JUN 1 - 1999

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DON VAN NGUYEN, et al.,

Plaintiffs,

v.

AMERICAN SEAFOODS COMPANY,

Defendant.

NO. C98-525WD

ORDER ON PLAINTIFFS' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs, eighteen men of Vietnamese national origin, worked aboard defendant American Seafoods Company's F/T OCEAN ROVER during the "A Season" of 1998. During the second trip of the season, plaintiffs, who were employed in the vessel's processing plant, stopped working and did not work for the rest of the trip. Plaintiffs allege that they ceased working because they became too ill to work, and that defendant ("ASC"), by denying them leave from work to recuperate, forced them to quit. They contend that ASC subjected them to unlawful working conditions, and, afterward, improperly reduced the pay shares of some of the plaintiffs. ASC denies these contentions and alleges that plaintiffs conducted an unlawful strike.

In this suit, plaintiffs allege that ASC's conduct was discriminatory, amounted to a breach of contract, and violated federal and state statutes. ASC counterclaims, contending that plaintiffs'

unlawful strike led to lost production, and that plaintiffs damaged some of the ship's staterooms. Plaintiffs now move for partial summary judgment on certain contract claims, on the application of state law, and to dismiss defendant's counterclaims.

II. RULE 56 STANDARD

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the case and requires a trial to resolve differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., Inc., 809 F.2d at 630-31.

III. MOTION FOR PARTIAL SUMMARY JUDGMENT ON CERTAIN CONTRACT CLAIMS

Plaintiffs move for partial summary judgment on their contention that defendant breached its contracts by failing to pay them their full contracted crew shares. Each plaintiff entered into a contract with ASC in which the company promised to pay him a fixed percentage of the production of the vessel while he worked on board. The contracts provided for different shares of the production but were made on identical forms prepared by ASC. The term of the contracts was for one trip, although it was contemplated that the contracts would be renewed for later trips.

The plaintiffs stopped working during the OCEAN ROVER's second 1998 fishing trip. They claim they were constructively discharged in violation of their civil rights; defendant claims that

plaintiffs went on strike and/or voluntarily quit their jobs. Defendant imposed a penalty on most plaintiffs[1] by unilaterally reducing their shares to .00112, and by paying them based on this lower share. The shares were reduced retroactively for both the first and second trips.

Plaintiffs contend that the contract does not permit the reduction imposed by ASC. Paragraph 4.2 of each contract provides:

> Employer reserves the right to increase, decrease or maintain Crew Member's share for subsequent trip contracts and/or trip extension Agreements, if any, based upon Crew Member's work performance during the term of this Agreement. The Vessel Factory Manager or Vessel Captain shall have the sole discretion to determine Crew Member's assigned share each trip. A change in Crew Member's share shall have no effect in altering any other terms of this agreement.

ASC Human Relations Vice President Tammy French discussed this provision in her deposition.[2] She testified that Paragraph 4.2 does not allow the company to reduce an employee's crew share for trips already completed or commenced at the time the employee quits.

ASC argues that this testimony contradicts her testimony on pages 288-89 of her deposition that the contract "did allow for crew shares to be increased or decreased at the discretion of the vessel." That statement cannot, however, be reasonably read to contradict her specific concession -- also on page 289 -- that Paragraph 4.2 does not allow retroactive share reductions. Read as a whole, Ms. French's testimony regarding Paragraph 4.2 is clear and unequivocal.[3]

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[1] Seventeen of the eighteen plaintiffs had their shares reduced. Ultimately, defendant reinstated the prior crew share levels for a number of those employees after receiving confirmation of their medical conditions.

[2] Ms. French was designated by defendant as its CR 30(b)(6) representative regarding "American Seafoods' interpretation of the crew contract used aboard the OCEAN ROVER in 1998."

[3] In a declaration submitted in opposition to this motion for partial summary judgment, Ms. French contradicts her deposition testimony, claiming that, under Paragraph 4.2, ASC has discretion to retroactively reduce the wages earned by a crew member. This changed testimony has little or no probative value. See Radobenko v. Automated Equipment Corp., 520 F.2d 540, 544 (9th Cir. 1975) (on motion for summary judgment, declining to find a genuine issue of material fact on the basis of affidavits which contradicted deposition

1 Ms. French's deposition testimony comports with the plain meaning of Paragraph 4.2. The first sentence of the paragraph provides that the company may decrease crew shares on subsequent trips; the second sentence provides that the "Vessel Factory Manager or Vessel Captain" shall exercise the company's discretion in that regard. If the contract were to be interpreted as granting defendant an unlimited right to decrease crew shares retroactively, the reference to "subsequent trip contracts" in the first sentence would be rendered meaningless.[4]

