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The Americans with Disabilities Act of 1990: Implications for the Manning, Operation and Construction of U.S. Commercial Vessels

Steven M. Stancliff
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The Americans with Disabilities Act of 1990:

Implications for the Manning, Operation and Construction of U.S. Commercial Vessels

by

Steven M. Stancliff

A paper submitted in partial fulfillment of the requirements for the degree of Master of Marine Affairs

University of Rhode Island
1992
Major Paper
Master of Marine Affairs

Approved:  
Professor Dennis Nixon

University of Rhode Island
1992
Since the process of obtaining a license is separate from the process of obtaining employment, the Coast Guard is not prohibited by the Americans with Disabilities Act of 1990 from imposing certain minimum physical standards which may have the effect of screening out individuals with a disability. This is analogous to the requirement for one to pass an eye examination to obtain an automobile driver's license. Furthermore, the ADA exempts the United States from even being considered as an employer. The Commandant of the Coast Guard is currently in the process of preparing a revision to the requirements of 46 C.F.R. § 12 which will include a comprehensive listing of physical requirements and standards for seamen. This project has been approved and assigned a docket number; the revised standards will be published as a notice of proposed rule making within the next year.

Requirements to Obtain CG License:

The requirements for original licenses and certificates of registry are described in 46 C.F.R. § 10.205 (1991). In order to obtain a Coast Guard license, an applicant must meet age and citizenship requirements, and

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37 Cdr Decessare, USCG Chief of Licensing Coast Guard Headquarters, interview by author, 11 December 1992.
satisfy experience and training prerequisites. An applicant must also successfully pass a physical examination or receive a waiver from the Commandant of the Coast Guard.

**Physical Requirements:**

"All applicants must pass an examination given by a licensed physician or licensed physician's assistant and present to the OCMI [Officer in Charge of Marine Inspection] a completed . . . form . . . executed by a physician. This form must provide information on the applicant's acuity of vision, color sense, and general physical condition."^38

Under certain circumstances, an applicant who is unable to pass the required physical examination may be entitled to a waiver. "Where an applicant does not possess the vision, hearing, or general physical condition necessary, the OCMI, after consultation with the examining physician or physician's assistant, may recommend a waiver to the Commandant if extenuating circumstances warrant special consideration."^39 Physical waivers are only considered if the applicant meets all other requirements, including experience, for a particular license. Other conditions the Coast Guard may consider when a waiver has been requested are:

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^38 46 C.F.R. § 10.205(D).

Whether the applicant can satisfactorily demonstrate or provide evidence of [his or her] ability to perform the duties that would normally be entrusted to the applicant by virtue of a license. This may be done through letters of recommendation from former employers attesting to the applicant's ability to perform safely those duties for which the applicant seeks a license, or (in extreme cases) by the results of a practical demonstration agreed to by the applicant.40

Practical Demonstrations:

Upon request for waiver, certain disabilities such as a missing limb or restricted motion in a limb may be evaluated during a practical demonstration. A practical demonstration will be granted on a case basis and will only be authorized by the Commandant of the Coast Guard. The Commandant will make the final decision whether to grant a waiver. The tests are designed to ensure that the applicant is "able to safely perform all the duties entrusted to the applicant by virtue of a license."41 The Coast Guard has established minimum physical performance requirements for applicants who fail to pass the physical examination, but desire to show competency through a practical demonstration. According to the Coast Guard, a practical demonstration for an Operator's License shall include such tasks as: handling mooring lines, climbing ladders, operating lifesaving and


firefighting equipment, donning a personal floatation device (PFD), assisting a person who has fallen overboard, and administering first aid.\textsuperscript{42} A practical demonstration for either a Deck or Engineer Officer's license shall include such tasks as: climbing ladders, operating watertight closures, wearing an emergency breathing device, donning a PFD, and operating deck or propulsion machinery controls.\textsuperscript{43}

Refusing a Waiver:

Because the harsh conditions that mariners must frequently operate offer little room for error, poor judgement, or physical weakness, waivers are not granted by the Coast Guard under the following conditions:

a. A color vision deficiency in a deck license applicant;

b. An epileptic condition uncontrolled by medication;

c. Loss of hearing not compensated for by hearing aid;

d. Insanity, senility, acute venereal disease, or neurosyphilis; or

e. Any other condition that would render the applicant unable to perform safely the duties with which the licensee would be entrusted.\textsuperscript{44}

These regulations are obviously designed to license only those individuals who are fit for the duties for which

\textsuperscript{42}Marine Safety Manual, 1.E.2.f.(1).

\textsuperscript{43}Marine Safety Manual, 1.E.2.f.(2).

\textsuperscript{44}Marine Safety Manual, 1.E.2.g.
the license is granted. It seems reasonable that the rigorous demands of life at sea require seafarers to possess superior skill, knowledge, and physical ability to survive the sea's unforgiving nature. Accordingly, it is a reasonable conclusion that the vast majority of individuals licensed by the U.S. Coast Guard do not possess a disability which would preclude or limit their future employment potential. Therefore, licensed seafarers are largely unaffected by the Americans with Disabilities Act of 1990.

**Persons Not Requiring CG License:**

Depending on the size of a particular vessel, there may be many on board and employed by the vessel who do not have or need a Coast Guard license. Members of the crew such as scientists, fish processors, waiters, stewards, cooks, bartenders, and entertainers normally do not possess Coast Guard licenses.\(^45\) In fact, the number of licensed personnel on a vessel at any given time could easily be far fewer than the number of unlicensed personnel; there may be only one.

\(^{45}\text{Although such individuals may not possess a Coast Guard license, some may hold Seaman's Documents. Regardless of license or document status, many will be considered to be "seamen" entitled to the owner's warranty of seaworthiness. According to Qualls v. Arctic Alaska Fisheries Corporation, 1991 AMC 582, (D. Alaska 1991) a fish processor qualifies as a Jones Act seaman because of his contribution to the function of the fish processing vessel.}\)
Summary:

Although the Federal Government is not bound to the strict employment provisions of the Americans with Disabilities Act of 1990, and the Coast Guard is not required to apply them, in the licensing process, the Coast Guard licensing process is not inconsistent with the Act and would probably fare well in a hypothetical compliance inspection. Licenses are issued to qualified individuals who are able to meet the prerequisites of the position (license) sought. Because of the arduous nature of their work, it is reasonable to apply an appropriate mental and physical standard. Finally, an individual who seeks a license but does not meet the physical standards may have the opportunity to demonstrate his ability to perform the essential functions of his position in a practical demonstration.
CHAPTER 5
LIABILITY UNDER MARITIME LAW

According to the Marine Index Bureau, there were 11,560 cases of crew injuries or illnesses aboard U.S. flag ships reported over the ten month period from January through October 1992. These injuries and illnesses directly equate to economic losses to shipowners and their insurers. For example, the United Kingdom Mutual Steam Ship Assurance Association (U.K. Club), which is the largest of Protection and Indemnity (P&I) clubs, paid out about $145 million for four-hundred twenty-five crew injury claims in 1991 alone. In 1992, the U.K. Club has already paid about $120 million on approximately three-hundred fifty crew injury claims. According to the U.K. Club's published "Analysis of Major Claims in 1992:"

The percentage number and value of claims on U.S. flag ships greatly exceeds their entry profile in the Association.

About fifty percent of the total number and value of crew injury claims made against the Club were from U.S. flag ships, while U.S. ships represent only about five percent of the Club's total membership. These figures may lead one to the conclusion that U.S. flag ships and crews are poor
insurance risks. The cost of crew injuries is significant and rightfully commands the attention of shipowners. Consequently, shipowners strive to man their vessels with the most qualified and capable seamen.

There are three remedies available to merchant seamen with respect to personal injury and wrongful death claims; each will be discussed hereafter. Known by some as the "unholy trinity," the three theories are:

1. the doctrine of maintenance and cure, under which the shipowner owes the duty to provide for the care and treatment of sick or injured seamen;

2. indemnity resulting from Jones Act negligence; and

3. breach of the shipowner's duty to provide a seaworthy vessel.

Because the "scales of justice are weighed heavily in favor of the seaman," shipowners are wise to choose carefully those whom should be offered employment. In some respects, the Americans with Disabilities Act of 1990 is another impediment to making employment decisions which are most beneficial to the vessel owner. Since the shipowners' exposure to liability is already extensive, the Act may, in some cases, exacerbate a difficult situation if it requires that individuals who are not healthy and competent seamen be hired.

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Maintenance and Cure:

Shipowners and seamen share an unusual relationship which is unique to the maritime profession. Unlike the owner of a business ashore, a shipowner is compelled under the general maritime law to provide for the care of seamen in their employ who become injured or ill. With this relationship, the seamen's health and well being are of primary concern to the vessel owner. In Harden v. Gordon, 11 F.Cas. 480, 482 (No. 6047)(C.C.D.Me.1823) Justice Joseph Story observed that:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence.

