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COURT OF APPEALS

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STATE OF WASHINGTON
BY 

No. 40382-0-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

VERONIKA CARDENAS, an individual,

Appellant,

v.

INTEROCEAN AMERICAN SHIPPING CORPORATION, a state of Delaware
corporation licensed to do business in the state of Washington,

Respondent.

APPELLANT'S OPENING BRIEF

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ORIGINAL

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C. The trial court abused its discretion when denying Ms. Cardenas' motion to strike the declaration and hearsay statements provided by an employer three years removed from Ms. Cardenas' employment with respondent, Interocean American Shipping ("IAS").

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2. Did the trial court err when granting summary judgment to IAS when Ms. Cardenas provided sufficient evidence to raise an issue of fact on each element of her retaliation claim?

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when finding that the appellant, Veronika Cardenas, failed to raise an issue of fact on the elements of her sex discrimination claim;
- B. The trial court erred when finding that Ms. Cardenas failed to raise an issue of fact on the elements of her retaliation claim;
- C. The trial court abused its discretion when denying Ms. Cardenas' motion to strike the declaration and hearsay statements provided by an employer three years removed from Ms. Cardenas' employment with respondent, Interocean American Shipping ("IAS").

II. ISSUES

- 1. Did the trial court err when granting summary judgment to IAS when Ms. Cardenas provided sufficient evidence to raise an issue of fact on each element of her sex discrimination claim?
- 2. Did the trial court err when granting summary judgment to IAS when Ms. Cardenas provided sufficient evidence to raise an issue of fact on each element of her retaliation claim?
- 3. Did the trial court abuse its discretion when denying Ms. Cardenas' motion to strike the declaration and hearsay statements provided by an employer three years removed from Ms. Cardenas' employment with IAS?

III. STATEMENT OF THE CASE

Procedural History:

Ms. Cardenas filed this action in Pierce County Superior Court in October, 2008. On January 22, 2010, the trial court granted IAS' motion for summary judgment. This appeal timely followed.

Statement of Facts:

In 1980, Ms. Cardenas immigrated with her parents to the United

States from Chile. In 1983, Ms. Cardenas became a merchant marine, and since that time she has served exclusively in the galley; first as a cook, and since 1993, as a steward.¹

In August 2004, Ms. Cardenas was awarded a permanent position as steward aboard the MV North Star, a ship operated by IAS; her termination from this ship 14 months later is the subject of this case.

When Ms. Cardenas joined the crew of the North Star the ship had two rotating Captains: John Hearn and Mark Daly.² Ms. Cardenas had not worked with Captain Daly, but she had worked with Captain Hearn – the Captain who would later terminate her – on two previous IAS ships: the Westward Venture in 1989 and the Cape Edmont in 1990.³

Ms. Cardenas sails with Captain Hearn on the Westward Venture.

Ms. Cardenas met John Hearn on the Westward Venture when she served a 6-month tour as the cook and Hearn was the First Mate. During that tour, Ms. Cardenas and First Mate Hearn had an affair.⁴ Towards the end of the tour, Ms. Cardenas learned that Hearn was married.⁵ The shipboard affair ended amicably at the end of Ms. Cardenas' tour.⁶

¹ CP, at 981 ¶ 1. The steward is the supervisor of the ship's galley/kitchen.

² Captains rotated approximately every ten weeks. Crewmembers worked rotating tours of duty of between 2-4 months, depending on position. CP, at 758-59, 761-63.

³ CP, at 981-82 ¶ 2, 3, 984 ¶ 8-10.

⁴ CP, at 855 (70:1-8), 981 ¶ 3.

⁵ CP, at 855 (70:6-10), 982 ¶ 4.

⁶ CP, at 982 ¶ 4-5.

Hearn testified he had the affair with Ms. Cardenas because she was pretty, a nice person, and he was attracted to her.⁷ Hearn also stated that in over 30 years at sea, he has had only one affair—with Ms. Cardenas.⁸

While working on the Westward Venture, Hearn could not recall Ms. Cardenas having any performance issues, but rather could only recall that she was a hard worker who was friendly and well liked by her coworkers.⁹

In July 1990, six months after Ms. Cardenas left the Westward Venture, Hearn had been promoted to Captain and was briefly in Seattle with his new ship.¹⁰ He called and asked Ms. Cardenas to meet him.

When they met, now Capt. Hearn told Ms. Cardenas that the Westward Venture had forwarded her 1989 Christmas postcard to his home, that his wife had confronted him about her, and that he had admitted the affair.¹¹ Despite this, Capt. Hearn and Ms. Cardenas again had sex, and again had another amicable parting.¹²

Ms. Cardenas works with Captain Hearn on the Cape Edmont: A few weeks later, Ms. Cardenas, who was only certified as a cook, received an award for a steward position the IAS ship, Cape Edmont. At the time,

⁷ CP, at 855 (73:4-11).

⁸ CP, at 856 (76:18-77:6).

⁹ CP, at 856 (75:23-76:7), 857 (80:15-18).

¹⁰ CP, at 858 (82:1-21), 983 ¶ 6-7.

¹¹ CP, at 858 (84:1-23), 983 ¶ 6-7.

¹² CP, at 983 ¶ 7. Capt. Hearn testified he could not recall this visit with Ms. Cardenas, but he could not say it did not happen. CP, at 858 (84:24-85:8).

there was a huge maritime surge to get materials to the Middle East in the build up to the first Gulf war, and a very large number of ships, including the Cape Edmont, were being reactivated from storage.¹³ This resulted in IAS "scrambling to get bodies" onto its ships, and many merchant marines being placed into positions for which they were not certified.¹⁴

When Ms. Cardenas arrived at the Cape Edmont she was surprised to find Capt. Hearn as its Captain, and also surprised that he was now standoffish towards her.¹⁵ Ms. Cardenas, however, simply went about preparing the dilapidated Cape Edmont galley to sail. As on the Westward Venture, Capt. Hearn again could only recall Ms. Cardenas as a hard-worker, who got along and worked well with her coworkers.¹⁶

Before the Cape Edmont left port, Capt. Hearn informed Ms. Cardenas he was replacing her stating she was not a certified steward and he wanted a "seasoned" crew for the upcoming trip.¹⁷ Ms. Cardenas doubted this explanation as most of the crew was new to his position.¹⁸ Indeed, Capt. Hearn admitted documenting that his Cape Edmont crew was "green."¹⁹

Capt. Hearn also admitted that Ms. Cardenas' replacement was a 70

¹³ CP, at 857 (81:6-16), 911 (191:12-25).

¹⁴ CP, at 911 (191:12-20).

¹⁵ CP, at 984 ¶ 11.

¹⁶ CP, at 859 (86:18-87:24), 152-53 (90:25-91:8). The cook on the Cape Edmont, Mohamad Shibly, would eventually be a cook on the North Star.

¹⁷ CP, at 984 ¶ 13.

¹⁸ CP, at 985 ¶ 14.

¹⁹ CP, at 860-61 (97:8-98:7).

year old male, who came out of retirement, and who was not able to even complete the Cape Edmont's first voyage.²⁰

Ms. Cardenas goes back to school to further her career.

In 1993, Ms. Cardenas made a significant investment in her career by going back to school at the Harry Lundeberg School of Seamanship ("Harry Lundeberg") to get certified as a steward. In 2002, she again returned to Harry Lundeberg and successfully obtained a steward "recertification" card. On both occasions, Ms. Cardenas was easily able to provide the required letters of recommendation from former captains and coworkers to support her applications to Harry Lundeberg.²¹

Ms. Cardenas joins the North Star.

Ms. Cardenas next saw Capt. Hearn in August 2004, when she joined the crew of the North Star as its "permanent" steward.²²

When Ms. Cardenas boarded the North Star, she was surprised to be immediately ordered to the Captain's office.²³ Following orders, Ms. Cardenas came face to face with Capt. Hearn for the first time in 14 years. There were no pleasantries exchanged as Capt. Hearn immediately and

²⁰ CP, at 861 (98:8-99:22).

²¹ CP, at 985, ¶ 15.

