

UNITED STATES OF AMERICA U.S. DEPARTMENT OF HOMELAND SECURITY UNITED STATES COAST GUARD	
ADDRESS OF COAST GUARD UNIT: Detachment Chief Suspension & Revocation NCOE 100 Forbes Drive Martinsburg, WV 25404 INVESTIGATING OFFICER: LCDR Orlando Hernandez TELEPHONE: (304) 433-3751	FOR DOCKETING CENTER USE ONLY
COMPLAINANT: UNITED STATES COAST GUARD	
RESPONDENT: JOSEPH ROBERT MC CANN	DOCKET NUMBER 2023-0106
Coast Guard Response in Opposition to Respondent's Motion to Dismiss Complaint	COAST GUARD ENFORCEMENT ACTIVITY NUMBER 7642885

The Coast Guard submits this Response in Opposition to Respondent's March 27, 2023, Motion to Dismiss Complaint ("Respondent's Motion). The Coast Guard respectfully requests the Court to issue an order denying Respondent's Motion. As set forth below, neither of the two counts alleged in the Coast Guard Complaint, filed on March 17, 2023, are time barred and therefore, the Court retains jurisdiction over this matter.

FACTS AND PROCEDURAL HISTORY

In December 2022, the Coast Guard was preparing for an administrative suspension and revocation (S&R) proceeding against Respondent's Merchant Mariner Credential (MMC) for sexual harassment he committed in 2020. *See USCG v. McCANN, Docket No. 2022-0467*, scheduled for hearing April 18, 2023. While preparing for the hearing, the Coast Guard received information that Respondent, while acting as Chief Mate on the

vessel, had been fired in August 2017, from a previous employer for engaging in similar sexually harassing behavior with a Cadet on her sea year assignment from the Kings Point U.S. Merchant Marine Academy.

Upon receipt of this information, the Coast Guard began an investigation under 46 C.F.R. Part 5 to determine if Respondent's behavior was an appropriate basis for an administrative S&R action against his MMC. The Coast Guard sought information from Respondent's employer at the time of the alleged sexual harassment and confirmed Respondent's employment had been terminated based on his sexually harassing behavior in violation of the company's policies. The Coast Guard also interviewed potential witnesses who confirmed Respondent's sexually harassing behavior did occur. After reviewing the facts uncovered during the Coast Guard investigation and confirming the allegations were legally sufficient, the Coast Guard determined it was more likely than not Respondent committed the newly discovered sexual harassment in 2017. Accordingly, the Coast Guard filed the subject Complaint in this matter alleging two counts of Misconduct. The first count alleges Respondent violated 46 U.S.C 7704a(a) by committing acts of sexual harassment, and the second count alleges Respondent violated company policy by his acts of sexual harassment. The Coast Guard served the subject Complaint on Respondent's attorney on March 17, 2023.

DISCUSSION

Respondent filed his Motion to Dismiss Complaint alleging Count 1 and 2 of the Coast Guard's March 17, 2023 Complaint are time barred. For the reasons discussed below, the Coast Guard opposes Respondent's Motion.

A. COAST GUARD'S COMPLAINT AS TO COUNT 1 FOR VIOLATION OF 46 U.S.C. §7704a(a) IS NOT TIME-BARRED

Respondent argues that the Coast Guard's Count 1 alleging misconduct for violation of 46 U.S.C. §7704a(a) is time barred because it is "clear on the pleadings that Coast Guard cannot show that Respondent's actions occurred within five years from the beginning of the S&R proceeding" when the Coast Guard Complaint was served on March 17, 2023. Respondent's Motion at 2. However, the 5-year time limitation for serving a complaint charging sexual harassment as grounds for suspension or revocation is not calculated from Respondent's actions, but instead is calculated from an "official finding of sexual harassment". 46 U.S.C §7704a(a).

The definition of "official finding" applicable in this matter is:

"a determination after an investigation by the Coast Guard that, by a preponderance of the evidence, the individual committed sexual harassment or sexual assault if the investigation affords appropriate due process rights to the subject of the investigation." 46 U.S.C. §7704a(c)(1)(B).

