statutory purposes, have viewed that statute as distinct from the Jones Act, and have thus interpreted the term "seaman" in the FLSA narrowly. See, e.g., Bay State Dredging, 149 F.2d at 348-52 (pre-Wilander), Bedell, 955 F.2d at 1035-36 (post-Wilander). Cf. General Dynamics Land Systems, Inc. v. Cline, 124 S. Ct. 1236, 1245-46 n.8 (2004) ("The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them, runs all through legal discussions. It has all the tenacity of original sin and must constantly be guarded against.") (internal quotation marks omitted).

3. Furthermore, during the periods before and after the FLSA's enactment in 1938, there was confusion as to the

"established meaning" of the term "seaman." See Wilander, 498 U.S. at 348-53 (describing Supreme Court's "inconsistent use of an aid in navigation requirement"). A brief description of the source of that confusion demonstrates that it can hardly be assumed that Congress intended the term "seaman" in the FLSA to have a meaning congruent with that term in the Jones Act. In 1927, Congress enacted the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 44 Stat. 1424, as amended, 33 U.S.C. 901-50. The LHWCA provides recovery for injury to a broad range of maritime workers, but explicitly excludes from coverage "a master or member of a crew of any vessel." 33 U.S.C. 902(3)(G). As discussed in Wilander, the "master or member of a crew" exception in the LHWCA was considered to be merely a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those workers who are covered under the Jones Act. See 498 U.S. at 347-48. See also Maryland Casualty Co. v. Lawson, 94 F.2d 190, 193 (5th Cir. 1938) (concluding that the worker was a "seaman" entitled to sue under the Jones Act, and also was a "member of the crew" excluded from the LHWCA).

While courts of appeals often used "seaman" and "crew" interchangeably, they nevertheless often imposed an "aid to transportation or navigation" component in order to be a member

of a crew excluded from LHWCA coverage.[15] For example, in Seneca Washed Gravel Corp. v. McMaginal, 65 F.2d 779, 780 (2d Cir. 1933), the court held that the word "crew" under the LHWCA connotes "a company of seamen belonging to the vessel," but that the crew "is usually referred to and is naturally and primarily thought of as those who are on board in aiding in the navigation." And in Diomede v. Lowe, 87 F.2d 296, 298 (2d Cir.), cert. denied sub nom. Moran Bros. Contracting Co. v. Diomede, 301 U.S. 682 (1937), the Second Circuit stated that "crew" under the LHWCA "is naturally and primarily thought of as those who are on board and aiding in the navigation." Accord Taylor v. McManigal, 89 F.2d 583, 585 (6th Cir. 1937).[16]

Thus, when the FLSA was enacted in 1938, the term "seaman," although unsettled, was frequently viewed as including an aid to transportation or navigation component. Shortly after passage of the FLSA, this Court, while explicitly recognizing that the terms crew and seaman had been used interchangeably, stated that to be a "member of the crew" under the LHWCA the worker must be

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[15] This occurred despite the fact that in 1934, the Supreme Court defined "seaman" broadly under the Jones Act. See Warner, 293 U.S. at 157-59.

[16] Indeed, the Supreme Court in Wilander stated that even after its decision in Warner, in 1934, "plainly rejected an aid in navigation requirement under the Jones Act," the Court nevertheless continued to "assert an aid in navigation requirement" in Jones Act cases in the 1950s, as well as in LHWCA cases. 498 U.S. at 348-53.

on board "primarily to aid in navigation," but that "one who does any sort of work aboard a ship in navigation" is a covered "seaman" under the Jones Act. Carumbo v. Cape Cod S.S. Co., 123 F.2d 991, 994-95 (1st Cir. 1941).

E. In dismissing this case, the district court failed to apply the Secretary's interpretation of the seaman exemption.

For purposes of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court must accept the plaintiff's allegations as true and draw all reasonable inferences in the plaintiff's favor. See Tag/ICIB Services, Inc. v. Pan American Grain Co., Inc., 215 F.3d 172, 175 (1st Cir. 2000). "A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should succeed only when it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegation." Doran v. Massachusetts Turnpike Authority, 348 F.3d 315, 318 (1st Cir. 2003) (internal quotation marks omitted), cert. denied, 124 S. Ct. 2107 (2004). See also Gonzalez-Bernal v. United States, 907 F.2d 246, 248 (1st Cir. 1990) (same).

