THE SEAMAN'S PROTECTION ACT*

INTRODUCTION

This paper first explores the protections afforded under the Seaman's Protection Act (SPA), also known as the Seaman's Whistleblower Act, which is codified at 46 U.S.C. § 2114. Next, it explains the procedure for filing a claim under the SPA. Finally, it sets forth the elements of a *prima facie* case under the SPA, and its shifting burdens of proof.

Congress passed the SPA in response to the Fifth Circuit opinion in *Donovan v. Texaco, Inc.*, 720 F.2d 825, 829 (5th Cir. 1983) (holding OSHA's prohibition against retaliatory discharge inapplicable to a seaman who was demoted and then terminated after contacting the Coast Guard to complain about the vessel).[1] The SPA now provides "whistleblower" protection, against discharge or any manner of discrimination, when a seaman makes a good-faith reporting, or is about to report (to the U.S. Coast Guard or other appropriate federal agency or department) a violation of a maritime safety law or regulation.[2] A maritime safety law or regulation includes any statute or regulation regarding health or safety that applies to any person or equipment on a vessel. 29 C.F.R. § 1986.101(g).

In general, the SPA prohibits discrimination or retaliation against a seaman who has reported or is about to report a violation of safety laws or regulations to the Coast Guard or other

*Thomas M. Bond is a principal and founding partner of The Kaplan/Bond Group, a maritime injury and wrongful death law firm in Boston, MA. Kevin Fields is a third year law student at Northeastern University School of Law.

[1] *Baetge-Hall v. Am. Overseas Marine Corp.*, 624 F. Supp. 2d 148, 157-158 (D. Mass. 2009); *Gaffney v. Riverboat Services of Indiana, Inc*., 451 F.3d 424, 446 (7th Cir. 2006).
[2] See 46 USCS § 2114(a)(1)(A).

federal agency; refused to perform duties that he thought would result in serious personal injury; testified in a proceeding to enforce maritime safety laws or regulations; notified or attempted to notify the vessel owner of work related injury or illness of a seaman; notified a federal agency of marine casualty; or, accurately reported his hours of duty. 46 U.S.C. §2114 (a)(1)(A) – (F). But in order to qualify for protection under the SPA for reporting an unsafe condition, the seaman must first have sought correction of that unsafe condition from his employer. 46 U.S.C. §2114 (a)(3).

"Seaman", for the purposes of the SPA, is defined as "any individual engaged or employed in any capacity on board a U.S.-flag vessel or any other vessel owned by a citizen of the United States, except members of the armed forces…" 29 C.F.R. § 1986.101.[3] This broad definition can be distinguished from prior, more narrow interpretations of "seaman" evidenced by early scrutiny of the term seen in 46 U.S.C § 30104 (Jones Act/Merchant Marine Act of 1920) protection.[4] OSHA's Final Ruling on the SPA goes even further and points out that land-based workers (maritime workers) "engaged or employed…on board a vessel" for some part of their duties may also invoke the protections of the SPA.[5] In sum, the SPA's coverage is far more expansive than the coverage under the Jones Act.

FILING A CLAIM UNDER THE SPA

[3] See also, Department of Labor - Occupational Safety and Health Administration Docket Number: OSHA-2011-0841, RIN 1218-AC58 *Procedures for Handling of Retaliation Complaints Under the Employee Protection Provision of the Seaman's Protection Act, as Amended*, Final Rule; and Federal Register Vol. 81 Number 179, pages 63396-63414 (September 15, 2016); [3] https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=STANDARDS&p_id=469; https://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=FEDERAL_REGISTER&p_id=27494; https://www.federalregister.gov/documents/2016/09/15/2016-21758/procedures-for-the-handling-of-retaliation-complaints-under-the-employee-protection-provision-of-the; last visited March 9, 2017.

[4] See *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337 (1991); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

[5] See note 4, and H. Rep. No. 111-303, pt. 1, at 119 (2009); https://www.congress.gov/111/crpt/hrpt303/CRPT-111hrpt303-pt1.pdf, last visited March 9, 2017.