To the court, this observation accentuated the need to provide for their care. The court also concluded that the special bond between the vessel's owner and its seamen is a sort of guarantee that:

The master will watch over [the seamens'] health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; . . .

Accordingly, the shipowner is saddled with the responsibility to provide food, shelter, and medical care for an injured or ill seamen in his or her service. However, this duty is not limitless and does not extend to instances in which there is a life time disability requiring
perpetual care. Rather, it extends "through the period when the maximum cure within the reach of medical science has been achieved." 47

The duty to provide maintenance and cure exists regardless of any negligence on the part of the seaman or the vessel owner. "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection." 48

Jones Act:

The Jones Act, as codified in 46 U.S.C.A. § 688(a), extends to injured seamen or their survivors the same negligence remedies available to railroad workers under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60. Unlike maintenance and cure, the Jones Act permits recovery of damages suffered by the seaman or survivors when there is negligence on the part of the vessel owner. Generally, contributory negligence on the part of the seaman is not a bar to recovery under the Jones Act. Instead, damages are apportioned according to degree of negligence. Like maintenance and cure, the Courts' tendency is to give the seaman every possible consideration over the owner.

Warranty of Seaworthiness:

Under the general maritime law, a shipowner or operator of a vessel is held to an implied warranty that the vessel is reasonably fit for its intended purpose. "The vessel and her owners are . . . liable to an indemnity for the injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship." 49 "The duty to furnish a seaworthy vessel is absolute and nondelegable, and its breach gives rise to liability for unseaworthiness which is a species of liability without regard to negligence." 50 "[T]he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability." 51 The owner is not relieved from providing a seaworthy vessel even when the condition which renders it unseaworthy is temporary or transient. Mitchell v. Trawler Racer, Inc. also admits that while the duty is absolute, it is not one which requires a perfect ship, but rather one that is reasonably fit for its intended use.

The standard is not . . . a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel

49 The Osceola, 189 U.S. 158 (1903).


reasonably suitable for her intended service.\textsuperscript{52}

Unseaworthy Crew:

The requirements of seaworthiness also extend to the vessel's crew. In \textit{Boudoin v. Lykes Bros. S.S. CO.}, 348 U.S. 336 (1955) where one member of the crew was savagely beaten by another, the court found "... no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other" and held that the vessel was unseaworthy. When an injury results because an individual crew member is not equal in disposition to the ordinary seaman or is not competent to carry out his duties, a claim of unseaworthiness may be lodged against the vessel owner.

In \textit{Clevenger v. Star Fish \\& Oyster Company, Inc.} 325 F.2d 397 (1963) the first mate, Whitaker, drove a "devils fork" (steel ice chisel four feet in length) into Clevenger's back. In considering the issue of seaworthiness, the court ruled that:

A seaman such as Whitaker, who may be properly characterized as "defective," because he fails to measure up to the standards of his calling, renders a ship as unseaworthy as a defective winch.

It further refined its ruling to establish the following:

... in itself a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is "not equal in disposition and seamanship to the ordinary

men in the calling. Drunkenness and bellicosity are additional factors to consider when the nature of the assault is inconclusive evidence of the attacker's fitness in terms of his calling.

While the shipowner cannot be held accountable for "injuries resulting from every sailor's brawl," assault with a dangerous weapon such as a meat cleaver renders a vessel unseaworthy as a matter of law. This same line of reasoning was followed again in *Miles v. Melrose* 882 F.2d 976 (5th. Cir. 1989), where a steward's assistant was stabbed at least sixty-two times by another crewman. Interestingly, the court also held that the union which referred Melrose for employment did not exercise reasonable care in making its referral, and although the shipowner's absolute duty to provide a seaworthy vessel remains unchanged, the owner was permitted to partially recover from the union for his economic loss.

[B]ecause of the union's active role in sending workers to vessels, the special relationship between the union and the maritime employer, the union's unique ability to prevent the harm, and admiralty law's concern with the safety of seamen, the union has a duty under the general maritime law toward the owner or operator of a vessel to exercise reasonable care when it knows of a worker's violent propensities and can foresee that he consequently may assault other crew members and thereby expose the employer to liability.

The cases described above clearly show that a vessel

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53 Connolly v. Farrell Lines Inc., 268 F.2d 653 (1st Cir. 1959).
will be considered unseaworthy by virtue of a "defective" crewman, and that even a ship that is otherwise properly manned with a qualified crew may be rendered unseaworthy by just one individual. When an inexperienced and unqualified galleyhand who was blind in one eye was filling in as a boathand caused serious injury to another, the vessel was found to be unseaworthy. "Not only was the crew insufficient in number, but the one crew member . . . was totally inexperienced and blind in one eye."54 The court also determined that even though Comeaux, the injured seaman, knew of the galleyhand's inexperience, he could not be held to have assumed the risk of an unseaworthy vessel.

While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seaman. No matter how glaring the negligence of the seaman that may be said to have contributed to his injury, assumption of risk never rises to the level of even a partial defense.55

Summary:

An owner's duty to provide a seaworthy vessel is absolute and nondelegable; it is inescapable. When he or she fails to fulfill this duty and the unseaworthy condition is the proximate cause of a seaman's injury, he or she is


then liable for the resulting damages. Furthermore, knowledge of the condition which causes the unseaworthiness in not necessary to incur liability. In a legal environment which is tilted heavily in favor of the seaman, an owner must take every precaution to ensure the continued seaworthiness of his vessel.
CHAPTER 6
DISCUSSION AND ANALYSIS

Notwithstanding the fact that the Federal Government is not bound to the strict employment provisions of the Americans with Disabilities Act of 1990, and that the Coast Guard is not now required to apply them in the licensing process, the procedures for licensing mariners used by the U.S. Coast Guard are consistent with the provisions of the Americans with Disabilities Act of 1990.

Essentially, the ADA requires that employment be offered to those individuals who can perform:

1. well defined essential job functions,
2. with or without a reasonable accommodation (unless such accommodation would impose an undue hardship on the employer),
3. unless such employment would cause a direct threat to the health or safety of others which could not be eliminated by reasonable accommodation.

Coast Guard Licensees:

In the case of Coast Guard licensing, the issue of employer accommodation is not relevant but the issues of
performing essential job functions and avoiding a direct threat to the safety of others are very relevant.

To put this issue in perspective, one must consider that many commercial vessels operate twenty-four hours a day with a very minimum crew. For example, the crew of even the largest vessels such as "Very (or Ultra) Large Cargo Carriers" of over 300,000 tons displacement, may have a crew with as few as twenty individuals. Typically, the crew would include a Master, three watch officers (each responsible for the safe navigation of the ship during his or her watch), three deck watchstanders, a Chief Engineer, three assistant engineers (each responsible for the safe operation of the machinery plant during his or her watch), three engineering watchstanders, a radio operator, a cook, a steward, and three or four individuals responsible for managing cargo and accomplishing miscellaneous maintenance actions. With such a small number of individuals on board, each crewman depends for his life and well being on the capability of the other crew members who must function as a closely knit team in both routine and emergency situations.

A watch officer who could not navigate the ship under stressful conditions (mental disability), read a navigational chart (mental and/or visual disability), properly identify and interpret various colored navigation

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56By comparison, the largest U.S. aircraft carrier displaces about 100,000 tons and is "operated" by a crew of hundreds.
lights on other ships or stationary aids in time to avoid collision, allision, or grounding (visual disability), or hear audible signals (hearing disability) would pose a serious danger to his ship and others. Thus, the presence of such a watch officer would constitute a direct threat to his ship, his shipmates, other ships, and himself. His presence would likely render the vessel unseaworthy, so denying this individual employment is both prudent and consistent with the ADA.

Similarly, an Operator who is not able to perform the following essential job functions would not be a qualified individual and, in some cases, could pose a direct threat:

a. Handle mooring lines;
b. Climb and descend from a ship's ladder;
c. Reach, handle, grasp, and lift lifesaving and firefighting equipment required on a motorboat (such as portable extinguishers); don and properly wear a personal floatation device (PFD); help passengers don PFD's; and cast ring buoys.
d. Assist a person who has fallen overboard;
e. Render simple first-aid to a passenger who may be unconscious or otherwise incapacitated; and
f. Use shipboard tools to repair a mechanical breakdown.  

Likewise, an applicant for either a Deck or Engineer Officer's license who could not perform the following essential job functions would also be considered unqualified

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and could pose a direct threat to the health and/or safety of both the applicant and his shipmates:

a. Climb ladders and a Jacob's ladder, open and close watertight doors, exit via emergency routes, row a lifeboat, handle firefighting gear, and wear an emergency breathing apparatus;

b. Don and properly wear a PFD and cast a life buoy into the water; and

c. Deck officers must be able to handle mooring lines and operate winch controls. Engineers must be able to operate valves and related machinery control equipment.\textsuperscript{58}

Ability to maintain watertight boundaries and compartments on board any ship is fundamental to good seamanship and is essential in order to minimize flooding in the event of hull damage. When boundaries are not maintained watertight and hull damage occurs, progressive flooding (sequential flooding to otherwise undamaged compartments) results, and the ship is at risk of sinking (as experienced on the TITANIC). Watertight doors, hatches and scuttles are not easy to manage even for individuals without physical handicap. Accommodation is just not a practicable matter since such closure devices are already human engineered to minimize effort.

