No. 06-389

IN THE
Supreme Court of the United States

RIVERBOAT SERVICES OF INDIANA, INC., *et al.*,

Petitioners,

v.

MICHAEL P. GAFFNEY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Seventh Circuit's conclusion that the plaintiffs were terminated in violation of the seaman's whistleblower statute, 46 U.S.C. § 2114, conflicts with the only other court of appeals decision interpreting the statute, or with interpretations of other whistleblower statutes.

2. Whether the Seventh Circuit's decision conflicts with its own precedent regarding proof of causation in retaliation cases.

3. Whether the Seventh Circuit erred in upholding the district court's punitive damages award under an abuse-of-discretion standard when the constitutionality of the award was never challenged.

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INTRODUCTION

Petitioners Riverboat Services, Inc., Riverboat Services of Indiana, and Thomas Gourguechon (collectively "Riverboat") urge this Court to adopt a radical and untested interpretation of the seaman's whistleblower statute, 46 U.S.C. § 2114, that has never been endorsed by any court examining this or any other analogous whistleblower statute. Riverboat's interpretation of the statute would, for the first time, exclude from protection reports of safety violations solely because the violations were committed by an agency rather than by a private employer. This interpretation would ignore both the plain language and the purpose of the seaman's whistleblower statute and would create an incentive for employees not to report safety violations that put passengers at direct risk of harm.

In addition, Riverboat asks this Court to intervene to correct what it perceives to be the Seventh Circuit's misapplication of its own precedent, and to set aside the district court's award of punitive damages based on an argument never made below. The Seventh Circuit's decision on both these issues, however, was correct under applicable precedent and, in any case, does not present a circuit split or any other issue necessitating review by this Court. For these reasons, the petition should be denied.

STATEMENT OF THE CASE

Michael P. Gaffney and the other plaintiffs in this case are merchant marine officers formerly employed on the *M/V Showboat*, a large gaming vessel operating on Lake Michigan. Pet. App. 4a. The district court found, and the U.S. Court of Appeals for the Seventh Circuit affirmed, that the plaintiffs were fired by Riverboat for reporting a violation of safety regulations to the Coast Guard. App. 2a-3a.

Coast Guard regulations require vessels the size of the *M/V Showboat* to employ only engineers holding unlimited licenses. Pet. App. 6a. Riverboat, however, requested and

obtained a certificate of inspection from the Coast Guard's regional examination center in Toledo, Ohio purporting to allow it to operate with less experienced limited-license engineers. Pet. App. 7a. Concerned about the resulting risks to passenger safety, the plaintiffs wrote several letters to the Coast Guard requesting more information, raising their safety concerns, and seeking to appeal the decision. Pet. App. 7a-10a. In a final letter of October 10, 1997, signed by all but two of the plaintiffs, the plaintiffs warned that "the change in licensing requirement for the engineers on the M/V Showboat [] from Unlimited to Limited has served to potentially and substantially compromise safety standards aboard the vessel." Pet. App. 9a-10a. The plaintiffs explained that an unlimited license was an essential qualification for an engineer on the *M/V Showboat* because of the vessel's large passenger capacity, the difficulty of maneuvering in shallow waters, and the danger of gusting wind. Pet. App. 9a-10a.

The Coast Guard initially rejected the plaintiffs' appeal. Pet. App. 11a. A little more than two months later, however, the Commander of the Coast Guard's Ninth District concluded that the *M/V Showboat*'s certificate of inspection in fact violated mandatory safety regulations and ordered that the certificate be amended to allow only unlimited-licensed engineers. Pet. App. 12a-13a. On the day after the amended certificate was posted on the *M/V Showboat*, Riverboat fired Gaffney, stating in a letter the reason for the termination: "Unauthorized communication and correspondence with regulatory bodies having jurisdiction over the operation of the vessel." Pet. App. 14a. Upon receiving the letter, Gaffney told his supervisor: "You can't fire me for that." Pet. App. 14a. Over the next two-and-a-half weeks, the other plaintiffs were also fired, but, after Gaffney's admonition to his supervisor, the

subsequent termination letters omitted the basis for discharge. Pet. App. 14a-15a.

The plaintiffs then filed suit under 46 U.S.C. § 2114, which forbids retaliation against seamen who report safety violations to the Coast Guard. Pet. App. 16a-17a. After a bench trial, the district court found that all but the two plaintiffs who did not sign the October 10 letter were terminated in retaliation for protected whistleblowing activities and awarded compensatory and punitive damages. Pet. App. 21a-23a. The Seventh Circuit affirmed the district court's judgment but concluded that the record evidence also required a finding that Riverboat was liable to the two plaintiffs who did not sign the October letter. Pet. App. 50a-53a.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Decision Does Not Create a Circuit Split on the Correct Interpretation of the Seaman's Whistleblower Statute or Other Whistleblower Statutes.