Complaints brought under the SPA are filed in the same manner as those filed under 49 U.S.C. §31105(b), which is also known as the Surface Transportation Assistance Act (STAA). First, the complaint must be filed within 180 days of the incident. Within 60 days of receiving the complaint, the Secretary of Labor conducts an investigation to determine whether the claim has merit. 49 U.S.C. §31105(b)(2)(A). If it is determined that a violation has occurred, the Secretary issues written findings and a preliminary order for relief. Objections to these findings and a request for a hearing must be filed not later than 30 days thereafter. Hearings are required to be held expeditiously. Not later than 120 days after the hearing, the Secretary of Labor must issue a final order. 49 U.S.C. §31105(b)(2)(C). Appeals from the final order are to the Circuit Court of Appeals for the circuit in which the violation occurred or in which the person resided at the time of the violation.

There is a two-pronged and burden-shifting framework in pursuing a claim under the SPA.[6] Initially, to invoke the protections of the SPA, a seaman must demonstrate four elements by a preponderance of the evidence: (1) he engaged in a protected activity; (2) the employer knew the seaman engaged in protected activity; (3) the seaman suffered an adverse action; and (4) the seaman's protected activity was a contributing factor in the employer's adverse action against him.[7] Then, if a *prima facie* case is established, the burden shifts to the employer who must show by *clear and convincing* evidence that any adverse action taken would have occurred notwithstanding employee engagement in a protected activity.[8] An administrative law judge

[6] In the Matter of: *Loftus v. Horizon Lines Inc., and Matson Alaska, Inc*., ALJ No: 2014- SPA-00004, 5 (July 12, 2016).
[7] Id.
[8] Id.

(ALJ) will determine if rights were violated by following the procedure set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21").[9] Additionally, Title Twenty-Nine, Part 1986 of the Code of Federal Regulations provides that the "SPA incorporates the procedures, requirements, and rights described in the whistleblower provision of the STAA, 49 U.S.C. § 31105." 29 C.F.R. § 1986.100(a).[10]

Elements of a Prima Facie Case

1.Seaman Engaged or is About to Engage in Protected Activity

The SPA lists what constitutes protected activity. Protected activities include when a seaman makes a good-faith report, or is about to report (to the U.S. Coast Guard or other appropriate federal agency or department) a violation of a maritime safety law or regulation. They also include when a seaman refuses to work when he reasonably believes the work will result in serious personal injury. Retaliation against a seaman for providing information or cooperating with government investigations, such as the furnishing of information to the National Transportation Safety Board or other public agencies regarding the facts of injury, death, or property damage, is also protected. 46 U.S.C. §§ 2101 et seq.].[11]

The courts have further expanded what constitutes protected activity under the SPA (through, among other things, its incorporation of the procedures, requirements, and rights described in the whistleblower provision of the STAA) by finding that complaints to supervisors,

[9] Id. at 4; Public Law 106–181 106th Congress, Subchapter III § 42121, 145-149 (April 5, 2000); https://www.congress.gov/106/plaws/publ181/PLAW-106publ181.pdf; last visited March 9, 2017.
[10] Id.
[11] 46 U.S.C.S. § 2114(a)(1)(A-G).

and internal safety complaints qualify for protection. See *Clean Harbors Envtl. Servs. v. Herman,*146 F.3d 12, 20 (1st Cir. 1998), citing *Yellow Freight Sys., Inc. v. Reich,* 8 F.3d 980, 986 (4th Cir. 1993).[12] Additionally, the mere intent to notify federal authorities about dangerous or harmful activities aboard a seagoing vessel has been found to raise significant public policy concerns, and supports a cause of action. *Baetge-Hall v. Am. Overseas Marine Corp*., 624 F. Supp. 2d 148, 159 (D. Mass. 2009). However, mere inquiries to authorities without an intent to report on an employer are *not* protected activities, and do not satisfy the requirements of § 2114. *Garrie v. James L. Gray, Inc*., 912 F.2d 808 (5th Cir.1990).