²² CP, at 985-86 ¶ 16. A permanent position is coveted because it allows a sailor to work on one ship – as opposed to taking various jobs as they become available – and take periodic "vacations" during which time her position would be filled by a "relief." The "relief" worker would obtain that position through standard union hall procedure: be qualified and at the top of the job board when the position is posted for filling. Id.

²³ CP, at 986-87 ¶ 18.

matter-of-factly told Ms. Cardenas that he understood she was the new steward and that the other galley crew would show her around.²⁴ This very brief meeting then ended with Capt. Hearn stating that he thought Ms. Cardenas would be home with children by this time; a comment Ms. Cardenas took to mean that Capt. Hearn thought she should be at home with children and not on his ship.²⁵

The encounter left Ms. Cardenas feeling odd because as far as she knew, there was no reason for Capt. Hearn to not want her as the steward on his ship: they had never exchanged a cross word, he could only recall her as a hard worker who got along well with coworkers, and he had her shipping card information establishing she was an experienced steward.²⁶

Ms. Cardenas again went about her work and getting to know her fellow crewmembers, and it appeared to her that many of the crew and officers had sailed together for years. Predictably, the crew had a variety of personalities and characters; most nice, but some not as much.²⁷

As for Captain Hearn, he was standoffish, and ignored or avoided Ms. Cardenas as much as possible.²⁸ The manner in which Capt. Hearn interacted with Ms. Cardenas made her feel unwelcomed, undermined, and

²⁴ Id.

²⁵ Id.

²⁶ Id.

²⁷ CP, at 987 ¶ 19.

²⁸ CP, at 990, 998 ¶ 29, 49.

disrespected on the ship. Indeed, throughout the time that they would sail together, Ms. Cardenas believed that Capt. Hearn did not want her on his ship: Capt. Hearn avoided and ignored her as much as possible, when they did pass each other he would rarely return her greeting, he never said a pleasantry towards her, and he avoided eye contact.²⁹ Ms. Cardenas witnessed Capt. Hearn's interactions with the male sailors, and noted that they were the opposite of the way he treated her.³⁰ Capt. Hearn always greeted the men appropriately and with a pleasant attitude, he easily chatted and laughed with them, appeared patient when discussing work issues with them, and treated them respectfully, "like people who have pride and dignity."³¹ Ms. Cardenas always felt stressed and nauseous, and found it hard to work such an environment.³²

Capt. Hearn issues Ms. Cardenas her first Letter of Warning.

Two weeks after joining the North Star, Ms. Cardenas was told by Capt. Hearn that when the North Star docked in Tacoma the following day, another company employee, Napoleon Lambino, would be coming onboard to train her on food ordering software.³³ Ms. Cardenas would not normally be required to stay on board after docking and had planned to

²⁹ CP, at 998 ¶ 29-49.

³⁰ CP, at 999 ¶ 51.

³¹ Id.

³² CP, at 998-99 ¶ 49, 51.

³³ CP, at 988 ¶ 21.

leave the ship to check on her house.³⁴ Ms. Cardenas reminded Capt. Hearn that Mr. Lambino had already cancelled one meeting with her, and asked him to let her know if the meeting was canceled again because she had planned to check on her house while in port.³⁵ Capt. Hearn curtly said that she gets paid overtime to attend such meetings and walked away.³⁶

Later that day, Ms. Cardenas prepared the overtime timesheets for herself and her two galley crewmembers because crew are paid when they reach port and timesheets must first be approved by the Captain.³⁷ On all three timesheets, Ms. Cardenas included "anticipated overtime" for the following day to cover her meeting with Mr. Lambino, and work she anticipated her crew would perform once in port.³⁸ In Ms. Cardenas' experience, the day coming into port is included on timesheets; she had not been told the practice was different on the North Star.³⁹ Ms. Cardenas then left the timesheets for Capt. Hearn to approve.⁴⁰

Ms. Cardenas got the timesheets back shortly before the North Star docked in Tacoma. Capt. Hearn had approved the "anticipated overtime" for her galley crew, but without explanation had crossed out the

³⁴ Id.

³⁵ Id.

³⁶ Id.; CP, at 736.

³⁷ CP, at 988 ¶ 22.

³⁸ CP, at 730-32; 988 ¶ 22.

³⁹ CP, at 988 ¶ 22; CP, at 865 (133:14-22).

⁴⁰ CP, at 988 ¶ 22; Capt. Hearn has a fiduciary duty to IAS to review every overtime timesheet for accuracy. CP, at 894 (84:20-87:2).

anticipated overtime on her timesheet – the time he had bluntly reminded her of the previous day – and recalculated her total overtime hours to exclude the anticipated overtime.⁴¹

Ms. Cardenas believed the denial of her overtime meant that her meeting with Mr. Lambino had again been cancelled and she was not expected to remain on board while in port.⁴² As discussed with Capt. Hearn, Ms. Cardenas departed after docking to check on her house.⁴³

The next day, Capt. Hearn was going through the line for lunch and brusquely asked Ms. Cardenas where she was the prior day. When Ms. Cardenas said she had gone to her house, Capt. Hearn told her Mr. Lambino had come onboard. Ms. Cardenas quickly explained she thought the meeting was cancelled because he had crossed out her overtime for that day. Capt. Hearn did not respond to Ms. Cardenas' explanation, much less tell her that he had crossed out her anticipated overtime to correct an error she had made on her timesheet.⁴⁴

⁴¹ CP, at 988-89 ¶ 23-24; 864-65 (126:8-20, 127:14-129:7, 131:1-3). Capt. Hearn admitted that he could have put a "post-it" on Ms. Cardenas' timesheet explaining her mistake: "I could have done that...there's a lot of things you can do in that circumstance. I did not do those things." CP, at 866 (136:17-24, 137:7-11).

⁴² CP, at 989 ¶ 24.

⁴³ CP, at 989 ¶ 25.

⁴⁴ CP, at 989 ¶ 26.

The following day Capt. Hearn issued Ms. Cardenas the first Letter of Warning ("LOW") she had received over her long career.⁴⁵ The reason: missing the meeting with Mr. Lambino. Capt. Hearn claimed at his deposition he resorted to a LOW because Ms. Cardenas has not taken seriously a conversation in which he had tried to issue her a "verbal warning."⁴⁶ The LOW is devoid of any reference to this alleged conversation, and when Capt. Hearn was asked to describe the conversation, he could not recall where it occurred, when it occurred, what was said, much less what Ms. Cardenas said that gave him the impression that she did not take him seriously.⁴⁷

Capt. Hearn issues Ms. Cardenas her second Letter of Warning.

Three weeks later, Ms. Cardenas met with Capt. Hearn to discuss routine galley issues, and a matter involving an overtime complaint by the "relief" cook, Mohamed Sani (the North Star's permanent cook, Mr. Shibly, had recently left for a 60-day vacation rotation).⁴⁸ Ms. Cardenas explained Mr. Sani was demanding certain overtime pay and was threatening to quit; something Ms. Cardenas wanted to avoid.⁴⁹ Capt. Hearn told Ms. Cardenas that Mr. Sani would be allowed two hours of

⁴⁵ CP, at 990 ¶ 27.

⁴⁶ CP, at 867-868 (140:18-141:9, 142:25-144:12).

⁴⁷ Id.; CP, at 736-37.

⁴⁸ CP, at 990, ¶ 29; CP, at 871-72 (156:19-161.12), 874 (166:8-167:4).

⁴⁹ Ms. Cardenas like working with Mr. Sani and had ordered some special foods so he could teach her new dishes. CP, at 990-91, ¶¶ 29-30.

overtime and that if he wasn't satisfied he could quit.⁵⁰ Capt. Hearn and Ms. Cardenas then discussed some additional minor galley issues before the meeting ended.⁵¹ At no time during the meeting did Capt. Hearn tell Ms. Cardenas he had issues with her work, management of the galley, or that Mr. Shibly had complained about her.⁵²

Capt. Hearn testified that this was the only meeting he could recall having with Ms. Cardenas during their first tour that involved any discussion of her galley staff.⁵³

Mr. Sani was unhappy with Capt. Hearn's overtime decision, but became angry when Capt. Hearn sent the ship's Bosun to reiterate his decision; Mr. Sani yelled at the Bosun "that's it! I quit."⁵⁴

Capt. Hearn recalls receiving equally blunt notice: "he came up to me and told me he quit. ... there was no responding to that. I just accepted it. And he left."⁵⁵ This is the only time Capt. Hearn recalls talking with Mr. Sani.⁵⁶

Capt. Hearn rotated off the North Star for vacation the following day. Before he left he issued Ms. Cardenas her second LOW in three weeks. As with the first LOW, the second LOW follows a meeting at which Ms.

