No. 10-421

In the

Supreme Court of the United States

DILLON OFFSHORE, INC.,

Petitioner,

v.

PRESTON PORTER,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

COMPETITION PACKET FOR THE
EIGHTEENTH ANNUAL JUDGE JOHN R. BROWN
ADMIRALTY MOOT COURT COMPETITION, 2011

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PRESTON PORTER, Plaintiff-Appellee,

v.

DILLON OFFSHORE, INC., Defendant-Appellant.

No. 09-62318

United States Court of Appeals,
Fifth Circuit

May 20, 2010

Appeal from the United States District Court for the Western District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Defendant-appellant Dillon Offshore, Inc., appeals the decision of the United States District Court for the Western District of Louisiana granting final judgment on a jury verdict awarding damages to plaintiff-appellee Preston Porter. Dillon Offshore contends that the district court erred as a matter of law by failing to grant its motion to dismiss the case on the basis of section 5(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(a), which immunizes the employers of covered workers from tort liability for workplace injuries.

The district court's decision and reasoning were correct. In light of *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985), and *Thibodeaux v. Grasso Production Management Inc.*, 370 F.3d 486, 2004 AMC 1694 (5th Cir. 2004), LHWCA § 5(a) cannot apply of its own force. Moreover, it cannot apply under the OCSLA extension of the LHWCA, 43 U.S.C. § 1333(b), in light of *Mills v. Director, OWCP*, 877 F.2d 356, 1990 AMC 218 (5th Cir. 1989) (en banc).

Even if LHWCA § 5(a) were applicable, it would not foreclose the state-law remedy Porter has pursued. Under the better-reasoned jurisprudence, the LHWCA contains an implied ex-

ception to the employer-immunity rule that permits recovery of tort damages when the employer is responsible for intentionally-inflicted injuries.

The decision below is affirmed.

PRESTON PORTER, Plaintiff-Appellee,

v.

DILLON OFFSHORE, INC., Defendant-Appellant.

No. 09-62318

United States Court of Appeals,
Fifth Circuit

July 9, 2010

Appeal from the United States District Court
for the Western District of Louisiana.

ON PETITION FOR REHEARING EN BANC

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

FORTESCUE, Circuit Judge, dissenting:

I agree that in the present state of the law the court below correctly denied Dillon Offshore's motion to dismiss. But it has become plain to me that our decision in *Mills v. Director, OWCP*, 877 F.2d 356, 1990 AMC 218 (5th Cir. 1989) (en banc), took an unacceptably narrow view of the coverage of section 4(b) of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1333(b). See *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 2010 AMC 1276 (9th Cir. 2010); *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 1989 AMC 278 (3d Cir. 1988). We should grant an en banc rehearing to reexamine *Mills*.

We should also address the apparently growing number of lower-court decisions purporting to find an intentional-tort exception to the LHWCA-granted employer immunity. Whether such an exception exists is a question of high importance, and it is fairly implicated in this case. In my view, the idea that the LHWCA includes or countenances such an exception is badly mistaken. Unlike Louisiana's workers' compensation statute, the LHWCA contains no intentional-tort exception. And nothing in the language of the immunity provision, LHWCA § 5(a), 33 U.S.C. § 905(a), suggests that such an exception is lurking elsewhere in the Act or that the courts should be encouraged to invent one. The employer's immunity from tort liability is the fundamental *quid pro quo* that justifies the imposition of responsibility for the generous no-fault reparations required by the LHWCA. This time-honored legislative balancing should not be upset or skewed by judicial creativity.

United States District Court
for the Western District of Louisiana

PRESTON PORTER, Plaintiff,

v.

DILLON OFFSHORE, INC., et al., Defendants.

No. 08-Civ-6838

JUDGMENT ORDER

In accordance with the jury verdict rendered in this action on September 10, 2009, with due allowance for the amounts that the plaintiff has already received in settlement from defendant Bill Rucker and in workers' compensation payments, IT IS HEREBY ORDERED that the defendant, DILLON OFFSHORE, INC., pay to the plaintiff, PRESTON PORTER, compensatory damages in the amount of $151,000.

