

No. _____

In the
Supreme Court of the United States

ELI DUNN,
Petitioner,
v.

BRYCE HATCH; HATCH MARINE ENTERPRISES, LLC,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

JOHN MERRIAM
Counsel of Record
LAW OFFICE OF JOHN MERRIAM
4005 20th Avenue West
Suite 110
Seattle, WA 98199
(206) 729-5252
john@merriam-maritimelaw.com

Counsel for Petitioner

April 7, 2020

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Should punitive damages be available to commercial fishermen cheated on their wages?
2. Is there a conflict among federal courts of appeal, and within the Ninth Circuit itself, as to whether 46 U.S.C. § 11107 provides a penalty for the *nonpayment* of wages as opposed to a penalty *rate* of wages for the failure to have a written contract of employment?
3. Can state law wage penalties be applied to claims brought by commercial fishermen, despite 46 U.S.C. § 11107?
4. As a matter of public policy, should the Court when sitting in admiralty fashion a remedy where Congress is silent on wage protection for seamen, other than the statutory penalty for the failure to pay wages to merchant seamen on foreign voyages?

**PARTIES TO THE PROCEEDINGS
AND RULE 29.6 STATEMENT**

All parties to the proceedings are listed in the caption. Colin Allen was not a party to the appeal below nor to this petition. Eli Dunn is not a corporation.

RULE 14.1(b)(iii) STATEMENT

The proceedings in federal trial and appellate courts identified below are directly related to the above captioned case in this Court.

Dunn v. Hatch et al., 2018 A.M.C. 371 (D. Idaho 2018) No. 1:15-cv-00479.

Dunn v. Hatch et al., No. 18-35485 and 18-35511 (unreported) (9th Cir. 11/21/19), *rehearing and rehearing en banc denied* (1/8/20).

The Ninth Circuit affirmed the trial court's judgment in this matter on November 21, 2019. The Ninth Circuit denied petitioner's combined petition for panel rehearing and rehearing en banc on January 8, 2020.

TABLE OF CONTENTS

QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT	ii
RULE 14.1(b)(iii) STATEMENT	ii
TABLE OF AUTHORITIES.....	v
OPINIONS BELOW.....	1
JURISDICTION.....	1
STATUTORY PROVISION INVOLVED.....	1
INTRODUCTION AND STATEMENT OF THE CASE	2
REASONS FOR GRANTING THIS PETITION	4
A. 46 USC § 11107 Provides a Remedy Not a Penalty	4
B. Historical Basis for Wage Penalties for Seamen	6
C. There are No Federal Statutory Penalties for Shorting Commercial Fishermen on their Wages	7
D. Vessel Owners can Contract Out of State Law Wage Penalties	8
E. Punitive Damages Should be Imposed under the General Maritime Law.....	9
CONCLUSION.....	9

APPENDIX

Appendix A	Memorandum Opinion in the United States Court of Appeals for the Ninth Circuit (November 21, 2019)	App. 1
Appendix B	Memorandum Decision and Order with Judgment in the United States District Court for the District of Idaho (May 23, 2018)	App. 7
Appendix C	Findings of Fact & Conclusions of Law & Order in the United States District Court for the District of Idaho (January 4, 2018)	App. 18
Appendix D	Memorandum Decision and Order in the United States District Court for the District of Idaho (May 8, 2017)	App. 31
Appendix E	Memorandum Decision and Order in the United States District Court for the District of Idaho (August 2, 2016)	App. 38
Appendix F	Order Denying Petition for Rehearing and Rehearing En Banc in the United States Court of Appeals for the Ninth Circuit (January 8, 2020)	App. 53
Appendix G	46 U.S.C. § 10601	App. 55
Appendix H	46 U.S.C. § 11107	App. 56

TABLE OF AUTHORITIES**CASES**

<i>Atlantic Sounding Co. v. Townsend</i> , 557 U.S. 404, 109 S. Ct. 2561 (2009)	7, 8, 9
<i>Doyle v. Huntress, Inc.</i> , 419 F.3d 3 (1st Cir. 2005)	5
<i>Dutra Group v. Batterton</i> , 139 S. Ct. 2275 (2019)	7, 8
<i>Flores v. American Seafoods Co.</i> , 335 F.3d 904 (9th Cir. 2003)	8
<i>Greene v. Pacific King Fisheries</i> , 1993 A.M.C. 2578 (W.D. Wash. 1993)	8
<i>Gruver v. Lesman Fisheries, Inc.</i> , 2005 A.M.C. 1434, 409 F.Supp.2d 1263 (W.D. Wash. 2005)	5, 6, 8
<i>Harper v. United States Seafoods</i> , 298 F.3d, 971 (9th Cir. 2002)	5
<i>Seattle-First v. Conaway</i> , 1997 A.M.C. 57, 98 F.3d 1195 (9th Cir. 1996)	4, 5, 9
<i>Sewell v. M/V Point Barrow</i> , 556 F.Supp. 168 (D. Ak. 1983)	8