⁵⁰ Id.

⁵¹ CP, at 990-91, ¶ 29:8-10.

⁵² CP, at 992, ¶ 31.

⁵³ CP, at 851 (4:19-20), 874 (166:1-7), 880 (198:6-24).

⁵⁴ CP, at 992, ¶ 32.

⁵⁵ CP, at 873 (163:8-164:14). Capt. Hearn testified that he tried to find out from Ms. Cardenas why Mr. Sani quit, but he did not recall Ms. Cardenas saying that the reason was the overtime dispute. CP, at 875 (170:10-171:2).

⁵⁶ CP, at 873 (163:8-164:14).

Cardenas allegedly failed to accept counsel: the meeting the previous day when the two discussed Mr. Sani and other galley issues.

Capt. Hearn testified he recalls during that meeting the previous day – which he estimated lasted "a few minutes" – Ms. Cardenas yelled at him when he tried to counsel her about how to better manage her galley and crew, and that he had "never been so upset with a crew member treating [him] like this in [his] career."⁵⁷ Yet, none of this conduct is reflected in the second LOW documentation.⁵⁸ Capt. Hearn was also unable to recall the events of the previous meeting saying "I don't recall this conversation, you know, that well."⁵⁹

In addition, at the time of this meeting, Capt. Hearn was apparently already in possession of a note written by Mr. Shibly before his departure for vacation – two weeks earlier – in which he complains about Ms. Cardenas "changing the menu," and having a "bad attitude and no personality."⁶⁰ The second LOW is silent as to Mr. Shibly, and Capt. Hearn does not recall discussing this note during the meeting.⁶¹

⁵⁷ CP, at 874-75 (168:21-170:8), 878 (182:16-183:14).

⁵⁸ CP, at 734.

⁵⁹ CP, at 879-80 (197:14-198:24).

⁶⁰ CP, at 86 ¶ 8, 738. Capt. Hearn testified that the "chief cook" referenced in the LOW was Mr. Sani. CP, at 873 (165:14-25)

⁶¹ Id. (198:2-5), CP, at 734. Capt. Hearn would use this note the following day to allege that Ms. Cardenas should be fired. CP, at 733, 735, 738.

The LOW stemming from the meeting also does not cite to any example of deficient conduct or performance by Ms. Cardenas, but rather only to comments Ms. Cardenas denies making, or that she did make but which are twisted to support what appears to be the basis of the letter: simply reminding Ms. Cardenas of her job duties.⁶²

When Ms. Cardenas was issued the second LOW, she wrote a response in the comment section: “It look to me that the warning is all about me being on this ship and is totally personal.”⁶³ Based upon the way Capt. Hearn treated her and the prior LOW, Ms. Cardenas felt Capt. Hearn was targeting her for unjust discipline because she was a woman he was not comfortable having on his ship.⁶⁴ Capt. Hearn read Ms. Cardenas’ written response, but ended the meeting without comment.⁶⁵

Capt. Hearn tries to get Ms. Cardenas removed from the North Star.

In discovery it was revealed that later that day, and prior to rotating off the ship for two months, Capt. Hearn prepared an evaluation of Ms. Cardenas in which he recommended that she not be returned to the North Star following the completion of her current tour. In the evaluation, Capt. Hearn described Ms. Cardenas as “high maintenance”, “emotional”,

⁶² CP, at 734, 991 ¶ 30, 992-93 ¶ ¶ 33-34.

⁶³ CP, at 734.

⁶⁴ CP, at 319-320 (232:16-233:20).

⁶⁵ CP, at 994, ¶ 36.

“difficult to manage”, “a weak department head,” and needing improvement in the areas of “crew mgt.” and “interface w/ other departments.”⁶⁶ Capt. Hearn did not tell Ms. Cardenas he had prepared this performance evaluation, and contrary to IAS policy, he did not provide her with a copy of it.⁶⁷

Capt. Hearn then secretly faxed the evaluation, the two LOW's, and two short statements to Robert Rogers, the Vice President of Human Resources for IAS, and requested Ms. Cardenas not return to his ship.⁶⁸

The short statements Capt. Hearn forwarded to Mr. Rogers were the previously described note by Mr. Shibly and a short statement by Mr. Courtney Henry, one of the North Star's two Chief Engineers (“CE Henry”).⁶⁹ Capt. Hearn had neither discussed the subject matter of these statements with Ms. Cardenas, nor told her that they had been written.⁷⁰

Capt. Hearn testified that he could recall having only one conversation with Mr. Shibly regarding Ms. Cardenas, and that he told Mr. Shibly “to be obedient to the steward and do his job.”⁷¹

Capt. Hearn did, however, ask Mr. Shibly to create the statement

⁶⁶ CP, at 735.

⁶⁷ CP, at 993-94 ¶ 35; CP, at 742-743. IAS guidelines actually suggest that evaluations be used as “a prelude to a ‘Letter of Warning’”. *Id.*, at Section 12.6.7. IAS policy requires that the completed evaluation be provided to the crewmember. CP, at 890 (28:12-22).

⁶⁸ CP, at 993-4, ¶ 35; CP, at 733-740. Mr. Rogers and Capt. Hearn are personal friends. CP, at 746-756, 773-74.

⁶⁹ CP, at 738-39.

⁷⁰ CP, at 993, ¶ 35.

⁷¹ CP, at 870 (152:4-153:22).

forwarded to Mr. Rogers, something he explained was his habit because he "won't accept verbal complaints about another person unless they document it;"

- Q. So if someone came to you to complain about Ms. Cardenas, you would ask them to give you a document setting their complaint in writing?
- A. If they complained about anybody or any issue that was -- any issue that would become an issue that we have to deal with, I would ask them to give it to me in writing so I could follow up on it better.
- Q. Including issues regarding Ms. Cardenas?
- A. Personnel issues especially including issues with Ms. Cardenas, yes.⁷²

Similarly, Capt. Hearn requested CE Henry to document any problem he had with Ms. Cardenas, which resulted in CE Henry documenting a brief interaction when Ms. Cardenas asked him to turn off the Galley's freezer fans while she cleaned that unit.⁷³ CE Henry had refused Ms. Cardenas' request and she made a comment which he viewed as meaning that IAS would be responsible for her medical bills if she got sick.⁷⁴

The discovery did not include any response from Mr. Rogers, the VP of HR, to Capt. Hearn's fax. Mr. Rogers recalls having read Ms.

⁷² CP, at 825 (23:1-23), 882 (216:5-12).

⁷³ CP, at 739; CP, at 851 (22-23), 882 (214:1-10). The other chief engineer said this was a typical request by stewards. CP, at 940 (34:15-35:25).

⁷⁴ Id. Mr. Rogers testified AIS would be responsible for such bills. CP, at 894 (83:20-84:6).

Cardenas' written response on the second LOW in which she complains of being targeted by Capt. Hearn, but he did not investigate her statement.⁷⁵

Ms. Cardenas sails with Captain Mark Daly on the North Star.

After sailing with Ms. Cardenas for six weeks, Capt. Hearn rotated off the North Star and Captain Mark Daly rotated on.⁷⁶ In contrast to Capt. Hearn, Capt. Daly treated Ms. Cardenas as he did the male sailors—as a capable, respected, and valued member of the crew.⁷⁷

Capt. Daly testified that Ms. Cardenas was a kind person that he got along with.⁷⁸ Capt. Daly also found Ms. Cardenas to be concerned about performing every aspect of her job well.⁷⁹ She cared about whether the crew enjoyed the food from her galley and they generally did.⁸⁰

Capt. Daly also stated that cleanliness of the galley and crew health are “extremely important” and consequently he inspected the galley every day: “it might be at night when nobody’s there, it might be at lunchtime, it might be at breakfast. I always look.”⁸¹ Capt. Daly believed Ms. Cardenas cared about a running a clean and sanitary galley, and based

⁷⁵ CP, at 910 (176:11-177:3), 911 (193:2-25).