The motion of a ship in a seaway is another factor that must be considered in formulating regulations which require accommodation under the ADA. A ship's rolling and pitching motion depends entirely on the ship's designed sea

\textsuperscript{58}Marine Safety Manual, 1.E.2.f.(2).
keeping characteristics, the sea state, and the weather conditions. Thus, the adage that a sailor "should use one hand for the ship and one hand for himself" means that he needs to secure his own safety as he performs his duty for the ship. Clearly a one handed or one armed mariner is at a severe disadvantage. Remarkably, the Coast Guard has issued licenses to individuals with only one arm who were able to demonstrate the ability to perform essential job functions. During the past ten years, the New York Licensing and Regional Examination Center approved deck licenses for at least two applicants who only had one arm. In these cases, the applicants were required to demonstrate the ability to "assist a person who has fallen overboard" through an actual in-water rescue of the Coast Guard license examiner. On the other hand, it may be easier to accommodate for the total or partial loss of a leg.

Accordingly, the well defined "essential job functions" and "direct threat" exceptions to the ADA requirements to offer and provide employment to disabled individuals is consistent with the U.S. Coast Guard licensing requirements and the owner's nondelegable responsibility to provide a seaworthy vessel and crew.

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59 Ken Kaufmann, USCG Assistant Chief of Licensing, Regional Examination Center, New York, interview by author, 18 December 1992.
Medical Conditions:

With regard to individuals who have medical conditions normally controlled by medication, it must be noted that the only medical care normally available on most commercial ships, except cruise liners, is first aid. In the event an individual with diabetes, cancer, heart disease, or some other potentially debilitating condition should require acute care during a voyage, at-sea transport to a ship with medical facilities places other crew members under a "direct threat" relative to the transfer evolution itself. If an afflicted individual requires transfer at sea for medical treatment, members of the crew may be required, with peril to themselves, to man and lower a small boat to the sea and then transfer the individual from alongside the other ship.

Non-Licensed Mariners:

On the other hand, non-licensed crew members such as stewards, cooks, entertainers, waiters, busboys, bartenders, cooks, butchers, bakers, and others still represent a large number of individuals who could benefit from coverage under the ADA. Note that on a typical one-thousand five-hundred passenger cruise ship operated by Royal Cruise Lines, the Coast Guard licensed crew could be as few as fifteen; the unlicensed crew could be as many as thirty-five; and the unlicensed hotel staff could number as many as two-hundred fifty (see table 3). However, the ADA requirements for
Table 3.--Typical 1500 Passenger Cruise Liner Hotel Staff

<table>
<thead>
<tr>
<th>HOTEL MANAGEMENT STAFF</th>
<th>Subtotal Galley Staff 30</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hotel Manager</td>
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<tr>
<td>Asst. Hotel Manager</td>
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<tr>
<td>Crew Paymaster</td>
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<tr>
<td>Passenger Cashier</td>
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<tr>
<td>Stenographers</td>
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<tr>
<td>Printer</td>
<td></td>
</tr>
<tr>
<td>Tour Escort</td>
<td></td>
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<tr>
<td>Asst. Tour Escort</td>
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</tr>
<tr>
<td>Surgeon</td>
<td></td>
</tr>
<tr>
<td>Nurse</td>
<td></td>
</tr>
<tr>
<td><strong>Subtotal Hotel Mngment</strong></td>
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<tr>
<th>HOTEL TOPSIDE STAFF</th>
<th><strong>Subtotal Htl Tpsd Staff</strong> 98</th>
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<tbody>
<tr>
<td>Chief Steward</td>
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<tr>
<td>Senior Second Steward</td>
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</tr>
<tr>
<td>Second Steward</td>
<td>1</td>
</tr>
<tr>
<td>Chief Cabin Steward</td>
<td>1</td>
</tr>
<tr>
<td>Head Bartender</td>
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<tr>
<td>Bartenders</td>
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<tr>
<td>Deck Lounge Stewards</td>
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<tr>
<td>Cabin Stewards</td>
<td>55</td>
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<td>Bellmen</td>
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<td>Night Steward</td>
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<tr>
<td>General Utility</td>
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<th>DINING ROOM STAFF</th>
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<tr>
<td>Maitre d'Hotel</td>
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<tr>
<td>Hd Waiter/Wine Stwrd</td>
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</tr>
<tr>
<td>Waiters</td>
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</tr>
<tr>
<td>Busboys</td>
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<td><strong>Subtotal Dine Rm Staff</strong></td>
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<th>GALLEY STAFF</th>
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<td>Executive Chef</td>
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<tr>
<td>2nd Cook</td>
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<td>Assistant Cook</td>
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<tr>
<td>Chief Butcher</td>
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<tr>
<td>Assistant Butcher</td>
<td>1</td>
</tr>
<tr>
<td>Baker</td>
<td>1</td>
</tr>
<tr>
<td>2nd Baker</td>
<td>1</td>
</tr>
<tr>
<td>Assistant Baker</td>
<td>1</td>
</tr>
<tr>
<td>Chief Pantry</td>
<td>1</td>
</tr>
<tr>
<td>Pantry Larder</td>
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<td>Assistant Pantry</td>
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<td>3rd Steward</td>
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<tr>
<td>General Utility</td>
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<tr>
<td>Assistant Storekeeper</td>
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</tr>
<tr>
<td>Chief Cook (Crew)</td>
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<tr>
<td>Assistant Cook (Crew)</td>
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<td>General Utility</td>
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<td>Chief Laundry</td>
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<td>Laudrymen</td>
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<td>Cruise Director</td>
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<td>Ass. Cruise Director</td>
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<td>Hostess</td>
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<td>Stage Manager</td>
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<tr>
<td>Musicians</td>
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<td>Entertainers</td>
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<td><strong>Subtotal Social Staff</strong></td>
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<tr>
<th>MISCELLANEOUS STAFF</th>
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<td>Sauna/gymnasium</td>
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<td>Gift Shop</td>
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<tr>
<td>Beauticians</td>
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<tr>
<td>Barbers</td>
<td>2</td>
</tr>
<tr>
<td>Photographers</td>
<td>2</td>
</tr>
<tr>
<td>Concession Staff</td>
<td>10</td>
</tr>
<tr>
<td><strong>Subtotal Misc. Staff</strong></td>
<td><strong>20</strong></td>
</tr>
</tbody>
</table>

| Grandtotal Hotel Staff                                 | **251**                       |

62
applicants to meet essential job functions, and for employers to provide reasonable accommodation without creating direct threats, are still applicable. Thus, it is reasonable to require that waiters and bus boys be able to walk unaided and carry trays and plates of food from the galleys to the dining rooms, but the employer may not automatically assume that two arms and two legs are needed to perform the essential functions of the job.

**Passenger Accommodation:**

While on the surface it does not appear that there would be a significant penalty or undue burden to the cruise ship owner, the actual costs of accommodation are contingent upon whether the owner is permitted to charge a premium commensurate with the larger size of the wheelchair accessible stateroom, whether the regulated number of accessible staterooms is excessive, and whether the accessible staterooms are acceptable to passengers without disabilities.

An additional consideration regarding physically disabled passengers is the owner's expanded duty to exercise "reasonable care." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) limited the shipowner's warranty of seaworthiness only to seamen, and instead imposed a lesser burden of "reasonable care under the circumstances of each case" for passengers. It seems
reasonable to argue that once a vessel embarks and undertakes to accommodate an individual with a known physical or mental disability, the circumstances of the situation would dictate a corresponding increased duty of responsibility and involvement. For example, should there be an emergency such as a fire or the spread of smoke, the circumstances of the case would require a special effort on the part of the crew to secure the disabled individual's safety. In other words, once the vessel provides the reasonable accommodation and embarks a disabled individual it is appropriate to expect an increased duty of care and attention throughout the voyage. This could be accomplished by assigning a crew member to locate the disabled individual during all simulated or actual passenger-related emergencies and provide individual instructions or assistance as required.

**Employee Accommodation:**

Since ADA specifically imposes requirements to provide reasonable accommodations to qualified individuals with disabilities, vessel owners may not make assumptions about the capabilities of an individual with a disability. There are many individuals with disabilities who are not only competent, but extraordinary in their occupational specialty. One need only reflect on the remarkable accomplishments of a one armed, major league baseball
pitcher to recognize that "disability" is a relative term.