STATUTES

28 U.S.C. § 1254(1)	1
46 U.S.C. § 591 et seq	6

46 U.S.C. § 598.....	6
46 U.S.C. § 10313(g).....	6
46 U.S.C. § 10313(h).....	6
46 U.S.C. § 10504(d).....	6
46 U.S.C. § 10601.....	2, 4, 5
46 U.S.C. § 11107.....	<i>passim</i>
Act of July 20, 1790, c. 29, sec.6, 1 Stat. 133	6
Pub. L. 98-89, 8/26/83, 97 Stat.566	6
OTHER AUTHORITIES	
Schoenbaum, <i>Admiralty and Maritime Law</i> (5th ed. 2011)	8, 9

Eli Dunn respectfully petitions for a writ of certiorari to review the memorandum decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Rule 36 disposition of the Court of Appeals is unreported. App. A, *infra*, 1. The Order of the Court of Appeals denying rehearing and rehearing en banc is unreported. App. F, *infra*, 53. The findings and conclusions of the district court following trial are reported at *Dunn v. Hatch*, 2018 A.M.C. 371 (D. Idaho 2018). App. C, *infra*, 18.

JURISDICTION

The Memorandum of the Court of Appeals was entered on November 21, 2019. App. A, *infra* 1. A timely petition for rehearing and rehearing en banc was denied on January 8, 2020. App. F, *infra*, 53. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

46 U.S.C. § 11107. Unlawful Engagements Void

A higher rate of wages is due seamen when engaged contrary to law. The statute is copied at App. G, *infra* 56. The question presented is whether this statute applies to the *non-payment* of wages as opposed to the failure to have a contract of employment.

INTRODUCTION AND STATEMENT OF THE CASE

This claim arose when petitioner Eli Dunn was cheated out of what turned out to be \$1905 in wages from fishing the 2013 salmon season in Bristol Bay, Alaska. Findings of Fact and Conclusions of Law in Order of January 4, 2018. App C. Dunn sued Hatch and Hatch Marine Enterprises in the Western District of Washington on October 7, 2014. Following jurisdictional ping-pong between the Western District of Washington and the District of Idaho, the case ended up in the District of Idaho at Boise.

Another deckhand, Colin Allen, was later added as a plaintiff to the case. Mr. Allen was dismissed for failing to appear at trial and is not a party to this petition.

Dunn was verbally promised a crew share of 10% of the catch. App. E. He asserted that the 10% crew share included any additional monies later paid by the cannery for a “price adjustment” or “profit sharing”. 10% of the profit-share/price adjustment was shown to be \$1905. App. E.

Dunn claimed that the written contract of employment required by 46 U.S.C. § 10601 was forged by Hatch. The trial court agreed with Dunn and ruled that the employment contract was a forgery and that Hatch got two of his deckhands to lie about seeing Dunn sign the employment contract. App. E. A one-day bench trial was held on November 13, 2017. The trial court ruled that Hatch acted in bad faith by forging the employment contract and lying about the

price adjustment. App. E. The judge awarded attorney fees limited to the cost of retaining and putting on testimony from Dunn’s handwriting expert. App. E. Post-trial in its memorandum decision of May 23, 2018, App. B, the trial court awarded attorney fees to Dunn in the amount of \$5,025.25 for proving Hatch’s forgery, and an additional \$5,000 in attorney fees “for Hatch’s failure to reveal in discovery the price-adjustment figures.” App. B. The trial judge found that Hatch made a false discovery response about the value of the catch, concealing payment of a \$19,050 price adjustment. The trial court refused to award attorney’s fees for the entire case based on the finding of bad faith. App. B.

In pre-trial proceedings the trial court ruled that punitive damages were not available to commercial fishermen asserting wage claims. App. C. The trial court also held that 46 U.S.C. § 11107 provides the only remedy to commercial fishermen asserting wage claims, to the exclusion of state law wage penalties and punitive damages. App. C. The court further ruled that punitive damages are not available under the general maritime law for forgery. App. C.

