Who Do You Work For?
A Harbor Pilot's Status Under the LHWCA

Vince C. Reuter
Eckland & Blando

A harbor pilot has always played a special role in maritime activity. The occupation stems from state law and his or her qualifications are tied to a licensing board and association that operates distinct from the vessel, the vessel owner, and the master and crew.[1] Courts face an ongoing challenge determining how to treat harbor pilots in the catalogue of federal admiralty law's duties and remedies. In *Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811 (5th Cir. 2020), the Fifth Circuit recently addressed this question by deciding whether a harbor pilot constitutes an "employee" under § 5(b) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), and thus whether he or she is limited to bringing a claim for negligence against a third party. The Fifth Circuit said no. By extension, that court addressed whether a harbor pilot could instead constitute a *Sieracki* Seaman, thus allowing him or her to bring a claim for unseaworthiness—and its benefits of strict liability. The Fifth Circuit said yes.

Defining "employee" under § 5(b) and its interplay with the *Sieracki* doctrine is rife with conflict. Unlike the Fifth Circuit, which reasoned that an "employee" must have an employer to fall under § 5(b), the Fourth and Ninth Circuits reasoned that an "employee" is merely anyone engaged in maritime employment.[2] But underlying this conflict looms *Sieracki*. Contrary to the Fifth Circuit, both the Fourth and Ninth Circuits have precedent suggesting § 5(b) essentially eliminated the *Sieracki* doctrine.[3] Did these prior holdings color the Fourth and Ninth Circuits' broad interpretation of "employee" under the LHWCA? This paper will address these questions and the underlying conflict.

The Sieracki Seaman and the LHWCA

In 1946, the Supreme Court introduced what became known as the "*Sieracki* Seaman," a title reflecting the doctrine that a shipowner may be liable to a non-crewmember for unseaworthiness if that individual is performing the ship's services with the shipowner's consent.[4] This rule provided a

---

1 *See, e.g.,* La. Stat. Ann. § 34:941 *et seq.*; N.Y. Nav. Law Chap. 37, Art. 6, § 87 *et seq.*

2 *Compare Rivera v. Kirby Offshore Marine, L.L.C.*, 983 F.3d 811, 817 (5th Cir. 2020) (holding that a harbor pilot acting as an independent contractor is not an employee under the LHWCA) *with Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1191 (4th Cir. 1991) (holding that a harbor pilot constitutes an employee under the LHWCA despite being an independent contractor) *and Ghotra v. Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1059 (9th Cir. 1997) (holding that the LHWCA definition of employee does not require an employer-employee relationship).

3 *Compare Aparicio v. Swan Lake*, 643 F.2d 1109, 1118 (5th Cir. 1981) (holding that § 5(b) did not eliminate the *Sieracki* Seaman); *with U.S. Lines, Inc. v. United States,* 593 F.2d 570, 571-72 (4th Cir. 1979) (suggesting that § 5(b) "abolished" the *Sieracki* doctrine) *and Normile v. Maritime Co. of Philippines*, 643 F.2d 1380, 1382 (9th Cir. 1981) (stating that § 5(b) "eviscerated if not eliminated Sieracki").

4 *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 95 (1946).

remedy for injured persons that fell outside the protections of the Jones Act.[5] In 1972, Congress amended the LHWCA to address the issue of non-seaman remedies and the Supreme Court's expansion of unseaworthiness claims.[6] Through § 5(b), Congress provided that covered "employees" can bring an action for an injury "caused by the negligence of a vessel," but explicitly excluded any liability "based upon the warranty of seaworthiness or a breach thereof."[7] The 1972 Amendments had significant ramifications for the covered parties. By law, proving negligence against a vessel requires proving fault, while unseaworthiness imposes the advantage of no-fault liability.[8]

In the wake of the 1972 Amendments, courts disagree on the remaining applicability (if any) of the *Sieracki* Seaman. The Fifth Circuit has held that § 5(b) did not completely eliminate the doctrine.[9] It recognizes that, at least hypothetically, injured parties can fall within the cracks between a "seaman" under the Jones Act, an "employee" under the LHWCA, or an invitee under general maritime law.[10] The Ninth Circuit went a different direction. In *Normile*, the court held that the plaintiff could not constitute a *Sieracki* Seaman, despite there being no dispute he could not recover under § 5(b), because "the 1972 Amendments have eviscerated if not eliminated Sieracki[.]"[11] Analyzing legislative history, the *Normile* court concluded that Congress sought to eliminate all "judicially created" unseaworthiness rights for "longshoremen."[12] In *U.S. Lines*, the Fourth Circuit similarly held that § 5(b) had an "indirect effect" on plaintiffs that are not covered under the LWHCA.[13]

---

5 *See id.* At that time, these plaintiffs also did not have a remedy against non-employers under the LHWCA. *See Aparicio*, 643 F.2d at 1113-15.