Riverboat's first argument for review is that the Seventh Circuit's decision conflicts with the only other court of appeals decision addressing the statute at issue in this case, *Garrie v. James L. Gray, Inc.*, 912 F.2d 808, 810 (5th Cir. 1990), and with the decisions of other courts interpreting different whistleblower statutes. The cases cited by Riverboat, however, involve very different circumstances and are not in any way inconsistent with the Seventh Circuit's decision here.

A. The Seventh Circuit's Decision Is Consistent with the Only Other Court of Appeals Decision to Interpret the Seaman's Whistleblower Statute.

Aside from the decision of the Seventh Circuit below, the only court of appeals decision to analyze the statute at issue in this case is the Fifth Circuit's decision in *Garrie*. *Id.* The plaintiff in *Garrie* called the Coast Guard to ask whether applicable regulations prohibited shifts of longer than twelve hours. *Id.* at 812. He did not, however, give the name of his employer or request that the Coast Guard investigate or take any other action. *Id.* Indeed, he explicitly stated that he did not wish to file a formal complaint. *Id.* After the plaintiff subsequently refused to work more than a twelve-hour shift, his employer fired him. *Id.* at 809-10.

The version of the seaman's whistleblower statute in effect in *Garrie*—the same version at issue here—provided that a seaman is protected from retaliation if he has "in good faith reported . . . to the Coast Guard that the seaman believes that a violation of . . . a regulation . . . has occurred." 46 U.S.C. § 2114 (1984, since amended in 2002). Given that the plaintiff in *Garrie* did not give the Coast Guard any information that would have allowed it to investigate a possible safety hazard, the Fifth Circuit held that the plain language of the statute was not implicated. *Garrie*, 912 F.2d at 812-13. The plaintiff in that case simply had not made a "report" of a safety violation to the Coast Guard.

Riverboat attempts to manufacture a conflict with *Garrie*, arguing that the plaintiffs in this case also did not make a "report" within the meaning of the statute. Petitioners apparently base this contention on the fact that the plaintiffs designated their various letters to the Coast Guard as either

requests for more information or as an appeal of the regional examination center's decision instead of as a formal "report."

The Seventh Circuit, however, saw no conflict with *Garrie* and relied on it heavily in its opinion. Pet. App. 32a-37a. As the Seventh Circuit recognized, nothing in the statute requires a report to be submitted in any designated form or with any particular degree of formality. Pet. App. 34a. Unlike the plaintiff in *Garrie*, the plaintiffs here alleged a specific safety violation and provided sufficient information for the Coast Guard to investigate. Pet. App. 36a-37a. Given that the Coast Guard in fact treated the plaintiffs' complaint as a report and investigated the allegations—indeed, the plaintiffs succeeded in causing the Coast Guard to revoke the amended certificate of inspection—it is nonsensical to argue that the plaintiffs, like the plaintiff in *Garrie*, did not give the Coast Guard sufficient information to remedy the complained-of safety violation.

Moreover, the seaman's whistleblower statute has since been amended to further broaden the protection given to whistleblowers. Although the amended language does not appear to significantly affect its application to this case, the fact that no court of appeals has yet interpreted the amended statute is another reason counseling against the intervention of this Court.[1]

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[1] The previous version of the statute applicable to this case read:

> An owner, charterer, managing operator, agent, master, or individual in charge of a vessel may not discharge or in any manner discriminate against a seaman because the seaman in good

(continued...)

B. The Seventh Circuit's Decision Is Consistent with Other Courts' Interpretations of the Whistleblower Protection Act and Analogous State Statutes.

Lacking any conflict with other cases interpreting the seaman's whistleblower statute, Riverboat looks to decisions interpreting other statutes designed to protect whistleblowers, including the federal Whistleblower Protection Act of 1989 ("WPA"). *See Francisco v. Office of Pers. Mgmt.*, 295 F.3d 1310 (Fed. Cir. 2002); *Meuwissen v. Dep't of Interior*, 234 F.3d 9 (Fed. Cir. 2000). The cases cited by Riverboat suggest that a government employee is not entitled to whistleblower protection when the recipient of the disclosure is already aware of the violation. Thus, under this rule, a federal employee

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[1](...continued)

> faith has reported or is about to report to the Coast Guard that the seaman believes that a violation of this subtitle, or a regulation issued under this subtitle, has occurred.