Final judgment was entered by the trial court on May 23, 2018. App. B. Dunn appealed to the Ninth Circuit.

The Ninth Circuit affirmed the trial court in an unpublished memorandum decision on November 21, 2019. App. A. Dunn petitioned the Ninth Circuit for rehearing and rehearing en banc. That petition was denied by order January 8, 2020. App. F.

In affirming the trial court's denial of punitive damages, the Ninth Circuit stated:

In Dunn's case, the underlying facts do not support a claim that Hatch's conduct demonstrated a case of enormity or deplorable behavior. Instead the mere statutory violation of having an oral contract rather than a written contract does not constitute "reckless indifference" to the rights' of others.

App. A at 3.

The Ninth Circuit, in affirming the trial court's ruling that state law wage penalties were preempted by 46 U.S.C. § 11107, sub silentio overruled a long line of decisions applying state law wage penalties to wage claims brought under the federal maritime law.

REASONS FOR GRANTING THIS PETITION

A. 46 USC § 11107 Provides a Remedy Not a Penalty.

In his August 2, 2016 Memorandum Decision and Order, the trial judge ruled that the exclusive penalty for a fisherman cheated on his wages was provided by 46 U.S.C. § 11107. App. E. To reach that decision, the trial court relied on *Seattle-First v. Conaway*, 1997 A.M.C. 57, 98 F.3d 1195 (9th Cir. 1996). The trial judge seized upon some dictum to misinterpret the holding of the court in *Seattle-First v. Conaway, supra*.

§ 11107 provides for a penalty against vessel owners who employ seamen without written agreements in violation of § 10601.

Id., 1997 A.M.C. 61. This was a “penalty” for not having a written contract. It was *not* a penalty for the non-payment of wages at any rate of those wages. The *Conaway* court went on to indicate:

This is a case where seamen have suffered *two* wrongs. First, they were not given agreements to which they were entitled; and second, they were not given their wages.

Id., 1997 A.M.C. 63 (emphasis added). This makes sense. What penalty is there when, as in this case, there is no dispute about the *rate* of wages, but the vessel owner refuses to pay those wages? Under the trial court’s analysis, affirmed by the Ninth Circuit, the vessel owner may cheat fishermen like Dunn with impunity.

Other Courts have clarified this distinction between remedy and penalty in wage claims brought by commercial fishermen. See *Doyle v. Huntress, Inc.*, 419 F.3d 3,14-15 (1st Cir. 2005) (“§ 11107 is tied to § 10601 as a remedial provision”).

Although we have sometimes characterized § 11107 as imposing a penalty, it is perhaps better characterized as merely providing a statutory default to prevailing market wages in the case of an invalid contract.

Harper v. United States Seafoods, 298 F.3d, 971, 977 (9th Cir. 2002). 46 U.S.C. § 11107 should be properly construed as a remedy not a penalty. An example of the difference between remedy and penalty is given in *Gruver v. Lesman Fisheries, Inc.*, 2005 A.M.C. 1434, 409 F.Supp.2d 1263 (W.D. Wash. 2005) The district

court there recognized that, depending upon the facts, a higher crewshare could be paid to fishermen pursuant to 46 U.S.C. § 11107 as wages, not penalties, and therefore *penalties* could be imposed under state law on top of wages increased by § 11107. *Id.*

Like the trial court, the Ninth Circuit confused remedies with penalties. App. A.

B. Historical Basis for Wage Penalties for Seamen

Plaintiff has presented no evidence for a historical basis for allowing punitive damages in a wage dispute.

Ninth Circuit Memorandum, App. A at 3. Almost since the founding of this republic seamen have received wage protection, in the form of exemplary damages, against vessels owners who do not promptly pay wages in full. *See*, Act of July 20, 1790, c. 29, sec.6, 1 Stat.133. Wage protections for seamen were later codified at 46 U.S.C. § 591 et seq., specifically including oyster fishermen (46 U.S.C. § 598). These statutes were revised and re-codified in 1983. Pub. L. 98-89, 8/26/83, 97 Stat.566. The 1983 recodification provided wage penalties only to merchant seamen on foreign voyages, omitting all other seamen including commercial fishermen. 46 U.S.C. § 10504(d) and § 10313(h). Now that Congress has left the field open -- with the exception of double wages for every day of delay in payment of wages to seamen on foreign voyages, 46 U.S.C. § 10313(g) – the Court should again take on the mantle of protector of the wards of admiralty and continue the historical protection given

to the wages due seamen, in the form of exemplary damages.