⁷⁶ CP, at 758.

⁷⁷ CP, at 994, ¶ 37.

⁷⁸ CP, at 918 (39:13-14); CP, at 923 (58:10-13).

⁷⁹ CP, at 923 (59:5-20).

⁸⁰ Id. (58:14-59:4).

⁸¹ Id. (59:21-60:4).

upon his inspections, he believed that she was successful in doing so.⁸²

Capt. Daly testified that he and Ms. Cardenas had the type of healthy communication style he expected and that was necessary: important information exchanged during daily conversations that occur on a flexible, "happens when it happens" basis.⁸³

Regarding discipline, Capt. Daly testified that years earlier while sailing as a Third Mate, Capt. Hearn counseled him to try and emulate Capt. Hearn's "discipline style" which Capt. Daly described as: "to counsel somebody, to talk to somebody, not to use a threatening tone or any type of threatening manner. He was always – very kind is the best way I could say."⁸⁴

During Capt. Daly's ten week rotation, another two "relief" cooks rotated through the North Star Galley, both of whom Ms. Cardenas had worked well with.⁸⁵ Indeed, Capt. Daly testified that neither cook left as a result of any issue with Ms. Cardenas, but rather the first cook, Smail Hariri, left because he was not a very good cook, and the other, Rey Telmo, left when he completed his relief tour.⁸⁶

⁸² Id. (60:5-15).

⁸³ CP, at 920 (47:19-49:19).

⁸⁴ CP, at 917 (33:5-24).

⁸⁵ CP, at 761-63, 994 ¶ 38.

⁸⁶ CP, at 927-28 (76:20-78:14, 78:15-21, 80:25-81:8).

Captain Hearn rejoins the North Star as Captain.

On December 2, 2004, Capt. Hearn rotated back onto the North Star.⁸⁷ By this time, a new relief cook, Kahled Taffi, had come on board for a 30-day relief tour.⁸⁸ Ms. Cardenas got along well with Mr. Taffi.⁸⁹

On December 15, 2004, Ms. Cardenas rotated off the North Star for a two month vacation.⁹⁰ Capt. Hearn testified he could not recall ever speaking to Mr. Taffi about Ms. Cardenas, or having any issues regarding her brought to his attention during this tour.⁹¹ Before Ms. Cardenas rotated off, she asked Capt. Hearn if her permanent position was secure; he told her it was.⁹²

Capt. Hearn again attempts to fire Ms. Cardenas.

A month after Ms. Cardenas rotated off the North Star for vacation, Capt. Hearn sent Mr. Rogers a letter and then an email again stating he did not want Ms. Cardenas to return to his ship. Those communications were disclosed, however, IAS withheld from discovery two subsequent emails between Mr. Rogers and Capt. Hearn based upon both "attorney-client

⁸⁷ CP, at 758.

⁸⁸ CP, at 761-63.

⁸⁹ CP, at 994-5, ¶ 39.

⁹⁰ CP, at 761.

⁹¹ CP, at 823-24 (16:15-17:5, 20:4-21:19).

⁹² CP, at 995, ¶ 41; CP, at 770 (Capt. Hearn claims to have only replied "I'm not familiar with the shipping rules").

privilege" and "work product."⁹³

In the first disclosed communication, Capt. Hearn writes that Ms. Cardenas "was technically competent" and had not engaged in "a blatant violation of conduct as proof of incompetence and inability," but rather had shown "a consistent lack of good judgment and management."⁹⁴ Capt. Hearn then set out essentially the same deficiencies he asserted at the end of his first tour with Ms. Cardenas on the North Star in September 2004.⁹⁵

To show a problem with Ms. Cardenas, Capt. Hearn told Mr. Rogers "[d]uring [Ms. Cardenas'] period aboard, the ship rotated five Chief Cooks. Two regular and permanent members did not return."⁹⁶ Capt. Hearn was unable to substantiate this claim at his deposition.

The five cooks implicated by Capt. Hearn were Mr. Shibly, Mr. Sani, Mr. Hariri, Mr. Telmo, and Mr. Taffi.⁹⁷ Yet, Capt. Hearn admitted he did not know why Sani, Hariri, and Taffi left the ship; he understood Shibly left for a regularly scheduled vacation; and Telmo had completed a relief tour.⁹⁸ The implicated permanent employees were Mr. Shibly and Steward Assistant Nasser Ahmed, yet again, Capt. Hearn admitted he did

⁹³ CP, at 716 ¶ 3, 765, 769-771.

⁹⁴ CP, at 765.

⁹⁵ Id., Capt. Hearn also references "supporting documentation," but could "guess" that he forwarded the two earlier LOWs. CP, at 827 (38:15-39:25).

⁹⁶ CP, at 827 (39:1-41:3), 829 (51:24-52:3).

⁹⁷ CP, at 762.

⁹⁸ CP, 828-9(46:18-51.23). Capt. Hearn never sailed with Mr. Telmo. CP, at 758, 762.

not know why those men did not to return to the North Star: "Anything is possible for those men. I don't know what happened to them."⁹⁹

Capt. Hearn also tells Mr. Rogers that he was "concerned that Ms. Cardenas may reply with legal authority. ...She has replied that the matter is personal but I have no reason to feel prejudice or uncomfortable with her as a female or Hispanic."¹⁰⁰ Capt. Hearn testified he wrote this in response to Ms. Cardenas' written complaint on the second LOW that he was targeting her for unwarranted discipline.¹⁰¹

Mr. Rogers does not recall providing any response to Capt. Hearn's letter. When asked if he investigated the possibility that Capt. Hearn's treatment of Ms. Cardenas was motivated by "prejudice or discomfort" with her because of her gender or race, Mr. Rogers testified "I don't remember ever having a complaint."¹⁰²

In the second disclosed correspondence, an email sent to Mr. Rogers within days of the above communication, Capt. Hearn writes:

- Ms. Cardenas is "delicate" and unable "to handle the shipboard environment and stress of a senior position";
- he is "dealing with an emotional person that [he] wants off the ship";
- Ms. Cardenas is "a person of serious emotional concern who is a threat to anyone associated";

⁹⁹ CP, at 829 (52:4-53:17).

¹⁰⁰ CP, at 765.

¹⁰¹ CP, at 830 (62:7-17).

¹⁰² CP, at 896-97 (90:20-24, 93:20-94:5).

- That he is personally concerned that Ms. Cardenas would “serve injury in any manner of insult to anyone who opposes what she wants.”¹⁰³

Capt. Hearn also asserts two new allegations of deficient performance by Ms. Cardenas to bolster his attempt to fire her. First, he claims that Ms. Cardenas "terribly mismanaged ship maintenance" during her first tour by keeping a deficient steward assistant, George Gerssing.¹⁰⁴ Mr. Rogers testified that Ms. Cardenas did not have the authority to fire Mr. Gerssing, but that Capt. Hearn did.¹⁰⁵

Second, Capt. Hearn claims to have had significant conversations with Capt. Daly during which Capt. Daly echoed the performance issues asserted by Capt. Hearn. Yet, Capt. Daly testified that he and Capt. Hearn only discussed Ms. Cardenas on one occasion, and that the conversation was limited to Capt. Hearn “just mentioning” that he had issued Ms. Cardenas a LOW.¹⁰⁶

There is no document revealing whether Mr. Rogers replied to this email from Capt. Hearn, but as previously mentioned, the men exchanged emails a couple of days later which IAS has not produced asserting both "attorney-client privilege" and "work product."

Ms. Cardenas returns to the North Star for her second tour.

¹⁰³ CP, at 769-771.

¹⁰⁴ CP, at 770.

¹⁰⁵ CP, at 900 (107:24-108:25).

¹⁰⁶ CP, at 919 (43:14-23, 45:4-11).