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) should be used especially sparingly in a case such as this. Even if applying the proper legal standard, "[t]he line of demarcation between seamen and non-seamen is not distinctly drawn. . . . It depends a good deal upon the facts in each

case." Bay State Dredging, 149 F.2d at 351. See Wilander, 498 U.S. at 356 ("inquiry into seaman status is of necessity fact specific," and a directed verdict is appropriate only when "the facts and law will reasonably support only one conclusion"); Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986) (the question of how the employees spent their working time on the vessel is a question of fact).[17]

In the instant case, McLaughlin alleged that she spent more than 90% of her work day engaged in activities not related to navigation of the vessel (App. at 8-9). She specifically described seemingly non-navigational duties, such as collecting tickets and fares, loading and unloading passengers, and sweeping the dock areas.[18] If the district court had applied the

[17] See also Bedell, 955 F.2d at 1036 (district court's findings not stated "in terms sufficient to satisfy the standards of Labor's interpretive bulletins"); Tate v. Showboat Marina Casino, 2002 WL 31443124 (N.D. Ill. 2002) (motion to dismiss denied even though plaintiffs did not specifically allege that their work was not primarily in aid of transportation nor did they describe any non-maritime duties); Douglas v. Dixie Sand & Gravel Corporation, 17 Labor Cases (CCH) ¶65,370 (E.D. Tenn. 1949) (denial of motion to dismiss because particular facts regarding seamen exemption "will have to appear before the case can be intelligently adjudicated"); Sheppard v. American Dredging Co., 77 F. Supp. 73 (E.D. Pa. 1948) (dismissal premature even though unlikely that workers will prevail under the seaman exemption).

[18] Harbor Cruises argued before the district court that in 1962, loading and unloading baggage was deleted as an example of nonexempt work. (App. at 22, 24). However, the deletion of the phrase does not mean that handling baggage is exempt work. The 1962 IB was a reorganization of prior versions. Significantly,

Secretary's interpretation of the seaman exemption as set out above, these allegations should have been sufficient to defeat a motion to dismiss. Indeed, the district court's dismissal is tantamount to a finding that deckhands on commuter boats are exempt "water transportation workers" under 13(b)(6) as a matter of law. Clearly, the IB and the case law instruct that what the employee is called, or where the work is performed, is not determinative. Each case must be analyzed independently in accordance with the Secretary's "aid to transportation" test. That was not done in this case.

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it also added a new section explaining that employment as a seaman depends on "the character of the work he actually performs and not on what it is called or the place where it is performed." See 29 C.F.R. 783.33; 27 Fed. Reg. 8309, 8314 (August 21, 1962). Furthermore, the loading and unloading of freight is not considered the work of a seaman. See 29 C.F.R. 783.32. It would be difficult to distinguish between handling baggage and loading and unloading freight in terms of exempt status. See also 29 C.F.R. 783.5 ("The omission to discuss a particular problem in this part or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor or the Administrator with respect to such problem or to constitute an administrative interpretation[] or practice or enforcement policy.").

CONCLUSION

For the foregoing reasons, the Secretary supports McLaughlin's request for a reversal of the district court's dismissal of this case, and suggests that the case be remanded for a determination of the facts and for application of the law in accordance with the Secretary's interpretation to those facts.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing amicus brief of the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,999 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using Microsoft Office Word 2003, with 10.5 characters per inch and Courier New 12 point type style.

______________________	______________________
DATE	CAROL B. FEINBERG Attorney

CERTIFICATE OF SERVICE

I Carol B. Feinberg, Esq., hereby certify that on August 20, 2004, I served copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* in Support of Plaintiff-Appellant Megan McLaughlin, on the following parties, by way of Federal Express overnight mail, postage prepaid, to:

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