Punitive damages have long been an accepted remedy under general maritime law. *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 at 424, 109 S. Ct. 2561, 2575 (2009) (punitive damages for the failure to pay maintenance and cure). The Court should fill the void left by Congress and use the reasoning of *Atlantic Sounding* to allow punitive damages as a remedy for the non-payment of wages to commercial fishermen.

C. There are No Federal Statutory Penalties for Shorting Commercial Fishermen on their Wages.

In affirming the trial court's denial of any sort of wage penalties other than under § 11107, the Ninth Circuit reasoned that its affirmance:

... is supported by the Supreme Court's recent decision in *Dutra Group v. Batterton*, 139 S. Ct. 2275 (2019), in which the Court held that punitive damages cannot be recovered on claims in admiralty where there is no historical basis for allowing such damages. *Id.* at 2278 (further finding that courts should depart from those policies found in detailed statutory schemes cautiously.)

App. A at 3. What "detailed statutory schemes"? As is demonstrated above, there are no statutory penalties for the non-payment of wages to commercial fishermen. Rather,

our overriding objective is to pursue the policy expressed in congressional enactments...

Dutra, supra, 139 S. Ct. 2286.

Prior to *Atlantic Sounding, supra*, some courts borrowed from state wage penalty statutes to fill in this gap in the maritime law. *See Gruver v. Lesman, supra; Greene v. Pacific King Fisheries*, 1993 A.M.C. 2578 (W.D. Wash. 1993); *Sewell v. M/V Point Barrow*, 556 F.Supp. 168 (D. Ak. 1983).

D. Vessel Owners can Contract Out of State Law Wage Penalties

The application of state law in admiralty is a *default* rule; state law applies if there is no well-established federal admiralty rule and there is no need to create one.

Schoenbaum, *Admiralty and Maritime Law* § 4-2 (5th ed. 2011) (emphasis added).

Both the trial court and the Ninth Circuit below ruled that state law wage penalties are preempted by § 11107. Even if state law wage penalties are ultimately allowed in future cases, vessel owners may, and usually do, draft enforceable contracts stating that federal maritime law cannot be supplemented by state law remedies. *Flores v. American Seafoods Co.* 335 F.3d 904 (9th Cir. 2003). That leaves commercial fishermen with no remedy at all, even if state law wage penalties are not preempted.

E. Punitive Damages Should be Imposed under the General Maritime Law

The availability of punitive damages under general maritime law was in a confused state until *Atlantic Sounding v. Townsend, supra*, 557 U.S. 404 (punitive damages may be awarded for the “willful and wanton” disregard of a vessel owner’s obligation to pay maintenance and cure). The field is now wide open. Following the *Atlantic Sounding* decision, the rule seems to be that “punitive damages are available under the general maritime law except where they have been eliminated by statute.” Schoenbaum, *supra*, § 5-10.

Even if state law wage penalties were allowed, and not eliminated by language in employment contracts, punitive damages present a better remedy than the piecemeal borrowing from state statutes. Imposing a penalty under the general maritime law will promote uniformity when wage penalties are imposed upon vessel owners in the various states who cheat their deckhands on wages.

CONCLUSION

A seaman’s right to receive wages owed to him has traditionally received substantial legal protection, perhaps greater than the protection received by any other class of workers.

Seattle-First National Bank v. Conaway supra, 1997 A.M.C. 58-59.

There is nothing in the record to show that Hatch was criminally prosecuted for forgery. The trial court did not allow wage penalties or punitive damages and

made only a token award of attorney fees. Seven years after fishing the 2013 salmon season in Bristol Bay, AK, Dunn still has not been paid his full wages and no penalty has been imposed on Hatch for his behavior.

What disincentive is there for vessel owners who cheat their deckhands on wages? How will fishermen like Dunn, who get cheated on their wages, obtain competent legal representation in the future? Seamen, including commercial fishermen, are wards of the Court when sitting in admiralty. This important class of workers should not be without wage protection. This Court must allow wage penalties for commercial fishermen under the general maritime law in the form of punitive damages.

Respectfully submitted,

JOHN MERRIAM
Counsel of Record
LAW OFFICE OF JOHN MERRIAM
4005 20th Avenue West
Suite 110
Seattle, WA 98199
(206) 729-5252
john@merriam-maritimelaw.com

Counsel for Petitioner