Ms. Cardenas returned to the North Star on February 18, 2008. At the time, Capt. Daly was the Captain, and a new cook, Julito Crodua, and a new steward assistant, Mohamed Hussain, had rotated onto the ship.¹⁰⁷

A couple of weeks later, Ms. Cardenas was yelled at by Mr. Hussain who was upset at being asked to do something he felt was not within his job description.¹⁰⁸ Ms. Cardenas tried to explain the job description to Mr. Hussain, but he continued to yell that she was wrong. Ms. Cardenas did raise her voice, but only to be heard over Mr. Hussain, and only to twice tell him “Mohamed, calm down!”¹⁰⁹

The Bosun, John Glenn, happened to walk by the galley and Ms. Cardenas asked for his assistance with resolving the issue; the Bosun is charged with trying to informally resolve disputes between sailors.¹¹⁰ Rather than resolve it, Mr. Glenn took Mr. Hussain and left the galley.¹¹¹

Capt. Daly was told of the above interaction by Mr. Glenn. Capt. Daly testified that it was unusual for Mr. Glenn to come to his office, and that he was surprised when Mr. Glenn only informed of the interaction between Ms. Cardenas and Mr. Hussain as opposed to some shipboard

¹⁰⁷ CP, at 758, 761-63, 995 ¶ 42. Capt. Hearn could not recall ever discussing Ms. Cardenas with either Mr. Crodua or Mr. Hussain. CP, at 835 (118:24-119:6).

¹⁰⁸ CP, at 995-996, ¶ 42.

¹⁰⁹ Id.

¹¹⁰ CP, at 995-6 ¶ 42.

¹¹¹ Id.

emergency.¹¹² Capt. Daly investigated the incident and decided to issue a LOW to Ms. Cardenas and a verbal warning to Mr. Hussain.¹¹³ Capt. Daly testified that what Ms. Cardenas had said to Mr. Hussain was irrelevant; it was simply the volume at which it was said.¹¹⁴

Capt. Daly recalls Ms. Cardenas crying when issued the LOW because she was concerned that it would be used to build the case for her termination.¹¹⁵ Capt. Daly recalled "trying to calm her" by saying that he was not disciplining her and did not intend for his LOW to be used to support such action.¹¹⁶

Capt. Daly explained at his deposition that some people are better managers than others, and that Ms. Cardenas had a certain "angst" in that regard: "she didn't relish the role" of being the boss.¹¹⁷ To help her improve in this area, Capt. Daly "mentored" Ms. Cardenas; he always found her receptive to his advice, and he was adamant that Ms. Cardenas was never defensive when counseled: "No. No, she's not like that. No."¹¹⁸

¹¹² CP, at 928-29 (81:19-82:14). Mr. Glenn did not like Ms. Cardenas. Once she had left her diary by the computer in the mess hall, and when she returned to retrieve it, she found it thrown in the garbage and damaged. This greatly upset her and made her cry. Mr. Glenn admitted "it is possible" he was the person who threw the diary into the garbage. CP, at 969 (130:19-133:23).

¹¹³ CP, at 929 (84:13-85:2). This investigation did not include talking to either Ms. Cardenas or Mr. Hussain. CP, at 930 (86:22-25).

¹¹⁴ CP, at 929 (85:9-13), 931.

¹¹⁵ CP, at 930 (87:1-25).

¹¹⁶ Id. (88:1-8).

¹¹⁷ CP, at 924 (65:5-24, 66:8-67:4).

¹¹⁸ CP, at 922 (54:15-22), 925 (69:18-70:2).

After the LOW, Capt. Daly recalled having no further issues with Ms. Cardenas for the remaining 8 months of her time on the North Star.¹¹⁹

Ms. Cardenas' final tour of duty on the North Star.

On September 10, 2005, Capt. Hearn returned to the North Star. Capt. Hearn testified that he could not recall discussing performance issues with Ms. Cardenas since their first tour together ended in September 2004.¹²⁰

Once on board, Capt. Hearn continued to treat and interact with Ms. Cardenas in the same negative manner as he had in the past: he avoided and ignored her as much as possible, rarely returned her greetings, never said a pleasantry towards her, and avoided eye contact.¹²¹ Ms. Cardenas had become used to Capt. Hearn engaging in an odd habit when coming through the mess line for meals: he would either hide behind other Officers, or he would hide behind the post that was near the line and wait for any backup to clear so that he could get through the line more quickly.¹²² Ms. Cardenas had begun to purposely stay away from the food line while Capt. Hearn went through the line to lessen the anxiety she felt watching his conduct.¹²³

¹¹⁹ CP, at 926 (70:18-71:10).

¹²⁰ CP, at 835-36 (120:4-122:1). Capt. Hearn and Ms. Cardenas had last sailed together from May 27-July 1, 2005. CP, at 758, 761.

¹²¹ CP, at 998-99 ¶ 49.

¹²² Id.

¹²³ Id.

Adding to Ms. Cardenas' stress and anxiety was her observation that crewmembers who were friendly to her when Capt. Daly was the Captain, were "noticeably cooler" when Capt. Hearn was onboard.¹²⁴ In addition, for the first time since Ms. Cardenas joined the North Star, the crew included another woman; steward assistant Else David who had joined the crew in August 2005.¹²⁵ Ms. Cardenas observed Capt. Hearn treating Ms. David as he treated the male sailors, which increased her feelings that she was a woman Capt. Hearn was not comfortable having on his ship.¹²⁶ Capt. Hearn had never interacted with Ms. Cardenas the way he did with the male sailors, and as he was now interacting with Ms. David.¹²⁷

Ms. Cardenas' final month on the North Star.

Ms. Cardenas was friends with both Ms. David and her husband Shawn.¹²⁸ In early October, Ms. Cardenas received an email from Shawn David, but by the time she retrieved it someone had already opened it.¹²⁹ When Ms. Cardenas asked Ms. David whether she had opened the email by mistake, Ms. David immediately became upset and in a loud voice accused Ms. Cardenas of falsely accusing her.¹³⁰ Ms. Cardenas was

¹²⁴ CP, at 999 ¶ 50.

¹²⁵ CP, at 761-63.

¹²⁶ CP, at 999 ¶ 51.

¹²⁷ Id.

¹²⁸ CP, at 999-1000, ¶ 53.

¹²⁹ CP, at 1000, ¶ 54. Emails sent to the ship are not private. So, not surprisingly, crewmembers can, and do, open each others email. CP, at 999-1000, ¶ 53.

¹³⁰ CP, at 1000-01, ¶ 55.

surprised by Ms. David's response, and even though the matter was clearly personal, she was concerned that it might appear that she was having an issue with a subordinate.¹³¹ Ms. Cardenas quickly told Ms. David that she wasn't accusing her of anything, and it was now clear that Ms. David had not opened the email. Yet, when Ms. David continued to loudly proclaim her innocence, Ms. Cardenas started crying and told Ms. David that she could get in trouble if she was viewed as not getting along with someone in her galley.¹³² Hearing this, Ms. David calmed down and apologized for "overreacting." The two women then hugged and went back to work.¹³³

Capt. Hearn did not recall who told him about the above incident, but that once informed, the issue "stopped right there" because he did not investigate the incident and "there was some confusion about it, and I didn't get the whole story."¹³⁴

Yet, Capt. Hearn emails Mr. Rogers about the incident saying "Steward/Baker V. Cardenas is starting again."¹³⁵ Capt. Hearn says he would like to "confront Cardenas" but that he is sure "I will be accused of

¹³¹ Id.

¹³² Id.

¹³³ Id.

¹³⁴ CP, at 839 (134:14-23).

¹³⁵ CP, at 779.

harassing her.”¹³⁶ Capt. Hearn then calls Ms. Cardenas “one of the most clever and deceiving persons” he has ever shipped with, and asks Mr. Rogers “as VP Personnel, you must have the solution.”¹³⁷

Mr. Rogers could not recall following up on either Capt. Hearn's concern that he would be accused of harassment if he confronted Ms. Cardenas, or offering Capt. Hearn a "solution."¹³⁸

Capt. Hearn drafts "Steward Department Head Issues" document.

Two days later, Capt. Hearn drafted a three-page document entitled “Steward Department Head Issues” (“Steward Issues”) in which he enumerated 13 alleged performance deficiencies by Ms. Cardenas, including the interaction with Ms. David.¹³⁹ Capt. Hearn testified this document – which he drafted without assistance or notes – was not meant

“to bring up anything recent. We brought up past warning letters, other examples of issues that had occurred so that she could learn that these are not acceptable practices, and bring them up, talk about them, clear the air, and improve her stewardship in her position, and so she could do a better job in the future.”¹⁴⁰

Ms. Cardenas disputes the “Steward Issues” document.

