When Does a Jones Act Seaman Stop Being a Jones Act Seaman?

By F. Daniel Knight

Things are not always as they seem, both in art and in life. Walter White, the central character in "Breaking Bad," appears to be a simple high school chemistry teacher. White becomes a meth cook after being diagnosed with terminal cancer, adopting the alter ego "Heisenberg." Eventually, this seemingly good person manipulates his way to the top of a massive narcotics empire. During the course of five Emmy-winning seasons, White changes from himself into Heisenberg. While appearing the same, he is vastly different, but there is no one agreed-upon moment when Walter White actually "breaks bad."

Despite lacking the drama of *Breaking Bad*, certain situations exist in Admiralty law where something is not as it seems. For example, if a crewmember is fired on the vessel and thereafter claims injury when disembarking from the vessel, is he a Jones Act seaman whereby he could sue his former employer for negligence under the Jones Act, as well as maintenance and cure benefits and unseaworthiness under the General Maritime Law of the United States (collectively a "Jones Act claim.")?

As with many Admiralty issues, silence from the U.S. Supreme Court likely makes the answer an oft-repeated legal maxim: it depends. As SCOTUS is silent on this particular issue, the edicts of the various Federal Circuits provide the precedential standard. But, if suit is filed under the "Saving to Suitors" clause, added complications exist as to whether the state in question follows existing Federal Circuit precedent.

For example, in 1993, the Texas Supreme Court explained that higher Texas courts and SCOTUS precedent determine the appropriate substantive Federal Admiralty law in a "saving to suitors" case. Thus, precedent by U.S. Court of Appeals for the Fifth Circuit not adopted by a Texas appellate court arguably only constitutes persuasive authority.

For cases filed within the Fifth Circuit or in a Texas state court, the answer to the question posed is likely "no" despite the fact no directly published on-point case law exists. The 1948 SCOTUS decision in *Farrell v. United States* and 1959 decision in *Braen v. Pfeifer Oil* hold a Jones Act claim must arise "in the service of

the vessel" or, in other words, when the seaman was "answerable to the ship's call to duty" in order for the claim to be within the course and scope of the seaman's employment. Here, unlike with Walter White, there is a clear point in time as to when the seaman "breaks bad" so as to fall outside the course and scope of his employment.

In the Fifth Circuit the main case is *Sellers v. Dixilyn*, holding a seaman injured in a car wreck on his "time off" was not in the service of the vessel. Instead, to be answerable to the call of duty, the seaman had to be required, not just willing, to return to his vessel if told to do so. Because the seaman was on his time off, a binding obligation did not exist, and the Jones Act claim therefore prohibited. Two later Fifth Circuit decisions affirmed *Sellers*, and in 2005 the Texas Supreme Court cited to *Sellers* as the standard for determining the course and scope of a seaman's employment, arguably making *Sellers* binding on all Texas state courts. The argument then becomes whether a fired seaman has any obligation or requirement to assist in the navigation of the vessel at the time of the incident. If not, arguably no seaman's status exists.

Other Federal Circuits hold a broader view of when a seaman's employment ends. For example, the First and Fourth Circuits hold seamen remain a "ward of Admiralty" until "afforded reasonable time and opportunity for disembarkation." However, there is no valid Fifth Circuit or Texas case law citing to the such precedent, making it only persuasive authority in Texas.

Three practical considerations logically flow from this theoretical discussion. First, how does a proctor establish this issue both for consideration by the fact finder and appellate review? The answer is to obtain a specific finding from the fact finder on the issue, preferably with a jury question.

The second consideration is how to describe the fired seaman. A good "in the alternative" position for plaintiff counsel is that the fired seaman was a passenger at the time of the incident. Such status still gives rise to a General Maritime Law negligence claim, as well as any state law remedies. While even the least salty Admiralty proctor knows such a claim is far more defensible than a Jones Act claim for negligence, it is better to have a life preserver than nothing if your life boat springs a leak.

Third, maritime employers can avoid this scenario by terminating employees on land, and with multiple witnesses present. In a pivotal scene in *Breaking Bad*, White asks a rival drug dealer to say his name. The answer: Heisenberg. By controlling the location and circumstances of the termination, the employer can at least attempt to gain similar clarity, and avoid a situation that "breaks bad."

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