

FILED

JAN 21 1987

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By [Signature] Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 JUNG SIK LEE,)
)
 Defendant.)

No. A86-132 Cr.

FINAL RECOMMENDATION RE
MOTION TO DISMISS COUNT I

Pursuant to Local Magistrate Rule 12(C), the defendant's Objections to the Magistrate's Recommendation regarding the Motion to Dismiss Count I and the government's response thereto have been duly considered by the U.S. Magistrate.

The defendant has been charged in Count I of the Indictment with the offense of assaulting a federal officer or employee, namely, Jackie Heinricher, a United States Fisheries observer, acting for the Secretary of Commerce in the performance of her official duties, in violation of 18 U.S.C. §§ 111 and 1114. This assault provision is based on 18 U.S.C. §§ 118 and 254 of the 1940 edition wherein those sections were consolidated.

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Section 111 incorporates protection of those officers and employees of the United States designated in 18 U.S.C. § 1114.

The defendant maintains that the United States may not properly charge the defendant with an assault under §§ 111 and 1114 since a criminal charge could have been brought under 16 U.S.C. § 1857(1)(E) and § 1859(a).¹ Section 1857(1)(E) on its face applies to an "authorized officer in the conduct of any search or inspection described in subparagraph (D)." That subparagraph refers to § 1861 which refers specifically to law enforcement personnel not employees of the Department of Commerce generally. Thus, § 1857(1)(E) and 50 C.F.R. § 611.7(a)(3) do not appear applicable to United States Fisheries Observers. Subsequent to the enactment of the Magnuson Fishery Conservation and Management Act (MFCMA), coverage of officers and employees of the Department of Commerce was extended under § 1114 in 1978 by Public Law No. 95-616. See 92 Stat. 3110 (November 8, 1978). This amendment to § 1114 is applicable to Fisheries observers who are not authorized law enforcement officers.

¹Section 307 of the MFCMA, 16 U.S.C. § 1857(1)(E), specifically renders it unlawful for any person "to forcibly assault, resist, oppose, impede, intimidate, or interfere with [an officer authorized to enforce the provisions of the Act] in the conduct of any search or inspection described in [the applicable provisions of the MFCMA.]. Title 50 C.F.R. § 611.7(a)(14) makes it unlawful for any person to [f]orcibly assault, resist, oppose, impede, intimidate, or interfere with an observer placed aboard FFV under part 611" (foreign fishing) of 50 C.F.R. (Wildlife and Fisheries regulations pertaining to the MFCMA.) See also 50 C.F.R. § 611.7(17) prohibiting sexual harassment of an observer when it has the purpose or effect of reasonably interfering with the observer's work performance, or which creates an intimidating, hostile, or offensive environment.

The defendant has misconstrued the Magistrate's Recommendation when he states that the Magistrate concluded that Frank Orth & Associates "did not reap any benefit from [Heinricker's] services." Obviously, the hiring of a supplemental observer such as Jackie Heinricher by Frank Orth & Associates would potentially provide benefits to the contractor, but this recruitment would not prevent the hired observer from qualifying as a protected employee of the United States.

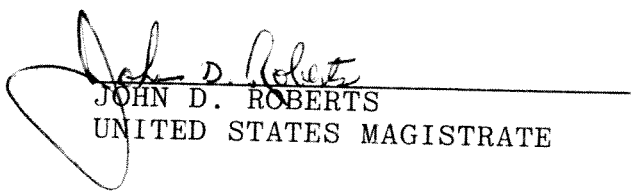
Dushon v. United States, 243 F.2d 451 (9th Cir. 1957), cited repeatedly by the defendant, is distinguishable on its facts. In that action, Dushon was an employee of a heavy construction contractor which had entered into a contract with the Alaska Railroad, an agency of the United States at the time, for the repair of a portion of the railroad tracks. Dushon was injured by being transported in a man-haul car propelled by a rail motorcar operated by a negligent employee of the contractor. The Alaska Railroad had never hired nor dispatched any motorcar operators for the contractor. Dushon argued unsuccessfully on appeal that because the Railroad had certain operating procedures for its motorcars, including the requirement that operators take an examination as to the operating rules of the Railroad, then the negligent operator of the motorcar was an employee of the United States within the application of the Federal Tort Claims Act, 28 U.S.C. §§ 1346 and 2671. The Ninth Circuit acknowledged that the test of "control" is only one of the factors to be weighed in determining whether an employment relationship is present. Id. at 453. Under the facts presented in Dushon, the

Ninth Circuit agreed with the district judge that the record was entirely inadequate to support a holding that such an employment relationship with the United States existed. In Dushon, the United States had delegated the proprietary function of repair of its tracks to the independent contractor whose employee concededly caused the collision and resulting injuries.

A benefit/control test is not the only criteria relied upon in the Magistrate's Recommendation to establish an employer-employee relationship between Heinricher and the United States. The statutory provisions, the contractual agreement between NOAA and the contractor and the duties actually performed by the U.S. observer are material to a determination of the critical relationship of Heinricher with the Department of Commerce.

The remaining objections by the defendant are without merit. WHEREFORE, having duly considered all of the objections of the defendant, and finding them to be without merit, the Recommendation is hereby forwarded without modification to the Trial Judge for his determination.

DATED this 21ST day of January, 1987 at Anchorage, Alaska.


JOHN D. ROBERTS
UNITED STATES MAGISTRATE

cc: ✓ U.S. Attorney
✓ Dan E. Dennis (DENNIS, KIBBY & MOSS)
✓ Judge Holland