46 U.S.C. § 2114 (1984). The amended version reads:

> A person may not discharge or in any manner discriminate against a seaman because . . . the seaman in good faith has reported or is about to report to the Coast Guard or other appropriate Federal agency or department that the seaman believes that a violation of a maritime safety law or regulation prescribed under that law or regulation has occurred.

46 U.S.C. § 2114.

whistleblower may not be entitled to protection after bringing forth information about a publicly known decision, such as a published agency adjudication. *See, e.g., Francisco*, 295 F.3d at 1314; *Meuwissen*, 234 F.3d at 13. Moreover, because the officials who committed the wrongs are already aware of the violation and are unlikely to take any action to remedy it, these cases hold that "[c]riticism directed to the wrongdoers themselves is not normally viewable as whistleblowing." *Horton v. Dep't of Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995).

From these cases, Riverboat attempts to extrapolate the principle that a report of a regulatory violation to an agency is not protected as long as *someone* at the agency is already aware of the violation. None of the cases, however, holds that disclosure to a *higher* authority who is not yet aware of the violation and is capable of taking action against the wrongdoer is not protected by the WPA. To the contrary, "contact[ing] or complain[ing] to a higher authority" is precisely the kind of whistleblowing contemplated by the statute. *Willis v. Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998); *see also Horton*, 66 F.3d at 282 ("The purpose of the [WPA] is to encourage disclosure of wrongdoing to persons who may be in a position to act to remedy it, either directly by management authority, or indirectly as in disclosure to the press."). In this case, although the regulatory violation reported by the plaintiffs was known to the low-level Coast Guard agents who granted Riverboat's request for the variance, it was known to neither the public nor the higher levels of Coast Guard command. Pet. App. 37a n.23. All the cases cited by Riverboat would require giving protection to the whistleblowers under these circumstances.

Indeed, because the WPA is a statute designed to protect federal employees who complain about *government* wrongdoing, it would have been absurd for courts interpreting the statute to have adopted a position inconsistent with the

Seventh Circuit's decision here. Violations reported under the WPA would *always* have been known to at least two classes of employees at the agency—the wrongdoers themselves and the complaining parties. *See Meuwissen*, 234 F.3d at 13 ("Whenever misdeeds take place in a Federal agency, there are employees who know that it has occurred . . . ."). The knowledge of these employees, however, does not mean that the violation is "publicly known" in the sense Riverboat uses that phrase. To hold otherwise would render the WPA entirely powerless to achieve its fundamental objective: protection of government whistleblowers.

The cases cited by Riverboat interpreting the Minnesota whistleblower statute deal with the same problem; in all these cases, the whistleblower reported the information only to the wrongdoer and was held not to have made a "report" within the meaning of the state statute. *See Hitchcock v. FedEx Ground Package Sys., Inc.*, 442 F.3d 1104, 1106 (8th Cir. 2006) (holding that the Minnesota Whistleblower Statute did not protect an employee who reported to her employer only what it already knew); *Obst v. Microtron, Inc.*, 614 N.W.2d 196, 203 (Minn. 2000) (same); *Rothmeier v. Inv. Advisers, Inc.*, 556 N.W. 2d 590, 593 (Minn. Ct. App. 1997) (same). *Cf. Kelly v. Lambda Research, Inc.*, 89 F. App'x 535, 545 (6th Cir. 2004) (holding that the Ohio Whistleblower Law did not protect an employee who had no good-faith belief in wrongdoing). Thus, the holdings in these cases are not in conflict with the decision below. Moreover, even if there were some conflict, the language and purposes of the myriad state whistleblower statutes would not shed any light on the proper interpretation of the federal statute at issue here.

C. The Seventh Circuit's Decision Does Not Conflict with the Third Circuit's Interpretation of the Clean Water Act's Whistleblower Provisions.

Riverboat also cites the Third Circuit's decision in *Passaic Valley Sewerage Commissioners v. U.S. Department of Labor*, 992 F.2d 474, 478 (3d Cir. 1993), for the proposition that a statute designed to protect *privately* employed whistleblowers does not provide any protection for employees who complain about *agency* wrongdoing and that, for this reason, the plaintiff's complaint about the Coast Guard variance is not protected. *Passaic Valley* held nothing of the kind. The question there was whether, under the Clean Water Act's whistleblower protection provisions, a report about corporate wrongdoing made internally within the corporation was protected whistleblowing, or whether the complaint had to be made to a government agency or to the press to be protected. *Id.* at 477-78. The court held that *either* form of complaint was protected, but did not even address the question whether a complaint about agency misconduct would also have been protected from retaliation. *Id.* at 478-80.