**Mobility Impaired Marine Biologist:**

By way of example, imagine a highly respected and well known marine biologist with many years of shipboard experience who was paralyzed in a crippling injury or illness, but still desires to participate in at-sea research. It is likely that before the ADA, he was without hope of ever being able to conduct at-sea research again. Now, with the statutory requirement for employers to provide reasonable accommodation where it does not impose undue hardship, this particular biologist may have the opportunity to commence his research once again. For the purpose of this discussion, assume he seeks employment on a State owned vessel.

Assuming this hypothetical marine biologist is indeed qualified for the research position sought and that he could perform all the essential functions of the position, the first consideration would relate to whether the accommodations needed to facilitate his activities on board the vessel were reasonable. Even costly accommodations may still be considered reasonable, and one cannot presume that the necessary accommodations would be "unreasonable".

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60Nelson v. Thornburgh, 567 F.Supp. 369 (E.D. Pa. 1983) required the State of Pennsylvania to provide reasonable accommodation in the form of "versabraille" devices to several blind employees despite their substantial cost.
without considering the financial resources available to the employer, which in the case of a State are considerable.

If, after evaluating the feasibility and cost of the required architectural modifications and concluding that the changes were too costly, and therefore an undue hardship, the State would have to allow the biologist the option to pay for that portion of the required accommodation which constituted the undue burden. With an additional grant, or independent wealth, the biologist could fund the required modifications and once again go to sea!

However, once at sea, the Oceanographic Research Vessels Act (OVRA), 46 U.S.C.S. § 441 et seq. stipulates that he is not a seaman entitled to the remedies of the Jones Act or the Death on the High Seas Act. But, according to Kelly v. Western Geophysical Co., 666 F.Supp. 890, (ED La 1987) he is still considered a seaman for the purposes of the warranty of seaworthiness.

Mobility Impaired Dance Instructor:

To illustrate this concept further, consider another example involving a different type of disabled employee. If a cruise liner employee whose job is to provide dance instruction to passengers suffers a fall and subsequent back injury during his dance instruction because of a slippery dance surface, and if the slippery floor is considered to render the vessel unseaworthy and is the proximate cause of
his injury, he would probably be entitled to recover under maintenance and cure, Jones Act negligence, and breach of the owner's warranty of seaworthiness. If, following his recovery to the "maximum cure within the reach of medical science" he is left paralyzed and confined to a wheelchair, how would his disability affect his capability to effectively function as a dance instructor and continue his employment?

Although this scenario may seem ridiculous on its face, the requirements of the ADA's employment provisions would require that the cruise liner evaluate his ability to perform the essential functions of the position either with or without a reasonable accommodation. It is assumed that the cruise liner is wheelchair accessible to a reasonable extent. This individual could retain his position if he were able to demonstrate that he is a qualified individual with a disability who is able to perform the essential functions of his employment with a reasonable accommodation. It would be difficult to show that his employment would pose a direct threat to anyone's safety, and since he was previously considered to be a satisfactory dance instructor, one could presume that he is qualified.

The next issue to consider is whether he could perform the essential functions of the position with or without a reasonable accommodation. If his primary purpose is to direct the activities of the dance class, and the essential
functions of the position include socializing with passengers, operating audio equipment, and offering instructions or criticisms, it is plausible that even an individual in a wheelchair could accomplish these tasks. Additionally, if he is able to direct the class with the help of an assistant to demonstrate steps which he is unable to perform (a reasonable accommodation), this instructor could be legally entitled to reclaim his position.

One Eyed Seaman:

Although the Coast Guard has established minimum vision requirements for the licensing and documentation of various seamen, having only one eye does not necessarily preclude one from attaining even a master's license. Notably, where practical demonstrations have revealed adequate peripheral vision and depth perception, and all other prerequisites have been satisfied, waivers have been granted by the Commandant of the Coast Guard and licenses issued for individuals with only one eye.

In Indiana Civil Rights Commission v. American Commercial Barge Line Company, 523 N.E.2d 241, 1989 AMC 764 (1988, Ind App), cert den (U.S.) 106 L Ed 2d. 592, 1095 S.Ct. 3246, the court considered whether a shipowner could deny employment to a seaman simply because she had only one eye. This issue is at the crux of the apparent clash between ADA's prohibition against discrimination due to
disabilities, and the shipowner's nondelegable duty to warranty the seaworthiness of the vessel and its crew. The State of Indiana Court of Appeals ruled that denying employment to a one-eyed seaman was not discrimination because of the vessel owner's overriding responsibility to provide a seaworthy vessel.

Considering that the United States Coast Guard, the agency delegated the responsibility of issuing mariner's licenses, at times, has evaluated and granted licenses to individuals with vision in only one eye, it is difficult to support the court's reasoning to deny employment solely because of her monocular vision. Since the court's opinion was issued before the employment provisions of the ADA were implemented, the court was not bound by the it. However, if this case were heard following the implementation of ADA's employment provisions and assuming the American Commercial Barge Line Company has at least twenty-five employees, their ruling would not be consistent with the ADA. Under ADA, and absent Federal regulation by the Coast Guard, it would be improper to determine as a matter of law that an individual is entirely unseaworthy simply because he or she has only one eye; this forgone conclusion completely ignores the concepts of essential functions and reasonable accommodation. Unless the specific, essential functions of the position could not be accomplished by the individual with or without an accommodation, the employer would now be
required to offer her employment.
CONCLUSION

RECONCILING ADA WITH THE GENERAL MARITIME LAW

To evaluate the impact of the Americans with Disability Act of 1990, one must view it against a backdrop of civil rights guarantees, economic considerations, the perils of sailing ships, and the body of law which defines the shipowner's duty to his passengers, cargo and crew. As the shipowner strives to achieve compliance with the new law by implementing innovative employment practices, accomplishing architectural modifications, and manning his ships with competent crews, he must ultimately guarantee that his ship is seaworthy in all respects; this duty is unavoidable.

The issues of employment remain an area of great concern to owners because of the inescapable nature of their duty to provide a seaworthy vessel and competent crew. Though employers must now comply with a host of new requirements and procedures designed to safeguard the opportunities of disabled Americans, the Act's employment provisions should not extensively affect individuals who are required to hold a valid Coast Guard license, especially since license holders must meet specified physical
requirements or demonstrate their physical capabilities. However, because many members of a ship's complement not associated with the safety or operation of the vessel are not required to hold licenses, shipowners must continue to cautiously choose the men and women who man their vessels. This also applies to the many smaller passenger carrying vessels which are manned by crews of which only a few are required to maintain licenses.

Unlicensed crew members must perform many of the same functions that licensed individuals must perform. Where the functions required of unlicensed seamen are identical to the those of licensed personnel, it follows that shipowners may reasonably apply the same physical and mental standards the Coast Guard now applies to licensed individuals. The list of functions required during Coast Guard licensing examinations and practical demonstrations may serve as an immediate starting point with defensible authority for defining essential job functions. Consequently, such individuals as well as embarked passengers may derive the most benefit from coverage under the Act.

It is clear that careful analysis is required to adequately determine the extent of accommodation appropriate for any vessel as demonstrated through the simple analysis of standards for large passenger vessels. While demanding extensive structural modifications to provide wheelchair accessibility within existing U.S. built and operated
passenger vessels could be very costly, courts will consider the extent of modification as compared to the vessel's available resources. A cost must be more than substantial to excuse an owner from providing access; the cost must be an undue burden. In some cases, a limited approach to accessibility is feasible and would also satisfy the ADA's mandate to provide reasonable accommodation. Furthermore, in order to secure the fair treatment of Americans with Disabilities in the sense of public accessibility aboard passenger ships, Congress should also encourage foreign flag ships using U.S. ports to adopt an appropriate level of accessibility.

Reaching the goals of the Americans with Disabilities Act of 1990 will not be easy for the commercial vessels industry. There will be significant costs associated with compliance, but even substantial costs do not necessarily constitute undue burden. Employers cannot make assumptions about the capabilities of individuals relative to certain disabilities, but must assess each person on his or her own merits. Success will be enjoyed by those shipowners who employ resourcefulness and creativity in their approach to meeting ADA's challenges.
SELECTED BIBLIOGRAPHY


physician.

Since the process of obtaining a license is separate from the process of obtaining employment, the Coast Guard is not prohibited by the Americans with Disabilities Act of 1990 from imposing certain minimum physical standards which may have the effect of screening out individuals with a disability. This is analogous to the requirement for one to pass an eye examination to obtain an automobile driver's license. Furthermore, the ADA exempts the United States from even being considered as an employer. The Commandant of the Coast Guard is currently in the process of preparing a revision to the requirements of 46 C.F.R § 12 which will include a comprehensive listing of physical requirements and standards for seamen. This project has been approved and assigned a docket number; the revised standards will be published as a notice of proposed rule making within the next year.