In her declaration, Ms. Cardenas disputed every allegation in the

¹³⁶ Id. Capt. Hearn also reported Ms. David complained about being “harassed over the smallest things” and “blamed for everything”, yet, he testified that he did not ask Ms. David what she was being harassed and blamed for. CP, at 840 (138:3-8).

¹³⁷ Id.

¹³⁸ CP, at 901-02 (113:21-114:20, 115:22-116:8).

¹³⁹ Id., Exhibit 14.

¹⁴⁰ CP, at 844 (155:4-10). Capt. Hearn stated that he did not keep any notes regarding issues or concerns he had with Ms. Cardenas or her performance. CP, at 841 (144:22-145:7), 842 (148:5-11).

Stewart Issues document.¹⁴¹ The deposition testimony bolsters her position that each allegation was either an exaggeration of a past event, or a fabrication. Specifically, the testimony showed:

- Regarding Ms. Cardenas' interaction with Ms. David:
 - Capt. Hearn asserted it violated a particular policy, but could not recall the policy language or how it was implicated;¹⁴²
 - Capt. Hearn incorrectly stated that CE Poole had investigated the matter and determined Ms. Cardenas was wrong to believe that her email had been opened.¹⁴³
- CE Poole testified that he did not know what "demands" Ms. Cardenas was charged with making of the engine department, Ms. Cardenas had not "interrupted" him at meal time since learning his preference to not discuss work during mealtime. Additionally, the alleged "threatened lawsuit" involved Ms. Cardenas' innocuous the comment to CE Henry in August 2004;¹⁴⁴
- Capt. Hearn could not identify either the engineer or the advice he alleges Ms. Cardenas ignored regarding "operation of the reefer space",¹⁴⁵
- Capt. Hearn incorrectly asserted that Ms. Cardenas had "recently" interrupted a conversation between CE Poole and a shoreside foreman.¹⁴⁶

¹⁴¹ CP, at 1002-1004, ¶ 57.

¹⁴² CP, at 842 (148:20-25).

¹⁴³ CP, at 948-49 (79:7-9, 81:25-82:18), 842 (149:1-16).

¹⁴⁴ CP, at 514 (85:1-14), 843 (153:3-13), 940 (36:12-39:13), 945 (65:17-67:11)

¹⁴⁵ CP, at 1002:14-16; CP, at 843 (152:8-153:2).

¹⁴⁶ CE Poole could not recall when the incident occurred, but that it certainly was not a "recent" event. CP, at 950 (89:17-22). Ms. Cardenas was asked by CE Poole to join a galley meeting regarding a modification of the galley range, yet when she offered her opinion regarding the modification, CE Poole testified that he just looked at the foreman, said "let's go," and left without saying another word to Ms. Cardenas.¹⁴⁶ CE Poole said that the suggestion wasn't the problem, only the timing: he didn't want Ms. Cardenas' input on the design of the modification until *after* he and the shoreside foreman had already decided on the design. CP, at 955 (131:21-132:16). This interaction caused Ms. Cardenas to tell Capt. Hearn that she was anxious to ask CE Poole for assistance. CP, at 1002:17-1003:10.

- The IAS policy required Ms. Cardenas to "immediately" apprise Capt. Hearn of refrigeration issues.¹⁴⁷

In addition to contesting the allegations in the Steward Issues documents, Ms. Cardenas also asserts that the alleged performance issues were never discussed with her.¹⁴⁸ While Capt. Hearn claims to have discussed some of the issues with Ms. Cardenas – and testified that he tried to document matters as best as he could – he did not create any contemporaneous documentation to support that claim.¹⁴⁹ IAS also did not produce written documentation regarding the majority of the issues set out in the Steward Issues document, much less any documentation even indicating that such issues had been previously discussed with Ms. Cardenas.¹⁵⁰

When issued the Steward Issues document, Ms. Cardenas tried to respond to the allegations, but was told her attempts were just proof of yet another performance problem.¹⁵¹ She then told Capt. Hearn it was clear he was issuing her unfair discipline just to get her off his ship, and that she was going to call Robert Rogers to complain.¹⁵² When Capt. Hearn

Cardenas to tell Capt. Hearn that she was anxious to ask CE Poole for assistance. CP, at 1002:17-1003:10.

¹⁴⁷ CP, at 726 (§8.7.2).

¹⁴⁸ CP, at 1001 ¶ 56.

¹⁴⁹ CP, at 842 (148:5-11), 853 (17:12-25).

¹⁵⁰ CP, at 717 ¶ 5.

¹⁵¹ CP, at 1004 ¶ 58.

¹⁵² Id.

responded that "Bob Rogers is a busy man," Ms. Cardenas told him that she had a right to call Mr. Rogers because it is posted.¹⁵³

Capt. Hearn gives Mr. Rogers a "heads up."

After this meeting, Capt. Hearn forwarded the "Steward Issues" document to Mr. Rogers with the following:

"This letter, and the shipboard meeting, were necessary because Ms. Cardenas has a consistent record of interface, supervision, and managerial problems as a department head. Today she remained recalcitrant. She stated that she intends to call Bob Rogers. I advised Bob is a Vice President and busy and she said that she has the right to call the company because it's posted."¹⁵⁴

Mr. Rogers – who has been doing HR work for IAS for 32 years – testified he is listed as a contact person only on the IAS harassment and discrimination policy, which does tell crewmembers to call him if “they were being subjected to any kind of harassment or discrimination.”¹⁵⁵

When Mr. Rogers replied to Capt. Hearn's email he said "thanks for the heads up. I'll be as well prepared as possible for when she calls."¹⁵⁶

Mr. Rogers then warned Capt. Hearn that he didn't

“want [Ms. Cardenas] to be able to file a claim over hostile work environment or harassment, so she can't be dinged for any petty thing she does. But, significant events must be documented. These situations are very difficult, as you know.”¹⁵⁷

¹⁵³ Id.

¹⁵⁴ CP, at 788-89.

¹⁵⁵ CP, at 886 (11:22-23), 891-92 (71:3-75:22).

¹⁵⁶ CP at 788-89.

¹⁵⁷ Id.

Ms. Cardenas calls Mr. Rogers.

When Ms. Cardenas called Mr. Rogers she introduced herself and said that she was calling him because it was posted on her ship.¹⁵⁸ Mr. Rogers told Ms. Cardenas that he knew who she was and that he had been expecting her call.¹⁵⁹

Ms. Cardenas recalls the call being long and that she was very upset when describing to Mr. Rogers her working conditions on the North Star.¹⁶⁰ Ms. Cardenas complained that Capt. Hearn had given her unwarranted and unfair discipline to build a case for her termination, he never talked to her about the issues beforehand, he accused her of things she did not do, and twisted things that had happened.¹⁶¹ Ms. Cardenas also told Mr. Rogers that Capt. Hearn treated her the opposite of how he treated male crewmembers: Capt. Hearn easily interacts and appears comfortable with the men, greets them and returns their greetings, talks with them, laughs with them, treats them with respect and dignity, and makes them feel welcomed.¹⁶²

Ms. Cardenas also told Mr. Rogers that Capt. Hearn avoided talking with her and "that it is very hard to do my job without talking with the

¹⁵⁸ CP, at 1004, ¶ 59.

¹⁵⁹ Id.

¹⁶⁰ CP, at 1005 ¶ 60.

¹⁶¹ Id.

¹⁶² Id.

Captain."¹⁶³ Ms. Cardenas described her efforts to communicate with Capt. Hearn, and that she tried different times and different places, but that she was always told it wasn't the right time.¹⁶⁴ Ms. Cardenas told Mr. Rogers she had suggested using email as captains on other ship like to do, but Capt. Hearn also rejected that suggestion.¹⁶⁵ As a result, Ms. Cardenas told Mr. Rogers she believes Capt. Hearn doesn't want to talk to her because he doesn't want her to be able to do her job, and that he doesn't want her to be able to do her job because "he doesn't want [her] on his ship, period."¹⁶⁶

Ms. Cardenas admitted at her deposition that when talking with Mr. Rogers she did not use the terms or tell him that she felt "discriminated" or "harassed."¹⁶⁷ Ms. Cardenas believed that Mr. Rogers understood she was calling for that reason because he told her he was expecting her call.¹⁶⁸

After this phone call Ms. Cardenas felt defeated. Mr. Rogers seemed uninterested in her situation, hardly said anything during the call, didn't ask her any questions, and didn't offer any solutions.¹⁶⁹ Instead, Mr. Rogers told Ms. Cardenas he "has known Capt. Hearn for a long time, and

¹⁶³ Id.