6 *Id.* at 1115; *see also Drake v. Raymark Industries, Inc.*, 772 F.2d 1007, 1013 (1st Cir. 1985) (calling the 1972 Amendment "a complex *quid pro quo*" that allows for "higher compensation for injuries, and the option of bringing a negligence action again the vessel," while eliminating "strict liability actions under unseaworthiness and contribution or indemnity form an employee based on express or implied warranties[.]").

7 33 U.S.C. § 905(b); *see also* 33 U.S.C § 903(a) (prescribing that the chapter applies to "an employee"); *see also* 33 U.S.C. § 902(3) (defining "employee").

8 *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 548-49 (1960).

9 *Aparicio*, 643 F.2d at 1118.

10 *Id.* at 1117-18, n.17 (stating there are "pockets of Sieracki seamen remaining after the 1972 amendments" and inferring that this pocket may include injuries sustained outside the navigable waters of the United States); *see also Cormier v. Ocean Contractors, Inc.*, 696 F.2d 1112, 1113 (5th Cir. 1983) (confirming *Apraricio*); *Burks v. American River Transp. Co.*, 679 F.2d 69, 71-75 (5th Cir. 1982) (same); *see also Bridges v. Penrod Drilling Co.*, 740 F.2d 361, 364 (5th Cir. 1984) (holding *Sieracki* does not apply where a seaman has Jones Act remedies).

11 *Normile*, 643 F.2d at 1382.

12 *Id.* at 1383.

13 *U.S. Lines,* 593 F.2d at 572.

An "Employee" Under the LHWCA

The LHWCA defines "employee" to mean "any person engaged in maritime employment[.]"[14] This definition provides two additional parts that, while not directly related to *Rivera* and this paper, impacts a full understanding of the term. First, through an "including" clause, it provides the following examples of covered employees: "longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker[.]"[15] Second, the LHWCA definition explicitly excludes certain types of employment. These are generally categorized into occupations that are not traditionally in the furtherance of maritime commerce, those that would otherwise trigger the Jones Act, and occupations involving work on relatively small vessels.[16] Thus, while the LHWCA definition is seemingly straightforward, the circuit courts do not uniformly agree on what constitutes an LHWCA "employee."

The Fifth Circuit Incorporates a Narrow Reading of "Employee" that Excludes Harbor Pilots

The case that sparked this most recent inter-circuit conflict is the Fifth Circuit's recent decision in *Rivera v. Kirby Offshore Marine*. Captain Rivera was a state-commissioned pilot in Texas.[17] In that role, he was a member of the local unincorporated pilots association.[18] Captain Rivera operated his professional career through Riben Marine, Inc., an S-Corporation that he used for his piloting services as well as for other services like being an expert witness and a charter service provider.[19]

In August 2016, Captain Rivera was dispatched to pilot the M/V TARPON, a 120-foot seagoing vessel indirectly owned and operated by Kirby Offshore Marine, L.L.C.[20] Soon after boarding the vessel for the first time and walking to the wheelhouse, Captain Rivera stepped awkwardly onto a hatch cover, rolled his ankle, and severely injured himself.[21] Doctors diagnosed him with a fracture and a condition that causes lingering pain.[22] As a result, he was deemed medically unfit for his mariner

---

14 33 U.S.C. § 902(3).