Requirements to Obtain CG License:

The requirements for original licenses and certificates of registry are described in 46 C.F.R. § 10.205 (1991). In order to obtain a Coast Guard license, an applicant must meet age and citizenship requirements, and

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37 Cdr Decessare, USCG Chief of Licensing Coast Guard Headquarters, interview by author, 11 December 1992.
satisfy experience and training prerequisites. An applicant must also successfully pass a physical examination or receive a waiver from the Commandant of the Coast Guard.

**Physical Requirements:**

"All applicants must pass an examination given by a licensed physician or licensed physician's assistant and present to the OCMI [Officer in Charge of Marine Inspection] a completed . . . form . . . executed by a physician. This form must provide information on the applicant's acuity of vision, color sense, and general physical condition."³⁸

Under certain circumstances, an applicant who is unable to pass the required physical examination may be entitled to a waiver. "Where an applicant does not possess the vision, hearing, or general physical condition necessary, the OCMI, after consultation with the examining physician or physician's assistant, may recommend a waiver to the Commandant if extenuating circumstances warrant special consideration."³⁹ Physical waivers are only considered if the applicant meets all other requirements, including experience, for a particular license. Other conditions the Coast Guard may consider when a waiver has been requested are:

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³⁸ 46 C.F.R. § 10.205(D).
³⁹ 46 C.F.R. § 10.205(d)(4).
Whether the applicant can satisfactorily demonstrate or provide evidence of [his or her] ability to perform the duties that would normally be entrusted to the applicant by virtue of a license. This may be done through letters of recommendation from former employers attesting to the applicant's ability to perform safely those duties for which the applicant seeks a license, or (in extreme cases) by the results of a practical demonstration agreed to by the applicant. 40

Practical Demonstrations:

Upon request for waiver, certain disabilities such as a missing limb or restricted motion in a limb may be evaluated during a practical demonstration. A practical demonstration will be granted on a case basis and will only be authorized by the Commandant of the Coast Guard. The Commandant will make the final decision whether to grant a waiver. The tests are designed to ensure that the applicant is "able to safely perform all the duties entrusted to the applicant by virtue of a license." 41 The Coast Guard has established minimum physical performance requirements for applicants who fail to pass the physical examination, but desire to show competency through a practical demonstration. According to the Coast Guard, a practical demonstration for an Operator's License shall include such tasks as: handling mooring lines, climbing ladders, operating lifesaving and


41 Marine Safety Manual, 1.E.2.f. 43
firefighting equipment, donning a personal floatation device (PFD), assisting a person who has fallen overboard, and administering first aid.\textsuperscript{42} A practical demonstration for either a Deck or Engineer Officer's license shall include such tasks as: climbing ladders, operating watertight closures, wearing an emergency breathing device, donning a PFD, and operating deck or propulsion machinery controls.\textsuperscript{43}

Refusing a Waiver:

Because the harsh conditions that mariners must frequently operate offer little room for error, poor judgement, or physical weakness, waivers are not granted by the Coast Guard under the following conditions:

a. A color vision deficiency in a deck license applicant;

b. An epileptic condition uncontrolled by medication;

c. Loss of hearing not compensated for by hearing aid;

d. Insanity, senility, acute venereal disease, or neurosyphilis; or

e. Any other condition that would render the applicant unable to perform safely the duties with which the licensee would be entrusted.\textsuperscript{44}

These regulations are obviously designed to license only those individuals who are fit for the duties for which

\textsuperscript{42}Marine Safety Manual, 1.E.2.f.(1).

\textsuperscript{43}Marine Safety Manual, 1.E.2.f.(2).

\textsuperscript{44}Marine Safety Manual, 1.E.2.g.
the license is granted. It seems reasonable that the rigorous demands of life at sea require seafarers to possess superior skill, knowledge, and physical ability to survive the sea's unforgiving nature. Accordingly, it is a reasonable conclusion that the vast majority of individuals licensed by the U.S. Coast Guard do not possess a disability which would preclude or limit their future employment potential. Therefore, licensed seafarers are largely unaffected by the Americans with Disabilities Act of 1990.

Persons Not Requiring CG License:

Depending on the size of a particular vessel, there may be many on board and employed by the vessel who do not have or need a Coast Guard license. Members of the crew such as scientists, fish processors, waiters, stewards, cooks, bartenders, and entertainers normally do not possess Coast Guard licenses. In fact, the number of licensed personnel on a vessel at any given time could easily be far fewer than the number of unlicensed personnel; there may be only one.

Although such individuals may not possess a Coast Guard license, some may hold Seaman's Documents. Regardless of license or document status, many will be considered to be "seamen" entitled to the owner's warranty of seaworthiness. According to Qualls v. Arctic Alaska Fisheries Corporation, 1991 AMC 582, (D. Alaska 1991) a fish processor qualifies as a Jones Act seaman because of his contribution to the function of the fish processing vessel.
Summary:

Although the Federal Government is not bound to the strict employment provisions of the Americans with Disabilities Act of 1990, and the Coast Guard is not required to apply them, in the licensing process, the Coast Guard licensing process is not inconsistent with the Act and would probably fare well in a hypothetical compliance inspection. Licenses are issued to qualified individuals who are able to meet the prerequisites of the position (license) sought. Because of the arduous nature of their work, it is reasonable to apply an appropriate mental and physical standard. Finally, an individual who seeks a license but does not meet the physical standards may have the opportunity to demonstrate his ability to perform the essential functions of his position in a practical demonstration.
CHAPTER 5
LIABILITY UNDER MARITIME LAW

According to the Marine Index Bureau, there were 11,560 cases of crew injuries or illnesses aboard U.S. flag ships reported over the ten month period from January through October 1992. These injuries and illnesses directly equate to economic losses to shipowners and their insurers. For example, the United Kingdom Mutual Steam Ship Assurance Association (U.K. Club), which is the largest of Protection and Indemnity (P&I) clubs, paid out about $145 million for four-hundred twenty-five crew injury claims in 1991 alone. In 1992, the U.K. Club has already paid about $120 million on approximately three-hundred fifty crew injury claims. According to the U.K. Club's published "Analysis of Major Claims in 1992:"

The percentage number and value of claims on U.S. flag ships greatly exceeds their entry profile in the Association.

About fifty percent of the total number and value of crew injury claims made against the Club were from U.S. flag ships, while U.S. ships represent only about five percent of the Club's total membership. These figures may lead one to the conclusion that U.S. flag ships and crews are poor
insurance risks. The cost of crew injuries is significant and rightfully commands the attention of shipowners. Consequently, shipowners strive to man their vessels with the most qualified and capable seamen.

There are three remedies available to merchant seamen with respect to personal injury and wrongful death claims; each will be discussed hereafter. Known by some as the "unholy trinity," the three theories are:

1. the doctrine of maintenance and cure, under which the shipowner owes the duty to provide for the care and treatment of sick or injured seamen;

2. indemnity resulting from Jones Act negligence; and

3. breach of the shipowner's duty to provide a seaworthy vessel.

Because the "scales of justice are weighed heavily in favor of the seaman," shipowners are wise to choose carefully those whom should be offered employment. In some respects, the Americans with Disabilities Act of 1990 is another impediment to making employment decisions which are most beneficial to the vessel owner. Since the shipowners' exposure to liability is already extensive, the Act may, in some cases, exacerbate a difficult situation if it requires that individuals who are not healthy and competent seamen be hired.

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Maintenance and Cure:

Shipowners and seamen share an unusual relationship which is unique to the maritime profession. Unlike the owner of a business ashore, a shipowner is compelled under the general maritime law to provide for the care of seamen in their employ who become injured or ill. With this relationship, the seamen's health and well being are of primary concern to the vessel owner. In *Harden v. Gordon*, 11 F.Cas. 480, 482 (No. 6047)(C.C.D.Me.1823) Justice Joseph Story observed that:

Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence.

To the court, this observationaccentuated the need to provide for their care. The court also concluded that the special bond between the vessel's owner and its seamen is a sort of guarantee that:

The master will watch over [the seamens'] health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate; . . .

Accordingly, the shipowner is saddled with the responsibility to provide food, shelter, and medical care for an injured or ill seamen in his or her service. However, this duty is not limitless and does not extend to instances in which there is a life time disability requiring
perpetual care. Rather, it extends "through the period when the maximum cure within the reach of medical science has been achieved."  

The duty to provide maintenance and cure exists regardless of any negligence on the part of the seaman or the vessel owner. "Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection."  

Jones Act:

The Jones Act, as codified in 46 U.S.C.A. § 688(a), extends to injured seamen or their survivors the same negligence remedies available to railroad workers under the Federal Employers' Liability Act, 45 U.S.C.A. §§ 51-60. Unlike maintenance and cure, the Jones Act permits recovery of damages suffered by the seaman or survivors when there is negligence on the part of the vessel owner. Generally, contributory negligence on the part of the seaman is not a bar to recovery under the Jones Act. Instead, damages are apportioned according to degree of negligence. Like maintenance and cure, the Courts' tendency is to give the seaman every possible consideration over the owner.