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Id.

¹⁶⁷ CP, at 1004 ¶ 59; 1005 ¶ 61.

¹⁶⁸ Id.

¹⁶⁹ CP, 1006 ¶ 62.

he is a good man,” and that he could not help Ms. Cardenas because he “is 3,000 miles away.”¹⁷⁰ Ms. Cardenas knew she was on her own.¹⁷¹

Mr. Rogers testified to having a limited memory of his conversation with Ms. Cardenas: the call was lengthy, Ms. Cardenas was upset, it was difficult to understand her, he said little during the call, and mostly listened.¹⁷² He did not recall if Ms. Cardenas was upset because she felt Capt. Hearn was trying to get her off his ship, but offered

“what she said I can't speculate on because I don't know. At this point, I can't say. Possibility the sun could come up in the west tomorrow. So, anything like that is possible.”¹⁷³

Despite being “well-prepared” for Ms. Cardenas' call, Mr. Rogers testified he took no notes during the call.¹⁷⁴ When pressed to explain why, a well-experienced VP of HR, would not take notes during a call from an employee he is “concerned may subsequently file a claim for hostile work environment or harassment,” Mr. Rogers responded:

“the last thing I want to do is to have notes lying around that can be deposited.”¹⁷⁵

Capt. Hearn responds to Ms. Cardenas' call to Mr. Rogers

Shortly after Ms. Cardenas' call with Mr. Rogers, she and Capt. Hearn passed in a hallway. Ms. Cardenas was used to Capt. Hearn not speaking

¹⁷⁰ Id.

¹⁷¹ Id.

¹⁷² CP, at 903-04 (129:10-15, 130:15-131:7).

¹⁷³ Id., at 129:18-131:3.

¹⁷⁴ Id., at 131:18-19.

¹⁷⁵ CP, at 912 (202:9-203:19).

in such circumstances, and was surprised when he spoke, and then frightened by what he said: "I heard about your call."¹⁷⁶ Ms. Cardenas described Capt. Hearn as "growling" this comment to her. Both Capt. Hearn and Ms. Cardenas kept going their separate ways in the hallway, but Ms. Cardenas believed that she was going to be fired.¹⁷⁷

In a last ditch effort to keep her job, Ms. Cardenas wrote a note to Capt. Hearn saying she has tried to do a good job, she did not want to lose her job, but that she did "not like to feel like I'm not wanted here."¹⁷⁸

Capt. Hearn did not respond to Ms. Cardenas' note, but did email Mr.

Rogers about it:

- "the note does not state an apology, and in kind, I remain unforgiving."
- "apparently she would not have written a kind note to me if she thought that you, at IAS, would take her side and reprimand me in some manner. But please accept my apology for the disruption, and my gratitude for your support and trust."
- "As you can imagine, the Marine Psychologists aboard are having a field day trying to figure this out."
- "I appreciate your continued support."¹⁷⁹

Mr. Rogers replied to Capt. Hearn's email saying Ms. Cardenas had "called and rambled," but was only told "the issues she wanted to discuss

¹⁷⁶ CP, at 1006 ¶ 63.

¹⁷⁷ Id.

¹⁷⁸ CP, at 796.

¹⁷⁹ Id, CP, at 798-99.

(which made no sense whatsoever) were shipboard matters.”¹⁸⁰ Mr. Rogers told Capt. Hearn “good luck, but let me know if I can help.”¹⁸¹

Decision is made to terminate Ms. Cardenas.

A week later, Capt. Hearn drafted a performance document for Ms. Cardenas—this time about three galley issues he claimed recently came to his attention: undated leftovers stored in the freezer, meats found defrosting in a galley sink, and night lunches not containing items suggested by union contract, such as sardines and hard boiled eggs.¹⁸²

Captain Hearn did not provide the document to Ms. Cardenas, but instead, three days later he emailed it to Mr. Rogers.¹⁸³ Despite the delay, Capt. Hearn claims in the email that “the present matter, food handling in particular, are critical and I must correct it as soon as possible.” He claimed to be reluctant to discuss the issues with Ms. Cardenas because “she believes I am personally attacking her.”¹⁸⁴ Capt. Hearn then tells Mr. Rogers “I’ve discussed the matter with senior officers and SIU aboard, and have their support. Please review the document and advise if I should re-write it as a letter of warning, or in any manner you think best.”¹⁸⁵

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² CP, at 801, 806, 820, 847 (182:22-183:18).

¹⁸³ CP, at 805-06.

¹⁸⁴ CP, at 806, 847 (182:22-183:5).

¹⁸⁵ Id.

In reply, Mr. Rogers does not question Capt. Hearn about the alleged galley issues or ask whether Ms. Cardenas has been spoken to about them in the past; in his limited response he appears to make the decision to terminate Ms. Cardenas: "I think it is time to change the warning to a discharge letter. These issues are pretty clear cut...can't risk people on the ship becoming ill."¹⁸⁶ Yet, the next day, Capt. Hearn sends a different email to Mr. Rogers: "if you continue to support, every senior officer and senior unlicensed agree that this is a good opportunity to terminate Ms. Cardenas."¹⁸⁷ Additionally, four days after Ms. Cardenas was terminated, Mr. Rogers wrote a letter to her union in which he defended the termination stating "[t]here have been a number of warnings issued, and the Captain advised me of his actions before her termination, and I concurred."¹⁸⁸

Ms. Cardenas issued "Letter of Discharge."

On October 28, 2005, Capt. Hearn issued Ms. Cardenas a "Letter of Discharge," which was identical to the October 23, 2005, document he had forwarded to Mr. Rogers two days earlier.¹⁸⁹ The issues set out in the Letter of Discharge were (1) undated frozen leftovers in the freezer box; (2) frozen meats left to thaw overnight at room temperature; and (3) night

¹⁸⁶ CP, at 805.

¹⁸⁷ CP, at 808.

¹⁸⁸ CP, at 810.

¹⁸⁹ CP, at 801, 803.

lunches did not contain all of the items suggested by the union steward department guide, such as "hard boiled eggs and sardines."

Despite the alleged "critical" nature of the above issues, Capt. Hearn admitted the first time the issues were brought to Ms. Cardenas' attention was when she was fired.¹⁹⁰ Once apprised, Ms. Cardenas contested that her practice regarding leftovers and night lunches was improper.¹⁹¹ Moreover, Ms. Cardenas had followed the same practice with both frozen leftovers and night lunches for the entire time she served on the North Star.¹⁹² The remaining issue – defrosting meat – was conduct engaged in by the cook, Julito Crodua, and Ms. Cardenas was unaware of it.¹⁹³

The only effort Capt. Hearn could recall making to ensure the alleged improperly frozen leftovers were not served to the crew – to avoid the entire crew becoming ill – was writing the unused document he had earlier forwarded to Mr. Rogers.¹⁹⁴ The only effort he could recall making regarding the alleged improperly thawed meat was to "monitor the menu" and to discuss the matter with Mr. Crodua, although he could not recall doing so before he terminated Ms. Cardenas.¹⁹⁵

¹⁹⁰ CP, at 1006 ¶ 65; CP, at 801, 820 (5:9-11), 847 (183:19-184:8).

¹⁹¹ CP, at 1006-08 ¶¶ 65-66.

¹⁹² Id.; CP, at 523-524 (108:1-109:10).

¹⁹³ CP1008, ¶ 67.

¹⁹⁴ CP, at 820 (5:9-11), 848 (186:15-189:12).

¹⁹⁵ CP, at 231 (197:3-17).