ASC submits extrinsic evidence that it claims supports its contention that the contract allows it to reduce crew shares retroactively. Under Washington law, extrinsic evidence is admissible regardless of whether or not the contract language is ambiguous, but cannot be considered "for the purpose of varying the terms of a written contract." U.S. Life v. Williams, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). Under federal law, "[e]xtrinsic evidence is inadmissible to contradict a clear contract term." See Pierce Co. Hotel Employees & Restaurant Employees Health Trust v. Elks Lodge, B.P.O.E. No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987). Under either the Washington or federal rule, the extrinsic evidence offered by ASC fails to raise an issue for trial. "It is the duty of the court to declare the meaning of what is written, and not what was intended to be written." U.S. Life, 129 Wn.2d at 571 (quoting Berg v. Hudesman, 115 Wn.2d 657 (1990)). Paragraph 4.2 clearly

testimony). In the same declaration, Ms. French also reads of Paragraph 6.2(f) of the contract as permitting retroactive crew share reductions. That paragraph clearly refers to recovery for damage "claims" incurred by ASC as a result of employee actions; it cannot be read to allow ASC to retroactively reduce crew shares to compensate for general lost production.

[4] Under defendant's interpretation of the contract, the "Vessel Factory Manager or Vessel Captain" would have unrestricted discretion to retroactively reduce a crew member's contractual share. Such an interpretation would probably render the contract illusory. See The Howick Hall, 10 F.2d 162, 163 (E.D. La. 1925) ("[T]o allow the shipowner or the captain to arbitrarily reduce wages would be going too far, and to give the clause that meaning would render it void for lack of mutuality."). Furthermore, such an arrangement could violate 46 U.S.C. § 10601, which requires that vessel owners to put contracts with workers in writing, including compensation terms. Although there is a written contract in this case, under defendant's argument the written crew share term would be meaningless.

applies to subsequent trips only, and no other provision of the contract permits ASC to retroactively reduce crew shares.

ASC, of course, has other remedies when a crew member voluntarily stops working. Under the contract, the employer will owe only a crewshare based on production earnings through the last shift worked, and may charge for travel expenses and room and board.

IV. MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE APPLICATION OF STATE LAW

Plaintiffs claim that defendant discriminated against them on account of their race and Vietnamese national origin and breached its contracts with them by failing to pay them their full wages. They allege that this conduct violated three Washington statutes: the Washington Law Against Discrimination, RCW 49.60; a statute that makes it a misdemeanor to fail to pay an employee's full wages at the end of employment, RCW 49.48; and a statute that makes it a misdemeanor to willfully withhold an employee's wages, RCW 49.52.

The contracts between plaintiffs and ASC contained a provision purporting to waive all protections afforded by state law:

> This Agreement shall be governed exclusively by the general maritime laws of the United States and applicable United States Statutes. Employer and Crew Member expressly agree that their respective obligations, rights, and remedies with respect to the employment relationship established by this Agreement and all disputes of whatever nature arising out of this employment relationship, shall be governed exclusively by such federal law and shall not be enlarged, supplemented or modified by the laws of any State or local jurisdiction.

Plaintiffs argue that this contractual provision is ineffective to eliminate the crew members' statutory rights under Washington law.

As a general matter, the federal maritime law does not preempt non-conflicting state law. States "may supplement federal admiralty law as applied to matters of local concern, so long as state law does not actually conflict with federal law or interfere with the uniform working of the maritime legal system." Pacific Merchant Shipping Ass'n v. Aubry, 918 F.2d 1409, 1422 (9th Cir. 1990), cert.

denied, 504 U.S. 979 (1992). ASC has not suggested that the Washington statutes involved in this case conflict or interfere with federal maritime law, and no such conflict or interference is apparent.

The question, then, is whether the contract plaintiffs signed is effective to waive their rights under the Washington statutes. In Shoreline Community College Dist. No. 7 v. Employment Sec. Dept., the Washington Supreme Court held that employees could not waive statutory unemployment benefits in a collective bargaining agreement. 120 Wn.2d 394, 409-410, 842 P.2d 938 (1992). Although, as ASC points out, Shoreline involved an unemployment compensation statute which expressly prohibited waiver of its provisions by contract, the holding did not rely on the statutory language prohibiting waiver. Instead, the court emphasized that "[w]here a statutorily created private right serves a public policy purpose, the persons protected by the statute cannot waive the right either individually or through the collective bargaining process." Id.

