LEGGE ★ FARROW

ADMIRALTY AND MARITIME MATTERS

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Recent Court Decisions Hold Pilot Associations Lack the Capacity to be Sued in Employment Discrimination Cases, as well as in Collision Cases Involving the On-Board Negligence of an Individual Pilot

1. *Coleman v. New Orleans and Baton Rouge Steamship Pilots Association*, 2006 AMC 429 (5th Cir. 2006).

In this case the Court of Appeals for the Fifth Federal Circuit held that the pilot associations were not "employers" of pilots under the Age Discrimination and Employment Act ("ADEA"). Terry Coleman was a fifty-five year old applicant who sued the pilot association, as well as the pilot commissioners, alleging that they discriminated against him by refusing to elect him into the pilot apprentice program because of his age. The court dismissed the claim holding that neither the pilot association, nor the pilot board was an"employer" as defined within the meaning of the ADEA. Thus, they were not subject to the ADEA's prohibition on age discrimination in employment.

The case contains an interesting discussion of the pilot application process. The individual applying for a deputy pilot position first submits his application to the board of commissioners for their approval. As with many Texas pilotages, the Board of Pilot Commissioners certifies applicants as eligible and places them in a pool from which the pilot association members can choose. The applicant is then elected to deputy status by a majority vote of the pilot association.

Turning to the facts of the case, the court noted that the NOBRA pilot association required an applicant to be under the age of forty-five when elected as a deputy. The court found that NOBRA was not an employer as described under the ADEA. The pilot association lacked employer status because it lacked control over its members. With no control, the association could not be their employer.

The court also observed that pilot associations cannot be considered "employment agencies" or "labor organizations," which can also be sued under the ADEA. It found the dispatching function the association provides may be analogous "in a general way" to an employment agency or union hiring hall. However, it found that pilot associations are neither as they do not exist for "the purpose

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of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment." Nor are they are not employment agencies which are defined as entities that "regularly undertake with or without compensation to procure employees for an employer and includes an agent of such person." It found that true labor organizations interact with the employer of its members. The shipowner is not an "employer" of pilots. The pilot is an independent contractor of the ship owner. This is due to the fact that the ship owner exercises no control over the pilot's navigation of the vessel. The court found no authority for deeming pilots to be anything than other than an independent contractor of the vessel that they are hired to navigate.

Ultimately, the court found its decision to hinge on whether pilots were employees of the associations. The court found that they are not. First, the associations cannot "hire or fire" pilots. This is because they have no power to grant the state commissions that permit pilots to work. These commissions are received from the Governor. With regard to the actual job performed – piloting – the role of the association is generally limited to dispatching a pilot to the ship. The vessel engages the pilot, not the association. The master of the vessel can refuse the services of a particular pilot. Further, the individual pilot's work is not "supervised" by someone higher in the pilot organization. There is no chain of command with regard to the actual on-board performance of their work. The individual pilot gives navigational advice independently according to his own professional judgment. Another factor was that pilots exert substantial influence over the general management of the association as they each hold an equal share and participate in the management of the association. Another factor is that the association does not intend individual pilots to be employees. The charter forming the associations expressly states the relationship between pilots and the association is for the mutual benefit of the member pilots. It is not an employment situation. Lastly, the association has no vicarious liability for the acts of a pilot while he or she is on board a ship. They are independent contractors who operate according to their own professional judgment. The pilots remain personally liable for their own negligence.

2. *Oceanrunner Inc. v. The Associated Branch Pilots of the Port of New Orleans and the Louisiana River Pilots Association, Inc.*

This case involved a collision that occurred on February 21, 2004 near Southwest Pass. One of the vessels was an offshore supply boat proceeding downriver in dense fog. The other was an inbound

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container ship, the MV ZIM MEXICO, which was under the conn of a state compulsory pilot. The plaintiffs sought to impose liability on the pilot association for the alleged negligence of the ship pilot. The basis of that claim was that the association breached alleged duties to: (1) adequately train its members, (2) establish procedures and rules for safe operation of vessels on which the member pilots are assigned, (3) adequately respond to the accident, and (4) oversee vessel safety on the Mississippi River.

The court noted that these types of allegations were not novel and have been addressed many times by the courts. It began its discussion with the seminal case of *Guy v. Donald*, 203 U.S. 399, a U.S. Supreme Court case from 1906 which found that pilot associations are not vicariously liable for the acts of its member pilots. This principle has been consistently followed by the U.S. Fifth Circuit Court of Appeals, in which the State of Texas sits. The court in *Oceanrunner, Inc.* dismissed the plaintiff's claim finding there was no cause of action against pilots associations for vicarious liability based upon the acts of an individual member. It found that the association did not have the duties alleged by the plaintiff and as the pilots' association could not breach a duty it does not owe, dismissal was proper.

CONCLUSION

We recently attended the American Pilot's Association Attorneys' Meeting on October 23, 2006. Attorneys representing associations all over the country were consistent in their advice on avoiding association liability for the acts of an individual pilot on board a ship. The following were comments from the various lawyers:

- "The ship hires a pilot, not the association."
- "Let the pilot go down to the ship and make the on-scene decision."
- "Treat control by the association over individual pilots like the plague."
- "Don't instruct the pilot – just pass along information. The individual pilots are smart, and they can figure it out for themselves."
- "The service provided by our pilot is real-time on board advice."

This advice is well taken.

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