The language of 46 U.S.C. §7704a was drafted specifically to prevent unreported sexual misconduct from escaping scrutiny simply because it was not reported to the Coast Guard until years after its occurrence. Accordingly, the time limit to initiate an administrative action under the newly established bases codified at 46 U.S.C. Ch. 77¹ for suspension or revocation of a mariner's MMC who commits sexual harassment is not connected to the date of the incident, which may

¹ 46 U.S.C. Chapter 77 Suspension and Revocation, was amended by the *2023 National defense Authorization Act (NDAA)*, Pub. Law 117-263, Title CXVI, 136 Stat. 2395 (2022) (codified at 46 U.S.C. §§ 2101, 7704a, 7541, 11101, 2114(a), 3203, 4901, 10104, 10105).

have remained unknown for years. Instead, the time limitation to serve a complaint for violations of 46 U.S.C. §7704a are based on the date of the "official finding".

In the present case the applicable official finding is the Coast Guard's March 2023 determination: that after an investigation conducted in accordance with the requirements and due process protections established under 46 C.F.R. Part 5, that there was a preponderance of the evidence supporting a finding that Respondent committed the acts alleged in the subject Complaint. As discussed *supra*, the 2017 sexual harassment was discovered by the Coast Guard investigator while preparing for another pending S&R action against Respondent's MMC for substantially similar behavior. The Coast Guard investigation under 46 C.F.R. Part 5 determined, by a preponderance of the evidence, that Respondent's behavior in 2017 was appropriate for S&R administrative action in March 2023. Accordingly, the Coast Guard timely served this Complaint on March 17, 2023, and if the official finding underlying this Complaint is affirmed by the Administrative Law Judge (ALJ) assigned to this matter, Respondent's MMC may be suspended or revoked. 46 U.S.C. §§7704a(a), 7704a(c)(2)(A). Therefore, the Coast Guard respectfully asks the Court to deny Respondent's request that Count 1 be dismissed with prejudice, along with any claim for legal costs potentially awarded under the Equal Access to Justice Act under 5 U.S.C. §504.²

² Respondent erroneously cites to Department of Education regulations, which are inapplicable in Coast Guard suspension and revocation administrative proceedings.

B. 46 C.F.R. §5.55(b) IS APPLICABLE TO THE CHARGE OF SEXUAL HARASSMENT UNDER 46 U.S.C § 7704a(a)

Respondent also argues that Respondent's violation of 46 U.S.C. §7704a(a) is not an act of misconduct and that labeling as such on the Complaint "is a mistake by the Coast Guard having used an old form." Respondent's Motion at 5. Additionally, Respondent argues that because violation of 46 U.S.C. §7704a(a) is not misconduct, any extension to the time limit to serve a complaint under 46 C.F.R. § 5.55(b) is inapplicable.

For the purposes of Coast Guard S&R administrative proceedings, misconduct is defined as "behavior that violates some formal, duly established rule. Such rules are found in [...] statutes [...]" 46 C.F.R. § 5.27. Under the plain language of 46 C.F.R. §5.27, Respondent's violation of 46 U.S.C. § 7704a(a) is an act of misconduct.³ The Coast Guard cited the applicable statutory definition of sexual harassment for notice purposes, as the definition of sexual harassment at 46 U.S.C. §2101(46) was enacted with 46 U.S.C. §7704a on December 23, 2022. To date, the Coast Guard has not yet amended its regulations to reflect the new statutory language.

Respondent's argument that Count 1 is time barred is again without merit. As a threshold matter, Respondent's violation of 46 U.S.C. §7704a is properly noted as misconduct, thereby placing it under the purview of 46 C.F.R. §5.55(b). Because March 2023 begins the 5-year time limitation to serve this Complaint for violation of 46 U.S.C. §7704a(a), the Complaint could be served any time before October 2029.⁴ Accordingly, the Coast Guard again respectfully asks the Court to deny Respondent's request that Count

³ Violation of 46 U.S.C. §7704a(a) could also conceivably be charged as a violation of law or regulation as defined by 46 C.F.R. § 5.33.

⁴ Adding 5 years and the 565 days of Respondent's sea time outside the United States to March 2023.

1 be dismissed with prejudice along with the claim for legal costs potentially awarded under the Equal Access to Justice Act under 5 U.S.C. §504.

C. COAST GUARD'S COMPLAINT AS TO COUNT 2 IS NOT TIME BARRED

Respondent also argues the Coast Guard's Count 2 alleging misconduct for violation of company policy is time barred. He argues this on two points: the first is that the time limitation to serve a complaint for misconduct is three years after the act occurred; and the second is that even with Respondent's 565 days of sea time applied to the three years, under 46 C.F.R. §5.55(b) the misconduct charge for violation of company policy is still time barred. Respondent's Motion at 3, 5-6.