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Warranty of Seaworthiness:

Under the general maritime law, a shipowner or operator of a vessel is held to an implied warranty that the vessel is reasonably fit for its intended purpose. "The vessel and her owners are . . . liable to an indemnity for the injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship."\(^{49}\) "The duty to furnish a seaworthy vessel is absolute and nondelegable, and its breach gives rise to liability for unseaworthiness which is a species of liability without regard to negligence."\(^{50}\) "[T]he shipowner's actual or constructive knowledge of the unseaworthy condition is not essential to his liability."\(^{51}\) The owner is not relieved from providing a seaworthy vessel even when the condition which renders it unseaworthy is temporary or transient. *Mitchell v. Trawler Racer, Inc.* also admits that while the duty is absolute, it is not one which requires a perfect ship, but rather one that is reasonably fit for its intended use.

The standard is not . . . a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel

\(^{49}\)The Osceola, 189 U.S. 158 (1903).


reasonably suitable for her intended service.\textsuperscript{52}

Unseaworthy Crew:

The requirements of seaworthiness also extend to the vessel's crew. In \textit{Boudoin v. Lykes Bros. S.S. Co.}, 348 U.S. 336 (1955) where one member of the crew was savagely beaten by another, the court found "... no reason to draw a line between the ship and the gear on the one hand and the ship's personnel on the other" and held that the vessel was unseaworthy. When an injury results because an individual crew member is not equal in disposition to the ordinary seaman or is not competent to carry out his duties, a claim of unseaworthiness may be lodged against the vessel owner.

In \textit{Clevenger v. Star Fish & Oyster Company, Inc.} 325 F.2d 397 (1963) the first mate, Whitaker, drove a "devils fork" (steel ice chisel four feet in length) into Clevenger's back. In considering the issue of seaworthiness, the court ruled that:

A seaman such as Whitaker, who may be properly characterized as "defective," because he fails to measure up to the standards of his calling, renders a ship as unseaworthy as a defective winch.

It further refined its ruling to establish the following:

... in itself a savage assault with a meat cleaver or similarly dangerous weapon can be sufficient proof that the attacker is "not equal in disposition and seamanship to the ordinary

\footnote{\textit{Mitchell v. Trawler Racer, Inc.}, 362 U.S. 539 (1960).}
men in the calling. Drunkenness and bellicosity are additional factors to consider when the nature of the assault is inconclusive evidence of the attacker's fitness in terms of his calling.

While the shipowner cannot be held accountable for "injuries resulting from every sailor's brawl," assault with a dangerous weapon such as a meat cleaver renders a vessel unseaworthy as a matter of law. This same line of reasoning was followed again in Miles v. Melrose 882 F.2d 976 (5th. Cir. 1989), where a steward's assistant was stabbed at least sixty-two times by another crewman. Interestingly, the court also held that the union which referred Melrose for employment did not exercise reasonable care in making its referral, and although the shipowner's absolute duty to provide a seaworthy vessel remains unchanged, the owner was permitted to partially recover from the union for his economic loss.

Because of the union's active role in sending workers to vessels, the special relationship between the union and the maritime employer, the union's unique ability to prevent the harm, and admiralty law's concern with the safety of seamen, the union has a duty under the general maritime law toward the owner or operator of a vessel to exercise reasonable care when it knows of a worker's violent propensities and can foresee that he consequently may assault other crew members and thereby expose the employer to liability.

The cases described above clearly show that a vessel

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53Connolly v. Farrell Lines Inc., 268 F.2d 653 (1st Cir. 1959).
will be considered unseaworthy by virtue of a "defective" crewman, and that even a ship that is otherwise properly manned with a qualified crew may be rendered unseaworthy by just one individual. When an inexperienced and unqualified galleyhand who was blind in one eye was filling in as a boathand caused serious injury to another, the vessel was found to be unseaworthy. "Not only was the crew insufficient in number, but the one crew member . . . was totally inexperienced and blind in one eye." The court also determined that even though Comeaux, the injured seaman, knew of the galleyhand's inexperience, he could not be held to have assumed the risk of an unseaworthy vessel.

While the seaman does assume the risk of those perils of the sea which are inescapable, no risk that can be reasonably controlled by the ship owner is assumed by the seaman. No matter how glaring the negligence of the seaman that may be said to have contributed to his injury, assumption of risk never rises to the level of even a partial defense. 55

Summary:

An owner's duty to provide a seaworthy vessel is absolute and nondelegable; it is inescapable. When he or she fails to fulfill this duty and the unseaworthy condition is the proximate cause of a seaman's injury, he or she is


then liable for the resulting damages. Furthermore, knowledge of the condition which causes the unseaworthiness in not necessary to incur liability. In a legal environment which is tilted heavily in favor of the seaman, an owner must take every precaution to ensure the continued seaworthiness of his vessel.
CHAPTER 6
DISCUSSION AND ANALYSIS

Notwithstanding the fact that the Federal Government is not bound to the strict employment provisions of the Americans with Disabilities Act of 1990, and that the Coast Guard is not now required to apply them in the licensing process, the procedures for licensing mariners used by the U.S. Coast Guard are consistent with the provisions of the Americans with Disabilities Act of 1990.

Essentially, the ADA requires that employment be offered to those individuals who can perform:

1. well defined essential job functions,
2. with or without a reasonable accommodation (unless such accommodation would impose an undue hardship on the employer),
3. unless such employment would cause a direct threat to the health or safety of others which could not be eliminated by reasonable accommodation.

Coast Guard Licensees:

In the case of Coast Guard licensing, the issue of employer accommodation is not relevant but the issues of
performing essential job functions and avoiding a direct threat to the safety of others are very relevant.

To put this issue in perspective, one must consider that many commercial vessels operate twenty-four hours a day with a very minimum crew. For example, the crew of even the largest vessels such as "Very (or Ultra) Large Cargo Carriers" of over 300,000 tons displacement, may have a crew with as few as twenty individuals. Typically, the crew would include a Master, three watch officers (each responsible for the safe navigation of the ship during his or her watch), three deck watchstanders, a Chief Engineer, three assistant engineers (each responsible for the safe operation of the machinery plant during his or her watch), three engineering watchstanders, a radio operator, a cook, a steward, and three or four individuals responsible for managing cargo and accomplishing miscellaneous maintenance actions. With such a small number of individuals on board, each crewman depends for his life and well being on the capability of the other crew members who must function as a closely knit team in both routine and emergency situations.

A watch officer who could not navigate the ship under stressful conditions (mental disability), read a navigational chart (mental and/or visual disability), properly identify and interpret various colored navigation

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56By comparison, the largest U.S. aircraft carrier displaces about 100,000 tons and is "operated" by a crew of hundreds.
lights on other ships or stationary aids in time to avoid collision, allision, or grounding (visual disability), or hear audible signals (hearing disability) would pose a serious danger to his ship and others. Thus, the presence of such a watch officer would constitute a direct threat to his ship, his shipmates, other ships, and himself. His presence would likely render the vessel unseaworthy, so denying this individual employment is both prudent and consistent with the ADA.

Similarly, an Operator who is not able to perform the following essential job functions would not be a qualified individual and, in some cases, could pose a direct threat:

a. Handle mooring lines;

b. Climb and descend from a ship's ladder;

c. Reach, handle, grasp, and lift lifesaving and firefighting equipment required on a motorboat (such as portable extinguishers); don and properly wear a personal flotation device (PFD); help passengers don PFD's; and cast ring buoys.

d. Assist a person who has fallen overboard;

e. Render simple first-aid to a passenger who may be unconscious or otherwise incapacitated; and

f. Use shipboard tools to repair a mechanical breakdown.57

Likewise, an applicant for either a Deck or Engineer Officer's license who could not perform the following essential job functions would also be considered unqualified

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and could pose a direct threat to the health and/or safety of both the applicant and his shipmates:

a. Climb ladders and a Jacob's ladder, open and close watertight doors, exit via emergency routes, row a lifeboat, handle firefighting gear, and wear an emergency breathing apparatus;

b. Don and properly wear a PFD and cast a life buoy into the water; and

c. Deck officers must be able to handle mooring lines and operate winch controls. Engineers must be able to operate valves and related machinery control equipment.\(^5^8\)

Ability to maintain watertight boundaries and compartments on board any ship is fundamental to good seamanship and is essential in order to minimize flooding in the event of hull damage. When boundaries are not maintained watertight and hull damage occurs, progressive flooding (sequential flooding to otherwise undamaged compartments) results, and the ship is at risk of sinking (as experienced on the TITANIC). Watertight doors, hatches and scuttles are not easy to manage even for individuals without physical handicap. Accommodation is just not a practicable matter since such closure devices are already human engineered to minimize effort.