Employers have predictably moved to limit the scope of what constitutes "protected activity" under the SPA. One such instance occurred when an employer unsuccessfully argued that protected activity should be confined to activities which fall outside of an employee's job description, or outside the normal reach of employment activities. *Bird v. Foss Mar. Co.,* No. C 07-05776 WDB, 2009 U.S. Dist. LEXIS 77411 (N.D. Cal. Aug. 31, 2009*).* In *Bird*, the court utilized a public policy analysis, borrowed from state law (and seen in *Baetge-Hall*), that found it would be clearly improper for employers to prohibit employees, whose job (in this case) was to monitor contract performance, from reporting or disclosing suspected violations of governmental

[12] See also, *Yellow Freight Sys., Inc. v. Martin*, 983 F.2d 1195, 1198 (2d Cir.1993) *Moon v. Transport Drivers, Inc*, 836 F.2d 226, 227-29 (6th Cir. 1987).

contracts.[13] There, regarding the SPA, the court sought to prevent employers from using job descriptions or other tools to "insulate themselves from liability."[14]

2. Employer Knew Seaman Engaged in Protected Activity

Plaintiffs seeking to invoke the protection of the SPA must establish that their employer was aware that they reported them, or intended to report them, to the Coast Guard, or other federal agency before an adverse action was taken. *Baetge-Hall v. Am. Overseas Marine Corp.*, 624 F. Supp. 2d 148, 158 (D. Mass. 2009); citing *Robinson v. Alter Barge Line, Inc.*, 513 F.3d 668, 671 (7th Cir. 2008*)*. In most circumstances, the individual must tell someone that he plans to report an incident.[15] However, circumstantial evidence, such as previous known reports to authorities, or the public, can be sufficient to establish that an employer knew that an issue would be, or has been, officially reported. See *Harley Marine Servs. v. United States DOL*, No. 15-14110, 2017 U.S. App. LEXIS 1366, at *10 (11th Cir. Jan. 26, 2017).

3. Seaman Suffered Adverse Action

Essentially any adverse action against a seaman is enough to trigger SPA protections, and the severity is not relevant.[16] Evidence of disparate treatment between employees engaged in similar conduct has been found to serve as circumstantial evidence of retaliation. *Baetge-*

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[13] See *Holmes v. General Dynamics Corp*., 17 Cal. App. 4th 1418 (1993); *Bird v. Foss Mar. Co.*, No. C 07-05776 WDB, 2009 U.S. Dist. LEXIS 77411 *32 (N.D. Cal. Aug. 31, 2009).
[14] Id.
[15] *Id*.
Bird v. Foss Mar. Co., No. C 07-05776 WDB, 2009 U.S. Dist. LEXIS 77411, at *19 (N.D. Cal. Aug. 31, 2009); citing *Robinson v. Alter Barge Line*, Inc., 513 F.3d 668, 671 (7th Cir.2008).
[16] See 42 U.S.C§ 42121(b); Bechtel Constr. Co., 710 F.3d at 447; Allen, 514 F.3d at 475-76; Harp, 558 F.3d at 723; Hutton, ARB No. 11-091, slip op. at 5; *In the Matter of: Loftus v. Horizon Lines Inc., and Matson Alaska, Inc*., ALJ No: 2014- SPA-00004, 19 (July 12, 2016).

Hall v. Am. Overseas Marine Corp., 624 F. Supp. 2d 148, 160 (D. Mass. 2009) citing *Schuppman v. Port Imperial Ferry Corp*., No. 99-3597, 2001 U.S. Dist. LEXIS 2682, 2001 WL 262687, at *3 (S.D.N.Y. March 15, 2001). Retaliation is also an adverse action.[17] Additionally, constructive discharge is considered an adverse action. See *Loftus, infra.* However, in the analysis, a temporal relationship between whistleblowing under the SPA, and adverse or retaliatory action, will likely have some bearing on a court's analysis.[18]

4. Seaman's Protected Activity was a Contributing Factor in Employer's Adverse Action Against Him.

Finally, the seaman must prove that the adverse action taken by the employer was a contributing factor in the action taken against him. This can be demonstrated by an action that simply draws an employer's animus for engaging in such activity.[19] For example, name calling or negative talk about engagement in a protected activity may help to prove that the engagement was a contributing factor to potential future adverse action.[20] Further still, the Ninth Circuit has indicated that this lower "contributing factor" standard can be inferred from timing alone where an adverse employment action follows on the heels of protected activity.[21]