/s/ HARRIET W. PORTIA
District Judge

October 13, 2009

United States District Court
for the Western District of Louisiana

PRESTON PORTER, Plaintiff,

v.

DILLON OFFSHORE, INC., et al., Defendants.

No. 08-Civ-6838

September 12, 2008

MEMORANDUM OPINION AND ORDER

PORTIA, J.:

Pending before the Court is the motion of defendant Dillon Offshore, Inc. ("Dillon Offshore") to dismiss plaintiff Preston Porter's complaint under Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the motion is DENIED.

Background

Porter brought a state-law tort action in the 9th Judicial District Court, Rapides Parish, Louisiana. Accepting the allegations in the complaint as true (as must be done when ruling on the motion to dismiss), Dillon Offshore employed Porter and defendant Bill Rucker[1] as welders on a fixed offshore oil production platform in state waters in the Bay Marchand oil and gas field off the Louisiana coast. While working on the platform, Rucker was in charge of the welding crew that included Porter. On May 17, 2006, Rucker became enraged because he believed that Porter was working too slowly and taking too many rest breaks. Rucker struck Porter on Porter's right shoulder with a heavy wrench, breaking Porter's collar bone and inflicting other injuries.

Porter alleges that Rucker was acting in the course and scope of his employment when he attacked Porter. Porter acknowledges his receipt of workers' compensation benefits from Dillon Offshore under the Louisiana workers' compensation act, La. R.S. 23:1021 et seq. He asserts

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[1] Rucker previously settled with Porter and is therefore no longer involved in this litigation.

that Rucker is liable to him under Louisiana law for committing the intentional tort of battery, which was not consented to, privileged, or justified, and that Dillon Offshore is vicariously liable for Rucker's tort, committed in the course and scope of his employment. He cites La. R.S. 23:1032(B) for the proposition that nothing in the Louisiana workers' compensation act stands in the way of this battery action against Rucker and Dillon Offshore.

Porter initiated the present action in the 9th Judicial District Court in Alexandria, Louisiana. Dillon Offshore, asserting that Porter is a citizen of Louisiana and that Rucker and Dillon Offshore are citizens of Texas, removed the case to this Court under 28 U.S.C. §§ 1332 and 1441. Porter did not move to remand the case to state court, and there is no doubt that this Court has subject matter jurisdiction.

Discussion

Dillon Offshore's sole argument for Rule 12(b)(6) dismissal is its assertion that Porter's action is barred by section 5(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(a), which declares in relevant part that "[t]he liability of an employer [under LHWCA] shall be exclusive and in place of all other liability of such employer to the employee." On Dillon Offshore's view, the statute provides that workplace injuries that fall within the coverage of the LHWCA are excluded from the tort-law regime and are confined to workers' compensation benefits. Another way to put the argument is that LHWCA § 5(a) immunizes Dillon Offshore against tort liability. There are two components to the argument. The first is that the statute has the meaning and effect Dillon Offshore ascribes to it. The second is that the statute preempts state law.

Dillon Offshore's argument is unavailing for at least two reasons.[2] First, the injury-producing incident in this case falls outside the coverage of the LHWCA. Looking at the LHWCA's coverage terms—*viz.*, the *status* requirement set forth in LHWCA § 2(3), 33 U.S.C. § 902(3), and the *situs* requirement set forth in LHWCA § 3(a), 33 U.S.C. § 903(a)—the incident in suit clearly falls outside LHWCA coverage. Porter lacked LHWCA "status" under *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985), which held that oil and gas exploration and production work on fixed offshore platforms is not maritime employment and thus not within the coverage of section 2(3). Moreover, the incident did not occur on a LHWCA "situs" under *Thibodeaux v. Grasso Production Management Inc.*, 370 F.3d 486, 2004 AMC 1694 (5th Cir. 2004).

