



Issue Date: 06 August 2015

Case Number: 2015-SPA-00001

In the Matter of:

DEVENDRA GUMMALA,

Complainant,

v.

CARNIVAL CRUISE LINES, INC.

Respondent.

ORDER OF DISMISSAL

This matter purports to arise under the Seaman’s Protection Act (“SPA” or “the Act”), 46 U.S.C. § 2114, implementing regulations at 29 C.F.R. Part 1986. The SPA protects a seaman who has engaged in certain protected activities from being discriminated against because of the seaman’s protected activity. 46 U.S.C. § 2114. Specifically, the SPA prohibits the discharge of or other discrimination against a seaman because of the seaman’s good faith report of a violation of a maritime safety law or regulation. 46 U.S.C. § 2114(a)(1)(A).

The applicable regulations allow for a seaman who believes that he has been retaliated against in violation of the SPA to file a complaint with the Occupational Safety and Health Administration (“OSHA”). 29 C.F.R. § 1986.103. After the filing of such a complaint, OSHA investigates and issues written findings as to whether there is reasonable cause to believe that an alleged violation of the SPA occurred. *Id.* at § 1986.105. Any party who desires review of these findings may file written objections and a request for a hearing with the U.S. Department of Labor, Office of Administrative Law Judges (“OALJ” or “Office”). *Id.* at § 1986.106(a).

Background

On June 22, 2014, Devendra Gummala (“Complainant”), a citizen and resident of Chile, filed an on-line complaint with OSHA against his former employer, Carnival Cruise Lines, Inc. (“Respondent”). The complaint alleged that Respondent had terminated Complainant’s employment “in retaliation for making a safety complaint to Respondent regarding a housekeeping hazard” while on board the vessel “Carnival Fascination”. After investigating,

OSHA found that “Respondent is a wholly owned subsidiary of a Panamanian corporation,” and that the “vessel on which Complainant was employed is not a vessel owned by a citizen of the United States.” OSHA therefore found that Complainant did not qualify as a “seaman” within the meaning of the SPA. *See* 29 C.F.R. § 1986.101(m) (setting forth the definition of “seaman”); § 1986.101(d)(1) (setting forth the definition of a “Citizen of the United States”); S. Rep. No. 98-454 at 11 (1984). On December 24, 2014, OSHA issued a findings letter dismissing the complaint.

On February 24, 2015, Complainant filed a letter with this Office, stating that he “would like to highlight a few details for [his] disagreement with the dismissal of this case.” These details included an inquiry as to whether certain information had been provided to OSHA by Respondent; information regarding Complainant’s original safety incident report; and the assertion that “OSHA has jurisdiction in this case as it is a discriminatory retaliation.” Most relevant to the issue pending before me was Complainant’s contention that he is a seaman under the laws of the United States and definitions on the OSHA website. However, Complainant never specifically asked for a hearing before an administrative law judge.

Following the issuance by this office of a *Notice of Docketing and Order to Show Cause* on March 30, 2015, Complainant clarified by letter filed on April 8, 2015 that he had intended his February 24 letter as a request for a formal hearing under the SPA. Complainant then reiterated the arguments presented in his February 24 letter. On May 4, 2015, this Office issued a *Second Order to Show Cause*, instructing the parties to show cause within thirty days why this matter should not be dismissed for lack of jurisdiction. Complainant and Respondent filed their respective responses on June 16, 2015 and June 26, 2015.

Discussion

The applicable regulations define a “seaman” for the purposes of the SPA as “any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States.” *See* 29 C.F.R. § 1986.101(m). The regulations further define “citizen of the United States” as, among other things, a corporation whose controlling interest is owned by citizens of the United States. *See id.* at § 1986.101(d)(1). The controlling interest in a corporation is owned by citizens of the United States if, 1) title to the majority of the stock in the corporation is vested in citizens of the United States free from any trust or fiduciary obligation in favor of a person not a citizen of the United States; 2) the majority of the voting power in the corporation is vested in citizens of the United States; 3) there is no contract or understanding by which the majority of the voting power in the corporation may be exercised, directly or indirectly, in behalf of a person not a citizen of the United States; and 4) there is no other means by which control of the corporation is given to or permitted to be exercised by a person not a citizen of the United States. 29 C.F.R. at § 1986.101(d)(1)(i) – (iv). Additionally, a corporation is only a citizen of the United States if it is incorporated under the laws of the United States or a State; its chief executive officer and the chairman of its board of directors are citizens of the United States; and no more of its directors are noncitizens than a minority of the number necessary to constitute a quorum. 29 C.F.R. § 1986.101(d)(2)(i) – (iii).