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[17] 1-13 Whistleblowing and Retaliation § 13.5 (2014); citing *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Bechtel v. Administrative Review Bd*., 710 F.3d 443, 447 (2d Cir. 2013); *Harp v. Charter Communs., Inc.*, 558 F.3d 722, 723 (7th Cir. 2009); *Allen v. Administrative Review Bd*., 514 F.3d 468, 476 (5th Cir. 2008); *Miles v. Wal-Mart Stores, Inc*., 2008 U.S. Dist. LEXIS 5781, at *10 & n.4 (W.D. Ark. Jan. 25, 2008); *Melton v. Yellow Trans., Inc.*, ARB Case No. 06-052, at 10-11 (Sept. 30, 2008); see also U.S. Dep't of Labor, OSHA Whistleblower Investigations Manual, at 3-12, n.3 (Apr. 21, 2015), available at http://www.whistleblowers.gov/regulations_page.html.1-13.

[18] *Capalbo v. Kris-Way Truck Leasing, Inc*., 821 F. Supp. 2d 397, 417 (D. Me. 2011); citing *Ahern v. Shinseki*, 629 F.3d 49, 58 (1st Cir. 2010) (A related STAA analysis).

[19] *Harley Marine Servs. v. United States DOL*, No. 15-14110, 2017 U.S. App. LEXIS 1366, at *10 (11th Cir. Jan. 26, 2017).

[20] *Bird v. Foss Mar. Co.*, No. C 07-05776 WDB, 2009 U.S. Dist. LEXIS 77411, at *50-51 (N.D. Cal. Aug. 31, 2009.

[21] *Id;* citing *Van Asdale v. Internat'l Game Technology*, No. 07-16597, 577 F.3d 989, 2009 U.S. App. LEXIS 18037, 2009 WL 2461906, slip op. at 11088 (9th Cir., August 13, 2009) (quoting *Villiarimo v. Aloha Island Air, Inc*., 281 F.3d 1054, 1065 (9th Cir. 2002)).

SHIFTING BURDENS OF PROOF

Once the seaman has established his prima facie case on these four elements, the burden then shifts to the employer to show that any adverse action against the seaman was not related to engagement in one or more of the protected activities.[22] The employer must show by *clear and convincing* evidence that the same adverse action would have been taken regardless of engagement in a protected activity.[23] This clear and convincing evidence standard is the intermediate burden of proof, in between a preponderance of the evidence and proof beyond a reasonable doubt. *See Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 60 L. Ed. 2d 323 (1979).[24] "Clear and convincing" has been defined as "highly probable or reasonably certain" that the adverse action would have occurred irrespective of the protected activity.[25] The adverse action must then have an independent cause, which can be difficult to establish once the protected activity has been engaged in by the seaman.

DAMAGES

A wide range of damages are available under the SPA. 49 U.S.C. §31105(b)(3)(A). Once a violation has been proven, the Secretary of Labor may take affirmative action to abate the violation. The Secretary may also reinstate the seaman to his former position, restoring all privileges and employee benefits. Finally, the Secretary can order that the employer pay compensatory damages, including back pay with interest and compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness

[22] See *Loftus* at 5.
[23] Id; *Harley Marine Servs. v. United States DOL*, No. 15-14110, 2017 U.S. App. LEXIS 1366, at *12 (11th Cir. Jan. 26, 2017).
[24] See *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013); The FRSA, like the SPA incorporates by reference the rules and procedures applicable to Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21") whistleblower cases. § 20109(d)(2)(A).
[25] See *Loftus* at 24

fees, and reasonable attorney's fees. *Id.* Courts have also awarded punitive damages under the SPA. *Loftus, infra; Polek v. Grand River Navigation* 872 F. Supp. 2d 582 (E.D. Mich. 2012).

CONCLUSION

Because of the broad application of who qualifies under the term seaman, the SPA whistleblower protections cover a wide-ranging number of workers, including even land-based workers who may only have a tangential connection to a vessel. Designed to promote marine safety, the SPA lays the groundwork for seamen to report violations of maritime safety laws and regulations without fear of repercussions, shifting the power dynamics that have traditionally existed between vessel owners and their crew.