

Assault on the High Seas:

How Cautious Crew Selection can Prevent Employer Liability

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By Darren Friedman and Lauren Smith & Maltzman Foreman, P.A.



From Popeye the Sailor to Captain Hook, the life of a seaman has been fantasized in countless movies and television shows, and no production is complete without a scene featuring a knock-down-drag-out fight between two sailors. Unfortunately, scenes like this are not just big screen theatricals; brawls between seamen and assaults on crewmembers are an occasional, unfortunate reality of the maritime business and when they occur, personal injury to one or both of the seamen is likely to result. While the law recognizes and understands this reality, the law can also hold employers liable for such injuries. In order to prevent this liability, employers need to understand the duties required of them under law and recognize the importance of an applicant screening process as their first line of defense.

Under the Jones Act, liability for injuries from assault may be based on two different theories. The first is a simple negligence theory under which a crewmember asserts that the acts or omissions of his employer directly caused his injuries. Typically this type of liability is based on the employer's negligent hiring of the assailant-crewmember and requires proof that the employer knew that the assailant had violent tendencies. Evidence of knowledge can include warnings from previous employers, prior arrests or convictions, and knowledge of previous acts of violence by the assailant. Other less common direct negligence claims include failure to prevent a foreseeable attack and failure to enforce a ban on alcohol or drugs when the intoxication of the assailant led to the assault.

The second theory of negligence is known as vicarious liability. Under this theory, an employer can be held liable for the acts of his employees. This theory rests on the notion that an employer exercises control over the conduct of its crew. In order for vicarious liability to exist for assault, the assault must have been in furtherance of the ship's business and the assailant must have been in a position superior to the victim. Examples of assaults that have been found to be in furtherance of the ship's business include a supervisor's assault on a crewmember as a disciplinary measure, as a means to wake the crewmember up and send him to duty, and as a means to hurry the crewmember to work. Whichever theory of liability is alleged, all negligence claims under the Jones Act are based on fault. In contrast, when a crewmember alleges the unseaworthiness of the vessel, fault of the employer is not required in order to establish liability; rather, the mere presence of a violent seaman can render the vessel unseaworthy.

The warranty of seaworthiness that is extended to all crewmembers requires that a vessel owner furnish a ship that is reasonably fit for its intended purpose. This includes providing a competent crew made up of men with seamanship equal to that

of ordinary members of the profession. The law recognizes the fact that the job of a seaman is different than most other occupations and that quarrels among crewmembers can arise. Thus, there is generally no liability for a brawl between two crewmembers of ordinary disposition. If, however, the assault is perpetrated by a seaman with a particularly vicious nature, the employer is liable for unseaworthiness because the seaman's presence onboard the ship makes the vessel dangerous. This liability does not depend on the employer's knowledge of the assailant's evil disposition. In determining whether the seaman's disposition is that of an ordinary crewmember or something more "evil," courts look at the following factors: provocation, severity of injury, prior and subsequent acts of violence, use of weapons, physical differences, and planned attack or intent to kill.

The potential for liability under both the Jones Act and the warranty of seaworthiness can be lessened with the implementation of a careful screening process that eliminates applicants with a tendency for violence. The best applicant screening process will be thorough and will include interviews, reference checks, background checks, and drug screening. Interviews allow employers to get a first hand impression of the disposition of the applicant and are the first step in any employee selection process. Reference checks, especially from former employers, will provide further information as to the work ethic and general disposition of the crewmember. A background check provides insight into the criminal history of the applicant. The mere fact that an applicant has a criminal record does not mean he will be a bad employee. However, employers should take into consideration any arrests or convictions for violent crimes as well as for drug use. Drug testing is valuable because, as mentioned earlier, employers can be liable for failing to enforce a ban on drugs or alcohol where the intoxication of the crewmember leads to an assault. It is important for employers to know whether applicants have potential drug or alcohol abuse problems in order to prevent assaults from occurring under these circumstances.

Although the maritime industry is fast paced, the potential for litigation and the threat of financial liability for assaults make the careful selection of crewmembers worth the extra time and effort. Defending a lawsuit can be very draining on a company's time and money and preventing liability by implementing a careful screening process allows these resources to be allocated to other important functions of the business.

• **About the Authors:**

Darren Friedman is a Partner at Maltzman Foreman, PA in Miami and specializes in representing the maritime industry. Lauren Smith is a third year law student at the University of Miami and is a law clerk for Maltzman Foreman, P.A.