In any case, reliance on another statute is inapposite here because the Seventh Circuit's interpretation of the seaman's whistleblower statute is the only one supported by the plain language of the statute. The version of the statute in effect for purposes of this case covers situations where a seaman "believes that a violation of . . . a regulation . . . *has occurred*" (emphasis added) and is not, as Riverboat suggests, limited to violations committed by the *employer*. Moreover, as the Seventh Circuit recognized, to limit the language in the way suggested by Riverboat would seriously undermine the statute's purpose of improving marine safety because it would discourage employees from reporting agency or other third-

party misconduct in cases where, for example, the Coast Guard granted a variance from binding safety regulations because of mistake or collusion and passengers are thereby put at risk. Pet. App. 43a. And, although Riverboat had not yet hired any limited licensed engineers at the time the complaint was made, there is no reason why a seaman should be forced to needlessly endanger the safety of passengers by waiting to report an imminent violation of a safety regulation until the violation has actually occurred. This is especially true where, as here, the defendant was the one who requested an illegal variance to the safety regulation and the variance has already been approved by the Coast Guard.

II. The Seventh Circuit's Decision Does Not Conflict with Its Own Precedent Regarding Proof of Causation in Retaliation Cases.

Riverboat next argues that the Seventh Circuit misapplied its own precedent in affirming the district court's decision. Riverboat cites Seventh Circuit precedent in the employment discrimination context holding that, when a plaintiff seeks to prove retaliation under the *McDonnell Douglas* burden-shifting framework, one element of the plaintiff's burden is to show that no similarly situated employees who did not engage in protected activities were subject to the adverse action.

Even assuming that the Seventh Circuit would import the *McDonnell Douglas* test into the seaman's whistleblower statute—which it has never done—the test would be inapplicable here, where the plaintiffs presented both direct and circumstantial evidence that their terminations were in retaliation for protected activity. *McDonnell Douglas* is designed to provide an alternate framework for plaintiffs who have no actual evidence of discriminatory intent. *See Stone v. City of Indianapolis*, 281 F.3d 640, 643 (7th Cir. 2002). It is

not intended to defeat plaintiffs—such as those here—who *do* have such evidence.[2]

In this case, the district court found powerful direct and circumstantial evidence in favor of the plaintiffs. Pet. App. 21a. Indeed, management's letter of termination to Gaffney—drafted the same day that the amended certificate of inspection was posted—*specifically stated* that the reason for the discharge was his report to the Coast Guard, evidence that the Seventh Circuit characterized as a "smoking gun." Pet. App. 51a. And although later termination letters to the other plaintiffs—all delivered within two weeks of the amended certification—did not explicitly contain the same admission, the district court found that the omission was explained by the fact that, after receiving his letter, Gaffney told management that his termination was illegal. Pet. App. 47a. Moreover, the district court found that Riverboat's alternative explanation for the discharges—that the plaintiffs were engaged in unionizing activities and sabotage—was not supported by any evidence and, given Riverboat's shifting justifications at various stages of the proceedings, "was simply not worthy of belief." Pet. App. 46a-47a.

Even if the Seventh Circuit *had* misapplied its own precedent, it would not be a reason for this Court to grant review. Riverboat does not argue that the decision creates a

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[2] Contrary to Riverboat's assertion, it makes no difference whether the plaintiff's actual evidence is direct or circumstantial in nature. *Rogers v. City of Chicago*, 320 F.3d 748, 753-54 (7th Cir. 2003). As long as the plaintiff produces *either* direct *or* circumstantial evidence sufficient for a trier of fact to find causation, there is no need to engage in the *McDonell Douglas* test. *Id.* Here, the plaintiffs produced both.

circuit split or raises any other issues necessitating this Court's intervention. The Seventh Circuit has already fully considered Riverboat's arguments and concluded that the district court's judgment is consistent with its own case law. Whether the Seventh Circuit correctly applied its precedent is a question for that court, not this one.

III. The Seventh Circuit Did Not Err in Upholding the District Court's Punitive Damages Award Under an Abuse-of-Discretion Standard.

Riverboat's final argument is that the Seventh Circuit erred in applying an abuse-of-discretion standard to the district court's award of punitive damages. As the Seventh Circuit made clear in its opinion, however, Riverboat never argued that the punitive damages award was unconstitutionally excessive. Pet. App. 72a n.39. This Court unambiguously held in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2001), that, "[i]f no constitutional issue is raised, the role of the appellate court, at least in the federal system, is merely to review the trial court's determination under an abuse-of-discretion standard." Because Riverboat failed to preserve its due process argument in the Seventh Circuit, its argument for application of a de novo standard of review in this Court is meritless.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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