15 *Id.*

16 *Id.*

17 *Rivera*, 983 F.3d at 815.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 *Id.* at 815-16.

certification.[23] In turn, on the Board of Pilot Commissioners' recommendation, the Governor of Texas revoked Captain Rivera's commission.[24] He also lost his membership to the pilots association.[25]

Captain Rivera sued Kirby under theories related to maritime negligence and unseaworthiness.[26] He later amended his complaint to include a claim under § 5(b).[27] Captain Rivera's primary argument was that because, as a harbor pilot, he could not qualify as a Jones Act seaman, he was instead entitled to bring his unseaworthiness claim as a *Sieracki* Seaman.[28] After a bench trial, the district court concluded that Captain Rivera qualified as a *Sieracki* Seaman, that the M/V TARPON was unseaworthy, and that he suffered damages in the amount of $11,695,136.[29] This award solely reflected Captain Rivera lost future earnings as a harbor pilot, not any earnings that were related to charting services or expert work.[30]

Kirby appealed the judgment and award under several theories.[31] For purposes of this paper, Kirby challenged the district court's conclusion that Captain Rivera constituted a *Sieracki* Seaman instead of an "employee" under the LHWCA.[32] The practical distinction being whether Captain Rivera could utilize the advantage of no-fault liability. The Fifth Circuit affirmed the district court, holding that Captain Rivera could bring an unseaworthiness claim under the *Sieracki* doctrine because he was not an "employee" under the LHWCA.[33]

---

23 *Id.* at 816.

24 *Id.*

25 *Id.*

26 *Id.*

27 *Rivera v. Kirby Corp*, 3:17-cv-111, 2019 WL 4051854 at *6 (S.D. Tex. August 28, 2019); *see also* Second Amended Complaint ¶¶ 44-53 [ECF # 51].

28 *Rivera*, 983 F.3d at 816-17.

29 *Id.* at 816. More precisely, the district court concluded that Captain Rivera's claim is meritorious even if the LHWCA applied. *Id.*; *accord Rivera v. Kirby Corp.*, No. 3:17-CV-111, 2019 WL 4051854, at *6 (S.D. Tex. Aug. 28, 2019) ("Even if Captain Rivera were covered by the LHWCA, he would still prevail.") The Fifth Circuit did not address this alternative conclusion after holding that Captain Rivera was not an LHWCA "employee." *See Rivera*, 983 F.3d at 816-20.

30 *Id.* at 817.

31 *Id.*

32 *Id.* Considering the district court's alternative basis for recovery under § 5(b), Kirby had the additional burden to argue error under a negligence theory. The Fifth Circuit did not address this issue. S*ee supra* note 28.

33 *Id.* at 817-18.

The Fifth Circuit based its holding on a narrow reading of "employee" as defined by the LHWCA and the court's prior *Bach II* decision.[34] In *Bach II*, the court passed on the issue of whether a harbor pilot could bring a *Sieracki* claim because "the record before us does not clearly reveal whether Bach was an LHWCA-covered worker."[35] In a critical footnote, however, the *Bach II* court clarified that the "record does not clearly show that Bach was the employee of anyone."[36] Adopting similar language, the *Rivera* court reasoned that, to be an employee under the LHWCA, "Captain Rivera must be the employee of someone," and that there is "no evidence that Captain Rivera was an employee while aboard the Tarpon[.]"[37]

In applying this rule, the *Rivera* court further concluded that Captain Rivera was not employed by Riben Marine, Inc.[38] In doing so, the court ignored any underlying formalities regarding the relationship between Captain Rivera and his S-Corporation, including whether or how Captain Rivera received payment from that entity.[39] The *Rivera* court instead focused on Captain Rivera's relationship with the association, which the court determined could not be considered his employer."[40] In the end, the Fifth Circuit concluded that "we consider harbor pilots akin to independent contractors," a designation that the *Rivera* court considered distinct from "employees" under the LHWCA.[41]

The Fourth Circuit Incorporates a Broad Reading of "Employee" that Includes Harbor Pilots

The Fourth Circuit has a significantly different understanding of "employee" under the LHWCA. In the 1991 *Harwood* decision, a harbor pilot named Captain Harwood was severely injured while attempting to board the M/V CAPTAIN MOST.[42] At the time of the accident, Captain Harwood was a member of the Virginia Pilot Association but, like Captain Rivera, "functioned as an independent contractor."[43] Exemplifying the uniqueness of the harbor pilot profession, the *Harwood* court further noted that Virginia law mandated the owner of the M/V CAPTAIN MOST to accept

---

34 *See id. at* 817 (citing *Bach v. Trident Steamship Co., Inc.*, 920 F.2d 322, 327 n.5 (5th Cir. 1991)).

35 *Bach*, 920 F.3d at 327.

36 *Id.* at 327 n.5.

