



CONNIE MILLER VERSUS CANAL BARGE COMPANY, INC.

CIVIL ACTION NO: 00-0526 SECTION: "J"(1)

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF
LOUISIANA

2000 U.S. Dist. LEXIS 20145; 2001 AMC 528

August 21, 2000, Decided

August 23, 2000, Filed; August 23, 2000, Entered

DISPOSITION: [*1] Plaintiff's Motion for Partial Summary Judgment on Retroactive and Future Increase of Maintenance Rate GRANTED.

COUNSEL: For CONNIE MILLER, plaintiff: Dennis M. O'Bryan, Neil A. Davis, O'Bryan, Baun & Cohen, Birmingham, MI.

For CONNIE MILLER, plaintiff: Philip Bohrer, Bohrer Law Firm, Baton Rouge, LA.

For CANAL BARGE COMPANY, INC., defendant: James H. Roussel, Maurice Edward Bostick, Phelps Dunbar, LLP, New Orleans, LA.

JUDGES: Carl J. Barbier, J.

OPINION BY: Carl J. Barbier

OPINION

Before the Court is Plaintiff's **Motion for Partial Summary Judgment on Retroactive and Future Increase of Maintenance Rate** (Rec. Doc. 7). Defendant opposes the motion. The motion, set for hearing on July 5, 2000, is before the Court on briefs without oral argument.

In this motion, Plaintiff seeks a retroactive

(Plaintiff's last day of work was September 17, 1999) and future increase in the maintenance rate from \$ 15.00 to \$ 21.24 per day. Defendant contends that plaintiff is not entitled to an increase, and that genuine issues of material fact preclude the Court from deciding the issue on summary judgment.¹

1 The maintenance rate in this case is not governed by a collective bargaining agreement.

[*2]

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Fed. Rule Civ. P. 56(c)*. Once the moving party demonstrates the absence of a genuine issue of material fact, the non-movant must then come forward with specific facts to show that there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)). If the non-movant cannot meet this burden, then summary judgment is appropriate. *Id.*

Maintenance is equivalent to the food and lodging to which a seaman is entitled while at sea. *Morel v. Sabine Towing & Transp. Co., Inc.*, 669 F.2d 345, 346 (5th Cir.

1982). Typically, the injured seaman's own testimony as to the reasonable cost of living expenses in the community where he is living ashore is sufficient to establish the appropriate rate. See *Yelverton v. Mobile Laboratories, Inc.*, 782 F.2d 555, 558 (5th Cir. 1986) [*3] (citing *Curry v. Fluor Drilling Servs., Inc.*, 715 F.2d 893 (5th cir. 1983)). However, evidence of actual expenditures for living expenses can be of even greater probative value. See *Morel*, 669 F.2d at 347. ²

2 Of course, the inquiry does not always end with proof of actual living expenses because the seaman might not have sufficient funds to obtain the kind of maintenance that the law provides. *McWilliams v. Texaco*, 781 F.2d 514, 518 (5th Cir. 1986).

Plaintiff's affidavit and attached receipts indicate that her actual living expenses (rent/utilities, basic telephone, food and basic necessities) total \$ 21.24 per day. Thus, she has made a *prima facie* showing as to the appropriate maintenance rate. *Incandela v. American Dredging Co.*, 659 F.2d 11, 14 (2d Cir. 1981). In opposition, Defendant argues that Plaintiff's submitted expenses are inaccurate for determining the maintenance rate because she lives with her parents, and because she had [*4] no access to a telephone for personal use aboard the vessel. In reply, Plaintiff admits that she moved in with her parents, but contends that she still contributes to household

expenditures and daily living expenses.

After reviewing the pleadings, affidavits, exhibits, and applicable law, the Court finds that Plaintiff is entitled to summary judgment. Plaintiff has met her initial burden, and while Defendant's Opposition argues several points which go to the heart of the maintenance rate question, Defendant points to no evidence whatsoever to support those arguments. In short, "unsubstantiated assertions" and "conclusory allegations" are insufficient to establish a genuine issue for trial. *Little*, 37 F.3d at 1075 (citing *Lujan v. National Wildlife Federation*, 497 U.S. 871, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990); *Hopper v. Frank*, 16 F.3d 92 (5th Cir. 1994)). Defendant simply has not met its burden. Accordingly,

IT IS ORDERED that Plaintiff's **Motion for Partial Summary Judgment on Retroactive and Future Increase of Maintenance Rate** should be and is hereby **GRANTED**. All future maintenance payments due, if any, are to be made at the rate of [*5] \$ 21.24 per day. Furthermore, Defendant is to pay Plaintiff maintenance, retroactive to the date of injury, September 17, 1999, at the rate of \$ 21.24 per day, subject to a credit for maintenance already paid.

Carl J. Barbier