The motion of a ship in a seaway is another factor that must be considered in formulating regulations which require accommodation under the ADA. A ship's rolling and pitching motion depends entirely on the ship's designed sea

keeping characteristics, the sea state, and the weather conditions. Thus, the adage that a sailor "should use one hand for the ship and one hand for himself" means that he needs to secure his own safety as he performs his duty for the ship. Clearly a one handed or one armed mariner is at a severe disadvantage. Remarkably, the Coast Guard has issued licenses to individuals with only one arm who were able to demonstrate the ability to perform essential job functions. During the past ten years, the New York Licensing and Regional Examination Center approved deck licenses for at least two applicants who only had one arm. In these cases, the applicants were required to demonstrate the ability to "assist a person who has fallen overboard" through an actual in-water rescue of the Coast Guard license examiner!59 On the other hand, it may be easier to accommodate for the total or partial loss of a leg.

Accordingly, the well defined "essential job functions" and "direct threat" exceptions to the ADA requirements to offer and provide employment to disabled individuals is consistent with the U.S. Coast Guard licensing requirements and the owner's nondelegable responsibility to provide a seaworthy vessel and crew.

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59Ken Kaufmann, USCG Assistant Chief of Licensing, Regional Examination Center, New York, interview by author, 18 December 1992.
Medical Conditions:

With regard to individuals who have medical conditions normally controlled by medication, it must be noted that the only medical care normally available on most commercial ships, except cruise liners, is first aid. In the event an individual with diabetes, cancer, heart disease, or some other potentially debilitating condition should require acute care during a voyage, at-sea transport to a ship with medical facilities places other crew members under a "direct threat" relative to the transfer evolution itself. If an afflicted individual requires transfer at sea for medical treatment, members of the crew may be required, with peril to themselves, to man and lower a small boat to the sea and then transfer the individual from alongside the other ship.

Non-Licensed Mariners:

On the other hand, non-licensed crew members such as stewards, cooks, entertainers, waiters, busboys, bartenders, cooks, butchers, bakers, and others still represent a large number of individuals who could benefit from coverage under the ADA. Note that on a typical one-thousand five-hundred passenger cruise ship operated by Royal Cruise Lines, the Coast Guard licensed crew could be as few as fifteen; the unlicensed crew could be as many as thirty-five; and the unlicensed hotel staff could number as many as two-hundred fifty (see table 3). However, the ADA requirements for
Table 3.--Typical 1500 Passenger Cruise Liner Hotel Staff

<table>
<thead>
<tr>
<th>HOTEL MANAGEMENT STAFF</th>
<th>HOTEL TOPSIDE STAFF</th>
<th>HOTEL TIPSIDE STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hotel Manager</td>
<td>Chief Steward</td>
<td>Maitre d'Hotel</td>
</tr>
<tr>
<td>Asst. Hotel Manager</td>
<td>Senior Second Steward</td>
<td>Hd Waiter/Wine Stwrd</td>
</tr>
<tr>
<td>Crew Paymaster</td>
<td>Second Steward</td>
<td>Waiters</td>
</tr>
<tr>
<td>Passenger Cashier</td>
<td>Chief Cabin Steward</td>
<td>Busboys</td>
</tr>
<tr>
<td>Stenographers</td>
<td>Head Bartender</td>
<td>Subtotal Dine Rm Staff</td>
</tr>
<tr>
<td>Printer</td>
<td>Bartenders</td>
<td>67</td>
</tr>
<tr>
<td>Tour Escort</td>
<td>Deck Lounge Stewards</td>
<td></td>
</tr>
<tr>
<td>Asst. Tour Escort</td>
<td>Cabin Stewards</td>
<td></td>
</tr>
<tr>
<td>Surgeon</td>
<td>Bellmen</td>
<td></td>
</tr>
<tr>
<td>Nurse</td>
<td>Night Steward</td>
<td></td>
</tr>
<tr>
<td>Subtotal Hotel Mngment</td>
<td>General Utility</td>
<td></td>
</tr>
<tr>
<td></td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>HOTEL MANAGEMENT STAFF</th>
<th>HOTEL TOPSIDE STAFF</th>
<th>MISCELLANEOUS HOTEL STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hotel Manager</td>
<td>Chief Steward</td>
<td>3rd Steward</td>
</tr>
<tr>
<td>Asst. Hotel Manager</td>
<td>Senior Second Steward</td>
<td>General Utility</td>
</tr>
<tr>
<td>Crew Paymaster</td>
<td>Second Steward</td>
<td>Assistant Storekeeper</td>
</tr>
<tr>
<td>Passenger Cashier</td>
<td>Chief Cabin Steward</td>
<td>Chief Cook (Crew)</td>
</tr>
<tr>
<td>Stenographers</td>
<td>Head Bartender</td>
<td>Assistant Cook (Crew)</td>
</tr>
<tr>
<td>Printer</td>
<td>Bartenders</td>
<td>General Utility</td>
</tr>
<tr>
<td>Tour Escort</td>
<td>Deck Lounge Stewards</td>
<td>Chief Laundry</td>
</tr>
<tr>
<td>Asst. Tour Escort</td>
<td>Cabin Stewards</td>
<td>Laundrymen</td>
</tr>
<tr>
<td>Surgeon</td>
<td>Bellmen</td>
<td></td>
</tr>
<tr>
<td>Nurse</td>
<td>Night Steward</td>
<td></td>
</tr>
<tr>
<td>Subtotal Hotel Mngment</td>
<td>General Utility</td>
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<td></td>
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</tbody>
</table>

DINING ROOM STAFF

<table>
<thead>
<tr>
<th>GALLEY STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executive Chef</td>
</tr>
<tr>
<td>Assistant Chef</td>
</tr>
<tr>
<td>2nd Cook</td>
</tr>
<tr>
<td>Assistant Cook</td>
</tr>
<tr>
<td>Chief Butcher</td>
</tr>
<tr>
<td>Assistant Butcher</td>
</tr>
<tr>
<td>Baker</td>
</tr>
<tr>
<td>2nd Baker</td>
</tr>
<tr>
<td>Assistant Baker</td>
</tr>
<tr>
<td>Chief Pantry</td>
</tr>
<tr>
<td>Pantry Larder</td>
</tr>
<tr>
<td>Assistant Pantry</td>
</tr>
<tr>
<td>Night Pantry</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MISCELLANEOUS HOTEL STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>3rd Steward</td>
</tr>
<tr>
<td>General Utility</td>
</tr>
<tr>
<td>Assistant Storekeeper</td>
</tr>
<tr>
<td>Chief Cook (Crew)</td>
</tr>
<tr>
<td>Assistant Cook (Crew)</td>
</tr>
<tr>
<td>General Utility</td>
</tr>
<tr>
<td>Chief Laundry</td>
</tr>
<tr>
<td>Laundrymen</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SOCIAL STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cruise Director</td>
</tr>
<tr>
<td>Ass. Cruise Director</td>
</tr>
<tr>
<td>Hostess</td>
</tr>
<tr>
<td>Stage Manager</td>
</tr>
<tr>
<td>Musicians</td>
</tr>
<tr>
<td>Entertainers</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>MISCELLANEOUS STAFF</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sauna/gymnasium</td>
</tr>
<tr>
<td>Gift Shop</td>
</tr>
<tr>
<td>Beauticians</td>
</tr>
<tr>
<td>Barbers</td>
</tr>
<tr>
<td>Photographers</td>
</tr>
<tr>
<td>Concession Staff</td>
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</tbody>
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</tr>
<tr>
<td>Photographers</td>
</tr>
<tr>
<td>Concession Staff</td>
</tr>
</tbody>
</table>

Subtotal Social Staff 13

Subtotal Misc. Staff 20

Grandtotal Hotel Staff 251
applicants to meet essential job functions, and for employers to provide reasonable accommodation without creating direct threats, are still applicable. Thus, it is reasonable to require that waiters and bus boys be able to walk unaided and carry trays and plates of food from the galleys to the dining rooms, but the employer may not automatically assume that two arms and two legs are needed to perform the essential functions of the job.

Passenger Accommodation:

While on the surface it does not appear that there would be a significant penalty or undue burden to the cruise ship owner, the actual costs of accommodation are contingent upon whether the owner is permitted to charge a premium commensurate with the larger size of the wheelchair accessible stateroom, whether the regulated number of accessible staterooms is excessive, and whether the accessible staterooms are acceptable to passengers without disabilities.

An additional consideration regarding physically disabled passengers is the owner's expanded duty to exercise "reasonable care." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959) limited the shipowner's warranty of seaworthiness only to seamen, and instead imposed a lesser burden of "reasonable care under the circumstances of each case" for passengers. It seems
reasonable to argue that once a vessel embarks and undertakes to accommodate an individual with a known physical or mental disability, the circumstances of the situation would dictate a corresponding increased duty of responsibility and involvement. For example, should there be an emergency such as a fire or the spread of smoke, the circumstances of the case would require a special effort on the part of the crew to secure the disabled individual's safety. In other words, once the vessel provides the reasonable accommodation and embarks a disabled individual it is appropriate to expect an increased duty of care and attention throughout the voyage. This could be accomplished by assigning a crew member to locate the disabled individual during all simulated or actual passenger-related emergencies and provide individual instructions or assistance as required.