Respondent is correct that service of a complaint alleging an act of general misconduct is limited to three years. However, the Coast Guard considers Respondent's acts of sexual harassment while acting as Chief Mate of the vessel as misconduct constituting sexual molestation or perversion, and therefore the charge is subject to the five-year time limitation for serving a complaint. 46 C.F.R. §§ 5.55(a)(2), 5.61(a). See Appeal Decisions 2573 (JONES) (Misconduct based on mariner's actions of sexual molestation and perversion, while he held a position of authority over the crew members he victimized onboard the vessel, was found to be "so contrary to good order and discipline at sea that revocation is the most appropriate sanction."); 1275 (LOVELETTE) (contact, whether sexual or otherwise, is not a required element to demonstrate the occurrence of sexual molestation). It was an oversight that the Coast Guard did not include this determination as a matter in aggravation to the charge, and the Coast Guard will amend its Complaint accordingly. 33 C.F.R. § 20.305.

Coast Guard has historically included the matters in aggravation on a complaint in the event a respondent defaults because. This is because such a default constitutes an "admission of all facts alleged in the complaint" and its inclusion is an efficient means to ensure the ALJ considers matters in aggravation when determining sanction in a defaulted case. 33 C.F.R. 20.310(c). However, this is not a requirement and the Coast Guard's failure to introduce matters in aggravation at this point in this administrative proceeding is not sufficient to support a Motion to Dismiss, as the ALJ will consider matters in aggravation or mitigation when determining an appropriate order of sanction. 46 C.F.R. § 5.569; Appeal Decision 2730 (BLAKE).

This proceeding is in the nascent stages as there has been no Answer filed, nor has there been any evidence submitted, apart from the Memorandum in Support of Respondent's Motion, from which an ALJ could order an appropriate sanction. Accordingly, a dismissal at this time is premature as the ALJ has not had an opportunity to hear any evidence with which to determine whether Respondent's actions rise to the level of sexual molestation or perversion. The Coast Guard is afforded an opportunity to "suggest an order and present argument in support of this suggestion during the presentation of aggravating or mitigating evidence", which has not yet occurred. 46 C.F.R. § 5.569(a). Accordingly, the Coast Guard may present evidence showing Respondent's misconduct constituted sexual molestation or perversion as a matter in aggravation prior to an order of sanction being issued.

Applying the time limitation for service of a complaint for an act of misconduct constituting sexual molestation or perversion under 46 C.F.R. 5.61(a) and, accounting for Respondent's sea-time outside the United States, Charge 2 is not time barred until February

28, 2024.⁵ Therefore, the Coast Guard respectfully asks the Court to deny Respondent's request that Count 2 be dismissed with prejudice along with the claim for legal costs potentially awarded under the Equal Access to Justice Act under 5 U.S.C. §504.

CONCLUSION

The 5-year time limitation for Charge 1, alleging Respondent committed sexual harassment in violation of 46 U.S.C. §7704a(a), is calculated from the Coast Guard's March 2023 investigative determination that there was a preponderance of the evidence to support the finding Respondent did commit the sexual misconduct. 46 U.S.C. §7704a(c)(1)(2). Therefore Charge 1 is timely served, at a minimum, any time before October 2029.

Charge 2 is similarly not time barred. The Coast Guard is afforded an opportunity to present evidence of matters in aggravation prior to a sanction being ordered. During its presentation of evidence the Coast Guard will show Respondent's actions constituted sexual molestation or perversion such that his misconduct is an act or offense under 46 C.F.R. §5.61(a) allowing for a 5-year time limit to serve the complaint. When accounting for Respondent's sea-time outside the United States, Charge 2 is timely served any time before February 28, 2024.

⁵ Added 5 years and 565 days to August 12, 2017.

Accordingly, neither charge in the Complaint is time barred and the Coast Guard retains jurisdiction in this matter. The Coast Guard respectfully requests the Court deny Respondent's Motion to Dismiss.

RESPECTFULLY SUBMITTED,
For the U.S. Coast Guard



Jennifer A. Mehaffey, Esq.
Counsel for the U.S. Coast Guard

Date: April 6, 2023

CERTIFICATE OF SERVICE

I hereby certify that I have electronically served the foregoing document upon Respondent's counsel,

Brian McEwing, Esq. at: mcewing@lawofsea.com

Anthony Sabitsky, Esq. at: sabitsky@lawofsea.com

I hereby certify that I have filed the foregoing document with the ALJ Docketing Center and ALJ's Office electronically.

Done this 6th day of April, 2023.



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