ASC points out that some courts have enforced contractual provisions that affect seamen's substantive rights.[5] It cites Fuller v. Golden, in which the court upheld a contractually agreed-upon six-month statute of limitations on *in personam* wage claims. 14 F.3d 1405, 1409 (9th Cir. 1994). The court recognized the special protection accorded to seamen as "wards of the court," and emphasized that "[w]hoever drafts a limitation of rights must prove that it 'was executed freely, without deception or coercion, [] that it was made by the seaman with full understanding of his rights' and that it is fair to the seaman." 14 F.3d at 1408 (quoting Garrett v. Moore-McCormack Co., 317 U.S. 239, 248 (1942)). The Fuller court did not have before it, however, the argument that state law public policy prohibited the contractual waiver at issue.

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[5]E.g., Lauritzen v. Larsen, 345 U.S. 571 (1953), in which the Supreme Court enforced the election of Danish law in a contract between a Danish ship and a Danish seaman. Lauritzen, however, involved an election between mutually exclusive U.S. and Danish law; the present case involves a waiver of rights under state law, where the state provisions are compatible with the federal scheme.

Defendant also cites Collins v. State of Alaska, in which the court enforced an election, under a collective bargaining agreement, to recover under Alaska's workers compensation scheme rather than under federal law. 621 F. Supp. 722 (W.D. Wash. 1985). That case is inapposite because it did not involve a blanket waiver of state law, and the court upheld the agreement because it was part of a "freely negotiated" collective bargaining agreement that provided "an adequate *quid pro quo*" in exchange for the relinquishment of recovery under federal law. 621 F. Supp. at 725. The decision in Caman v. F/V Lady Jay, also involved a collective bargaining agreement. 654 F. Supp. 709 (D. Mass. 1985).

ASC also suggests that state law may be waived because there are federal anti-discrimination laws and federal laws guaranteeing the payment of wages. Under the maritime scheme, however, parallel state and federal laws which serve the same or similar purposes are not mutually exclusive. States may supplement federal law, and the language and remedies of the state statutes may reflect an attempt to address local concerns. The fact that federal law offers some protection against discrimination and wage withholding, therefore, does not mean that state protections may freely be waived.[6]

It is undisputed that the Washington statutes alleged in the complaint here serve state public policy purposes, and that plaintiffs are persons whom the statutes are meant to protect.

For the reasons stated, the contract is ineffective to waive the protections accorded by those Washington laws.

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[6] In a footnote, defendant suggests that maritime law might preempt the state statutes involved in this case. Numerous cases in this district, however, have declined to find state law preempted in the maritime context. See also, Ellenwood v. Exxon Shipping Co., 984 F.2d 1270, 1279 (1st Cir. 1993), cert. denied, 508 U.S. 981 (1993) (state statutes prohibiting discrimination against the handicapped were not preempted by maritime law).

V. MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSING DEFENDANT'S COUNTERCLAIMS

ASC asserts two counterclaims against plaintiffs. First, ASC alleged in its answer that certain plaintiffs damaged their staterooms. Plaintiffs point out, however, that defendant has already assessed and collected a charge for this. In response, defendant has stipulated to dismissal of its counterclaim for damage to the staterooms.

Second, ASC seeks damages for lost production that allegedly resulted when the plaintiffs stopped working in mid-February. It contends that plaintiffs conducted an unlawful strike, and that they urged other workers to join the strike. The counterclaim is based on the general maritime law which prohibits seamen from striking, and on the common law tort of interference with business expectancy.

Plaintiffs contend that they stopped working because they were ill and defendant refused to provide them leave to recover. They point out that the contract gives the crew members the absolute right to terminate their employment at any time. The contract also provides that employees who quit during a trip will be assessed transportation costs and room and board; ASC made these deductions from the pay of those plaintiffs whom the company determined quit their jobs without a medical basis.

On the record here, even when all reasonable inferences are drawn in defendant's favor, there is no genuine issue of material fact on ASC's claim that a strike occurred aboard the OCEAN ROVER. In support of its counterclaim, defendant cites the deposition of Jan Pederson, the ship's factory manager. Pederson testified, however, that the Vietnamese processors had quit, not that they had gone on strike. He also testified that he was told by other processors that "they are trying to get them into strikes" and that he was afraid that there would be a strike. But neither he nor any other witness has provided admissible evidence that a strike was engaged in or threatened.

There is no evidence in the record from which a rational trier of fact could find that plaintiffs engaged in a strike. Accordingly, ASC's counterclaim for lost production must be dismissed.

VI. CONCLUSION

For the reasons stated, plaintiffs' motions for partial summary judgment on certain contract claims, for partial summary judgment on the application of state law, and to dismiss defendant's counterclaims, are granted.

The clerk is directed to send copies of this order to all counsel of record.

Dated: May 28, 1999.

William L. Dwyer
United States District Judge