Employee Accommodation:

Since ADA specifically imposes requirements to provide reasonable accommodations to qualified individuals with disabilities, vessel owners may not make assumptions about the capabilities of an individual with a disability. There are many individuals with disabilities who are not only competent, but extraordinary in their occupational specialty. One need only reflect on the remarkable accomplishments of a one armed, major league baseball
pitcher to recognize that "disability" is a relative term.

Mobility Impaired Marine Biologist:

By way of example, imagine a highly respected and well known marine biologist with many years of shipboard experience who was paralyzed in a crippling injury or illness, but still desires to participate in at-sea research. It is likely that before the ADA, he was without hope of ever being able to conduct at-sea research again. Now, with the statutory requirement for employers to provide reasonable accommodation where it does not impose undue hardship, this particular biologist may have the opportunity to commence his research once again. For the purpose of this discussion, assume he seeks employment on a State owned vessel.

Assuming this hypothetical marine biologist is indeed qualified for the research position sought and that he could perform all the essential functions of the position, the first consideration would relate to whether the accommodations needed to facilitate his activities on board the vessel were reasonable. Even costly accommodations may still be considered reasonable, and one cannot presume that the necessary accommodations would be "unreasonable"

\footnote{Nelson v. Thornburgh, 567 F.Supp. 369 (E.D. Pa. 1983) required the State of Pennsylvania to provide reasonable accommodation in the form of "versabraille" devices to several blind employees despite their substantial cost.}
without considering the financial resources available to the employer, which in the case of a State are considerable.

If, after evaluating the feasibility and cost of the required architectural modifications and concluding that the changes were too costly, and therefore an undue hardship, the State would have to allow the biologist the option to pay for that portion of the required accommodation which constituted the undue burden. With an additional grant, or independent wealth, the biologist could fund the required modifications and once again go to sea!

However, once at sea, the Oceanographic Research Vessels Act (OVRA), 46 U.S.C.S. § 441 et seq. stipulates that he is not a seaman entitled to the remedies of the Jones Act or the Death on the High Seas Act. But, according to Kelly v. Western Geophysical Co., 666 F.Supp. 890, (ED La 1987) he is still considered a seaman for the purposes of the warranty of seaworthiness.

Mobility Impaired Dance Instructor:

To illustrate this concept further, consider another example involving a different type of disabled employee. If a cruise liner employee whose job is to provide dance instruction to passengers suffers a fall and subsequent back injury during his dance instruction because of a slippery dance surface, and if the slippery floor is considered to render the vessel unseaworthy and is the proximate cause of
his injury, he would probably be entitled to recover under maintenance and cure, Jones Act negligence, and breach of the owner's warranty of seaworthiness. If, following his recovery to the "maximum cure within the reach of medical science" he is left paralyzed and confined to a wheelchair, how would his disability affect his capability to effectively function as a dance instructor and continue his employment?

Although this scenario may seem ridiculous on its face, the requirements of the ADA's employment provisions would require that the cruise liner evaluate his ability to perform the essential functions of the position either with or without a reasonable accommodation. It is assumed that the cruise liner is wheelchair accessible to a reasonable extent. This individual could retain his position if he were able to demonstrate that he is a qualified individual with a disability who is able to perform the essential functions of his employment with a reasonable accommodation. It would be difficult to show that his employment would pose a direct threat to anyone's safety, and since he was previously considered to be a satisfactory dance instructor, one could presume that he is qualified.

The next issue to consider is whether he could perform the essential functions of the position with or without a reasonable accommodation. If his primary purpose is to direct the activities of the dance class, and the essential
functions of the position include socializing with passengers, operating audio equipment, and offering instructions or criticisms, it is plausible that even an individual in a wheelchair could accomplish these tasks. Additionally, if he is able to direct the class with the help of an assistant to demonstrate steps which he is unable to perform (a reasonable accommodation), this instructor could be legally entitled to reclaim his position.

One Eyed Seaman:

Although the Coast Guard has established minimum vision requirements for the licensing and documentation of various seamen, having only one eye does not necessarily preclude one from attaining even a master's license. Notably, where practical demonstrations have revealed adequate peripheral vision and depth perception, and all other prerequisites have been satisfied, waivers have been granted by the Commandant of the Coast Guard and licenses issued for individuals with only one eye.

In Indiana Civil Rights Commission v. American Commercial Barge Line Company, 523 N.E.2d 241, 1989 AMC 764 (1988, Ind App), cert den (U.S.) 106 L Ed 2d. 592, 1095 S.Ct. 3246, the court considered whether a shipowner could deny employment to a seaman simply because she had only one eye. This issue is at the crux of the apparent clash between ADA's prohibition against discrimination due to
disabilities, and the shipowner's nondelegable duty to warranty the seaworthiness of the vessel and its crew. The State of Indiana Court of Appeals ruled that denying employment to a one-eyed seaman was not discrimination because of the vessel owner's overriding responsibility to provide a seaworthy vessel.

Considering that the United States Coast Guard, the agency delegated the responsibility of issuing mariner's licenses, at times, has evaluated and granted licenses to individuals with vision in only one eye, it is difficult to support the court's reasoning to deny employment solely because of her monocular vision. Since the court's opinion was issued before the employment provisions of the ADA were implemented, the court was not bound by the it. However, if this case were heard following the implementation of ADA's employment provisions and assuming the American Commercial Barge Line Company has at least twenty-five employees, their ruling would not be consistent with the ADA. Under ADA, and absent Federal regulation by the Coast Guard, it would be improper to determine as a matter of law that an individual is entirely unseaworthy simply because he or she has only one eye; this forgone conclusion completely ignores the concepts of essential functions and reasonable accommodation. Unless the specific, essential functions of the position could not be accomplished by the individual with or without an accommodation, the employer would now be
required to offer her employment.
CONCLUSION

RECONCILING ADA WITH THE GENERAL MARITIME LAW

To evaluate the impact of the Americans with Disability Act of 1990, one must view it against a backdrop of civil rights guarantees, economic considerations, the perils of sailing ships, and the body of law which defines the shipowner's duty to his passengers, cargo and crew. As the shipowner strives to achieve compliance with the new law by implementing innovative employment practices, accomplishing architectural modifications, and manning his ships with competent crews, he must ultimately guarantee that his ship is seaworthy in all respects; this duty is unavoidable.

The issues of employment remain an area of great concern to owners because of the inescapable nature of their duty to provide a seaworthy vessel and competent crew. Though employers must now comply with a host of new requirements and procedures designed to safeguard the opportunities of disabled Americans, the Act's employment provisions should not extensively affect individuals who are required to hold a valid Coast Guard license, especially since license holders must meet specified physical
requirements or demonstrate their physical capabilities. However, because many members of a ship's complement not associated with the safety or operation of the vessel are not required to hold licenses, shipowners must continue to cautiously choose the men and women who man their vessels. This also applies to the many smaller passenger carrying vessels which are manned by crews of which only a few are required to maintain licenses.

Unlicensed crew members must perform many of the same functions that licensed individuals must perform. Where the functions required of unlicensed seamen are identical to the those of licensed personnel, it follows that shipowners may reasonably apply the same physical and mental standards the Coast Guard now applies to licensed individuals. The list of functions required during Coast Guard licensing examinations and practical demonstrations may serve as an immediate starting point with defensible authority for defining essential job functions. Consequently, such individuals as well as embarked passengers may derive the most benefit from coverage under the Act.

It is clear that careful analysis is required to adequately determine the extent of accommodation appropriate for any vessel as demonstrated through the simple analysis of standards for large passenger vessels. While demanding extensive structural modifications to provide wheelchair accessibility within existing U.S. built and operated
passenger vessels could be very costly, courts will consider the extent of modification as compared to the vessel's available resources. A cost must be more than substantial to excuse an owner from providing access; the cost must be an undue burden. In some cases, a limited approach to accessibility is feasible and would also satisfy the ADA's mandate to provide reasonable accommodation. Furthermore, in order to secure the fair treatment of Americans with Disabilities in the sense of public accessibility aboard passenger ships, Congress should also encourage foreign flag ships using U.S. ports to adopt an appropriate level of accessibility.

Reaching the goals of the Americans with Disabilities Act of 1990 will not be easy for the commercial vessels industry. There will be significant costs associated with compliance, but even substantial costs do not necessarily constitute undue burden. Employers cannot make assumptions about the capabilities of individuals relative to certain disabilities, but must assess each person on his or her own merits. Success will be enjoyed by those shipowners who employ resourcefulness and creativity in their approach to meeting ADA's challenges.
SELECTED BIBLIOGRAPHY