37 *Rivera*, 983 F.3d at 817

38 *Id.*

39 *See id.*

40 *Id.*

41 *Id.*

42 *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1188 (4th Cir. 1991).

43 *Id.*

Captain Harwood as the pilot or face a criminal penalty.[44] After his injury, Captain Harwood sued the vessel owner, in part, for unseaworthiness, which the district court allowed and which subsequently became the subject of the appeal.[45]

A core issue in *Harwood* mirrored that in *Rivera*: Was Captain Harwood an "employee" as defined by the LWHCA?[46] The Fourth Circuit said yes. Unlike in *Rivera*, the *Harwood* court notably did not analyze any employer-employee relationship involving Captain Harwood—*i.e.*, who employed him as the putative employee—and instead treated the term "employee" as effectively synonymous with "worker." In reaching its decision, the *Harwood* court relied on the Supreme Court's *Perini* decision for the proposition that § 5(b) expanded "maritime employment" to include any employment on navigable waters.[47] As a result, the Fourth Circuit held that the "maritime employment" designation under § 5(b) generally applies "to workers injured on navigable waters of the United States," and does "not depend on the nature of the worker's duties."[48]

The Ninth Circuit Incorporates a Broad Reading of "Employee" that Includes Independent Contractors

The Ninth Circuit also has a significantly different interpretation of "employee" under the LHWCA, but its relevant decision falls outside of the harbor pilot context.[49] In the 1997 *Ghotra* decision, a marine surveyor named Captain Ghotra was injured and killed while he was attempting to inspect cleaning work being performed aboard the M/V GRACIOUS.[50] After the incident, his estate brought a wrongful death claim under general maritime law through a theory that Captain Ghotra was not "a seaman, longshore worker, or person otherwise engaged in maritime trade," occupations that

---

44 *Id.*

45 *Id.*

46 The *Harwood* court went on to analyze whether harbor pilots fall within the exception to 5(b) because they were part of the "master or the crew."

47 *Id.* at 1191 (citing *Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor v. Perini N. River Assocs.*, 459 U.S. 297, 324 (1983).

48 *Id.*

49 Another key distinction is that *Ghotra* did not involve claims for unseaworthiness under the *Sieracki* doctrine. But as discussed herein, the court's LHWCA analysis significantly impacts this discussion because it presents a claim—*i.e.*, state law wrongful death—that, like *Sieracki* unseaworthiness, is a mutually exclusive alternative to a negligence claim under the LHWCA.

50 *Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1052 (9th Cir. 1997).

would exclude him from that remedy.[51] Importantly, similar to *Rivera* and *Harwood*, the parties agreed that Captain Ghotra was "self-employed while performing this work aboard the vessel."[52]

Like the Fourth Circuit, the Ninth Circuit promulgated a broad interpretation of "employee" that focused generally on performing work rather than the existence of any employer-employee relationship.[53] Starting with the text of the statute, the *Ghotra* court reasoned that the "literal definition of 'employee'" under the LHWCA is merely "any person engaged in maritime employment," which the court reasoned "does not include any requirement that the employee be employed by a separate 'employer' entity."[54] And unlike in *Rivera*, the *Ghotra* court rejected any definition of "employee" that would "treat [Captain Ghotra] differently because he was self-employed" or that generally analyzes the need for a "'master-servant' relationship."[55] Adopting a simplified approach, the court reasoned that Captain Ghotra was hired by the vessel owners to perform work aboard the M/V GRACIOUS, and thus was "an 'employee' in the practical sense of the word."[56]

The Current State of the Law

These three decisions demonstrate that the term "employee" under the LHWCA is not uniformly defined or applied among the circuit courts. While the phrase "engaged in maritime employment" seems relatively straightforward, there is an analytical divide between understanding "employee" within the traditional context of an employer-employee relationship, or broadly construing "employee" as synonymous with a "worker" and "maritime employment" as synonymous with "performing work." This distinction is particularly important in the context of the harbor pilot, an occupation involving self-employment but that undoubtedly engages in maritime work.