Dillon Offshore counters with the argument that, regardless of LHWCA's coverage of its own force, it is made applicable in this case by the provision of the Outer Continental Shelf Lands Act (OCSLA) that extends LHWCA to cover "any injury [to a worker] occurring as the result of [mineral-extraction] operations conducted on the outer Continental Shelf." OCSLA § 4(b), 43 U.S.C. § 1333(b). There is no dispute that the platform where the incident occurred is located on the state side of the line separating state territorial waters from the waters over the outer continental shelf (OCS). It is similarly undisputed that the platform is part of an oil field that is located partly over the shelf and partly in Louisiana waters, and that it is connected by a gas flow line to a platform located over the shelf. Dillon Offshore reasons from these facts that Porter's injury "occurr[ed] as the result of" OCS operations within the terms of OCSLA § 4(b), 43 U.S.C. § 1333(b).

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[2] There could well be a third reason, except that plaintiff has waived it. The principle of *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 1980 AMC 1930 (1980), could arguably defeat the motion. *Sun Ship* stands for the proposition that workers injured under circumstances covered by both the LHWCA and a state workers' compensation statute may choose which remedial regime to pursue. See also *Hurst v. Boland Machine & Manufacturing Co.*, 713 So.2d 857 (La. App. 4th Cir. 1998). Even if the LHWCA were applicable, therefore, *Sun Ship* might allow Porter to opt out of that regime and proceed instead under Louisiana law. But at the hearing on the motion, counsel for plaintiff expressly disclaimed any reliance on the *Sun Ship* argument. Plaintiff has therefore waived the argument and this Court will attach no weight to it.

While Dillon Offshore's argument derives considerable force from the statutory language, it is foreclosed by *Mills v. Director, OWCP*, 877 F.2d 356, 1990 AMC 218 (5th Cir. 1989) (en banc), which held that § 1333(b) coverage requires that the injury-producing incident ***both*** resulted from OCS operations ***and*** occured on an OCS platform or on the waters above the shelf.

Second, the LHWCA, like Louisiana law, includes an intentional-tort exception to the otherwise applicable immunity from exposure to tort law that it grants to employers. See, e.g., *Fisher v. Halliburton*, 390 F. Supp. 2d 610 (S.D. Tex. 2005); *Taylor v. Transocean Terminal Operators, Inc.*, 785 So.2d 860 (La. App. 4th Cir.), *writ denied*, 793 So.2d 1243, *cert. denied*, 534 U.S. 1020 (2001). Because Rucker allegedly committed an intentional tort, LHWCA § 5(a)—even if it applied—would not protect Dillon Offshore from tort liability.

Conclusion

For the foregoing reasons, Dillon Offshore's motion to dismiss under Fed. R. Civ. P.12(b)(6) is

Denied.

Selected Chronology of the Case[*]

May 17, 2006	Plaintiff injured
Sept. 12, 2008	Defendant Dillon Offshore's pre-trial motion to dismiss under Fed. R. Civ. P. 12(b)(6) denied with a memorandum opinion and order (reported as *Porter v. Dillon Offshore, Inc.*, 2008 AMC 3333 (W.D. La. 2008))
Sept. 10, 2009	Jury verdict rendered for plaintiff
Oct. 13, 2009	District court judgment entered on the verdict
Oct. 23, 2009	Notice of appeal filed
May 20, 2010	Court of appeals opinion (reported at 2010 AMC 3333) filed and judgment entered
May 28, 2010	Defendant-Appellant's motion for rehearing with suggestion for rehearing en banc filed
July 9, 2010	Motion for rehearing denied
Oct. 5, 2010	Petition for certiorari filed raising (1) the OCSLA/LHWCA coverage issue and (2) the LHWCA intentional-tort exception issue.
Dec. 6, 2010	Petition for certiorari granted

[*] This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.