In this case, Complainant contends that he is a seaman under the SPA. While appearing to acknowledge that Carnival Corporation is registered in Panama, Respondent avers that the “majority of its board of directors as well as executives are American citizens” according to the Carnival Corporation website. Specifically, Respondent details that the chairman of Carnival Corporation, the CEO of Carnival Corporation, and the current and former presidents of Carnival Cruise Lines, Inc. are American citizens.

Complainant also refers to a variety of additional authorities which he asserts supports his contention that he is a seaman under the SPA. Complainant cites to “the United States Supreme Court’s statement on seaman status” in *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997), *Chandris v. Latsis*, 515 U.S. 347 (1995), and *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991). Complainant further details that the vessel on which he was employed is a U.S. Coast Guard-inspected vessel. Finally, Complainant avers that section 11(c) of the OSH Act provides OSHA authority over persons working on vessels and facilities on or adjacent to U.S navigable waters and the Outer Continental Shelf.

In response to Complainant’s contentions, Respondent argues that Complainant does not qualify as a seaman because the vessel on which he was employed is not owned by a citizen of the United States. Respondent details that Carnival Cruise Lines, Inc. is a division of Carnival Corporation, which is a Panamanian company. Respondent accordingly asserts that neither Respondent nor Carnival Corporation qualifies as a “citizen of the United States” for the purposes of the SPA. As Respondent is the operator of the vessel on which Complainant was employed and Carnival Corporation is the owner of that vessel, Respondent avers that the vessel is neither operated nor owned by a citizen of the United States. Respondent concludes that Complainant is not eligible to file a complaint with OSHA under the SPA.

As noted above, the applicable regulations define a “seaman” for the purposes of the SPA as “any individual engaged or employed in any capacity on board a vessel owned by a citizen of the United States.” A corporation is only a citizen of the United States if: (i) It is incorporated under the laws of the United States or a State; (ii) Its chief executive officer, by whatever title, and the chairman of its board of directors are citizens of the United States; and (iii) No more of its directors are noncitizens than a minority of the number necessary to constitute a quorum. 29 C.F.R. 1986.101(d)(2)(i)-(iii).

I find Complainant is not a seaman. According to the record currently before me, Complainant was employed as a photographer on board a vessel owned by Carnival Corporation. Carnival Corporation is a Panamanian corporation. Complainant does not contest this fact, and instead refers to the U.S. citizenship of the Chairman and CEO of Carnival Corporation, and the current and former presidents of Carnival Cruise Lines, Inc. While the citizenship of Carnival Corporation’s CEO and chairman may satisfy the requirements of sections (d)(2)(ii) and (iii), Respondent is not incorporated under the laws of the United States or a state as required by section (d)(2)(i), but instead Panama.

Additionally, the Supreme Court precedent that Complainant cites addresses the definition of a seaman only for the purposes of the Jones Act. Assuming Complainant is a seaman as that term is defined in the Jones Act, such a finding would not grant similar status under the SPA. Finally, as this Office is an administrative court of limited jurisdiction, a claim

must be properly brought before this Office to establish jurisdiction. As Complainant has not appealed any OSH Act claim he may have filed with OSHA, this Office does not have jurisdiction to consider Complainant's OSH Act allegations.

ORDER

In light of the foregoing discussion, I find Complainant is not a "seaman" under the SPA. Complainant has therefore failed to establish the basis for this Office's jurisdiction over this matter. Accordingly, it is hereby ordered that this matter is **DISMISSED**.

SO ORDERED:

STEPHEN R. HENLEY
Acting Chief Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: <https://dol-appeals.entellitrak.com>. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has

been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.