Textually, the issue may be whether the terms "employee" and "employment" carry any inherent definitions or understandings within the larger § 2 definition; or alternatively, whether the term is defined solely through that section within the context of the § 5(b) remedies. Stated differently, whether the § 2 definition supplements and clarifies the natural definition of "employee," *i.e.,* a person employed by an employer, as the Fifth Circuit's reasoning suggests, or whether the simple § 2 definition controls alone, an approach supported by the Fourth and Ninth Circuits. The Fifth Circuit's approach comports with an understanding that the LHWCA began as a workers' compensation

---

51 *Id.* (citing *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202 (1996)). The Supreme Court in *Yamaha* made clear that it used the catch-all term "nonseafarers" to distinguish between those that could bring a wrongful death claim, and those other seafarers that would be exclusively covered under federal statutes like LHWCA. *Yamaha*, 516 U.S. at 205 n.2. The analysis thus presents an either-or proposition similar to that with the *Sieracki* doctrine.

52 *Id.* at 1059

53 *See id.*

54 *Id.*

55 *Id.*

56 *Id.* at 1060.

regime. With that foundation, reading "employee" as implying the traditional employer-employee relationship, as opposed to another relationship excluded from coverage, is understandable. But the Fourth and Ninth Circuits' approach makes sense with an understanding that Congress enacted § 5(b) to, in part, codify remedies against third parties and to prohibit an unseaworthiness claim, a purpose distinct from the original LHWCA regime.[57]

A related question under the Fourth and Ninth Circuits' approach is whether "employee" can mean different things depending on the remedy sought under the LHWCA—*i.e.*, whether a person is seeking relief from his employer or a third party. The Ninth Circuit seemingly concluded that it could. It reasoned that "the fact that Captain Ghotra is unable to recover against an employer under the instant circumstances does not take him out of the scope of the LHWCA."[58] In that same vein, another question is whether an "employee" under the LHWCA necessarily needs an employer? The Ninth Circuit would ostensibly answer that question as sometimes one does, sometimes one does not. The Fourth Circuit's reasoning suggests it would likely answer that question similarly. But the Fifth Circuit would simply answer yes. The *Rivera* court clearly articulated a rule that, to qualify as an employee, the injured party "must be the employee of someone." This rule suggests that the proponent of LHWCA coverage better identify that someone.

Another preexisting conflict between these circuits may have influenced their reading of "employee" under the LHWCA. As noted, Fifth Circuit precedent provides that *Sieracki* remains viable in the "pockets" where the LHWCA and other federal law does not explicitly apply.[59] In that regard, the *Sieracki* doctrine can thus act as a fallback if the LHWCA language is problematic but the interests of justice support a maritime remedy. An argument can be made that the Fourth and Ninth Circuits have effectively eliminated this option.[60] Thus, in these courts, if the interests of justice promote a clear-cut admiralty claim to someone like a harbor pilot, the most precedentially consistent path is through § 5(b), which means considering him or her an "employee" under the § 2 definition. That provides an incentive to read the definition broadly.[61]

The correct way to interpret "employee" in the LHWCA remains an open question. But until the Supreme Court settles the conflict, the lack of uniformity is not merely academic. This is

---

[57] 33 U.S.C. § 905(b).

[58] *Ghotra*, 113 F.3d at 1059.

[59] *See supra* note 3.

[60] *Id.; see also Harwood*, 944 F.22d at 1189-90, n.1 ("Furthermore, this court has repeatedly ruled that the 1972 amendments 'abolished' the *Sieracki* form of action."); *but see id.* at 1198 n.9 (the dissent notes that Fourth Circuit precedent has "not directly confronted the issue of whether a seaman not covered under the [LHWCA] or the Jones Act retain their cause of action.").

[61] To be fair, unlike the Fourth Circuit, the Ninth Circuit did not decide *Ghotra* within the context of *Sieracki*, and thus had no occasion to consider its remaining viability against the definition of "employee" under the LHWCA—with harbor pilots or otherwise. But that circuit's precedent describing the expiration of *Sieracki* in 1972, *see Normile*, 643 F.2d at 1383, strongly suggests that it would also apply a broad interpretation of "employee" in that context, as opposed to reviving the *Sieracki* doctrine.

particularly true for harbor pilots, an occupational creature of state law that naturally falls within the gap between the Jones Act, the LHWCA, and general maritime law related to nonseafarers. As it stands, harbor pilots across the United States have significantly different remedies at their disposal merely because of their location. And on the other side of the ledger, vessel owners and their insurers must evaluate risk differently depending on the U.S. port the vessel travels to, not on the vessel itself.