Prior to firing Ms. Cardenas, Capt. Hearn said he had drafted a Letter of Resignation which she could instead sign, but he made clear that either way, Ms. Cardenas would be leaving the ship because she had "called the company."¹⁹⁶ Ms. Cardenas refused to resign and Capt. Hearn fired her.¹⁹⁷

Capt. Daly does not believe Ms. Cardenas should have been fired.

Capt. Daly testified that when he left the North Star on September 10, 2005, he expected to see Ms. Cardenas when he returned to the ship for his next tour.¹⁹⁸

Capt. Daly also testified he had briefly spoken to Capt. Hearn about Ms. Cardenas on only one occasion, and had never discussed her with Mr. Rogers.¹⁹⁹ Capt. Daly made it clear he never recommended that Ms. Cardenas be terminated, was never asked if he thought she should be terminated, was not privy to any discussion involving her termination, and still has never been told who made the decision to terminate her.²⁰⁰ Finally, Capt. Daly believes that Ms. Cardenas should not have been terminated saying "stewards – it's a difficult position and she had been doing an adequate job."²⁰¹

¹⁹⁶ CP, at 1008 ¶ 68.

¹⁹⁷ Id.

¹⁹⁸ CP, at 758, 935 (115:12-25).

¹⁹⁹ CP, at 919-20 (41:20-43:23, 45:4-11), 935 (3-11)

²⁰⁰ CP, at 934-5 (113:24-114:20, 116:25-117:3).

²⁰¹ Id., at 115:12-25.

IV. ARGUMENT

1. **The trial court erred when granting summary judgment on Ms. Cardenas' discrimination and retaliation claims.**

a. **Review of summary judgment ruling is *de novo*.**

The appellate "court engages in the same inquiry as the trial court when reviewing a summary judgment, construing all facts and reasonable inferences therefrom most favorably to the nonmoving party."²⁰² Summary judgment is only appropriate if "there can be but one reasonable conclusion as to the verdict."²⁰³ This court has previously recognized that summary judgment should rarely be granted in employment discrimination cases.²⁰⁴ Indeed, courts have *purposefully* "set a high standard for the granting of summary judgment in employment discrimination cases, ...'because the ultimate question is one that can only be resolved through a 'searching inquiry'—one that is most appropriately conducted by the factfinder, upon a full record."²⁰⁵

Applying this standard to the facts of this case must result in a finding that summary judgment was not appropriate.

²⁰² Johnson v. DSHS, 80 Wn. App. 212, 226, 907 P.2d 1223.

²⁰³ Lindahl v. Air France, 930 F.2d 1434 (9th Cir. 1998).

²⁰⁴ Johnson v. DSHS, 80 Wn. App., at 226, citing, deLisle v. FMC Corp., 57 Wn. App. 79, 84, 786 P.2d 839, review denied, 114 Wn.2d 1026 (1990).

²⁰⁵ Schnidrig v. Columbia Machine, Inc., 80 F.3d 1406 (9th Cir. 1996), citing, Lam v. Univeristy of Hawaii, 40 F.3d 1551, 1563 (9th Cir. 1994).

b. The trial court erred when finding that Ms. Cardenas failed to raise an issue of fact on the elements of her discrimination claim.

Discrimination claims involve a shifting burden of production between the plaintiff and defendant: the plaintiff first must make out a prima facie case of discrimination, the defendant then must produce evidence of a legitimate, nondiscriminatory reason for the challenged action, and finally the plaintiff must produce evidence that the defendant's stated reason is pretextual.²⁰⁶ In this case, Ms. Cardenas produced sufficient evidence to create issues of fact on the single prima facie element IAS challenged, as well as on the issue of pretext.

i. Ms. Cardenas raised an issue of fact on the challenged element of her prima facie case:

To meet her burden at summary judgment, Ms. Cardenas need only raise an issue of fact on the following elements: (1) member of a protected class, (2) who suffers adverse action, (3) had been doing satisfactory work, and (4) was replaced by someone not in the protected class.²⁰⁷ In the trial court, IAS asserted that Ms. Cardenas could not raise an issue of fact on the third element. The above facts do not support IAS' argument.

Ms. Cardenas produced testimony of Capt. Daly – her supervisor for slightly more than half her time on the North Star – that she was

²⁰⁶ Milligan v. Thompson, 110 Wn. App. 628, 953 P.2d 112 (1998)

²⁰⁷ Id., at 636.

performing satisfactorily and that at no point did he agree or believe that she should have been terminated.²⁰⁸ The record also included Mr. Rogers' testimony that if Ms. Cardenas was performing deficiently on the North Star he would expect to receive reports from a variety of people – shoreside people, Capt. Daly, people from IAS' sister company (TOTE), and office staff: "anyone who had any dealings with the vessel."²⁰⁹ Yet, Mr. Rogers could not recall having received such reports.²¹⁰

Ms. Cardenas also provided her own testimony, as well as other evidence that together raise an issue of fact regarding whether she was performing satisfactorily.

September 4, 2004 LOW: Capt. Hearn tied Ms. Cardenas' duty to remain on board to the overtime that she would be paid to do so, yet then denied that very overtime in a manner that predictably caused Ms. Cardenas to believe she was released from work.

At his deposition Capt. Hearn claimed that he issued the LOW because Ms. Cardenas had not taken him seriously when he tried to issue her a verbal warning, yet when pressed to articulate facts regarding that alleged attempt, Capt. Hearn could recall nothing of the prior conversation and the

²⁰⁸ CP, at 935 (114:10-115:25).

²⁰⁹ CP, at 898 (100:9-102:5).

²¹⁰ Id.

only documentation regarding this matter is silent as to any prior conversation.

September 28, 2004 LOW: The only conversation that Capt. Hearn had with Ms. Cardenas regarding her management of the galley occurred during a routine meeting after six weeks of sailing together. Again, Capt. Hearn issued the LOW after a meeting at which he claims Ms. Cardenas became more angry and vocal than any sailor in his 30 year career. Yet, again, the subsequent LOW is devoid of any mention of such conduct. The documentation is also devoid of any mention of Mr. Shibly having issues with Ms. Cardenas or providing a statement to that effect, although Capt. Hearn certainly possessed the statement at the time he met with Ms. Cardenas and when he issued her the second LOW.

September 29, 2004 attempt to remove Ms. Cardenas: Capt. Hearn did not follow IAS policy when completing the performance evaluation of Ms. Cardenas, in which he uses derogatory and stereotypical terms to describe Ms. Cardenas: “high maintenance”, “emotional”, and “weak” leader.²¹¹ By this date, Capt. Hearn recalls speaking with galley staff about Ms. Cardenas a total of three times: one conversation with Mr. Shibly, and two conversations with Nasser Ahmed, but he was unable to

²¹¹ And, apparently a woman he thought should have been home with children. CP, at 986-87 ¶ 18.

provide any details about those conversations. What Capt. Hearn does recall about his conversation with Mr. Shibly allows for the inference that he knew Mr. Shibly to be a difficult employee, but only made sure to get documentation of the subjective complaints about Ms. Cardenas.

January 2005 attempt to remove Ms. Cardenas: Capt. Hearn asserts that five cooks had rotated through the North Star Steward Department to implicate an issue with Ms. Cardenas' performance. Yet, Capt. Hearn knew that the rotation was either for a reason unrelated to Ms. Cardenas or that he had no idea why it had occurred.

October 9, 2005 Letter of Counsel: Capt. Hearn asserts that this document was provided to Ms. Cardenas only to "clear the air." The document contains numerous inaccurate or overstated claims that result in the document appearing to contain primarily recent performance issues, when in fact it merely rehashes prior claims of deficient performance that were never previously discussed with Ms. Cardenas, who has now fully rebutted the allegations.

October 28, 2005 letter of termination.

Capt. Hearn neither previously nor timely discussed the issues in this document with Ms. Cardenas (or her galley staff). For almost a week he allowed them to continue in allegedly deficient conduct despite a supposed concern for the health of the entire crew. Moreover, the timing of the

issues being raised is highly suspect as Capt. Hearn claims to have inspected the galley on a daily basis,²¹² and the issues primarily involved long standing practices of Ms. Cardenas.

By the foregoing direct and circumstantial evidence, Ms. Cardenas met her burden of producing sufficient evidence to create an issue of fact regarding whether she was performing satisfactorily. As such, Ms. Cardenas produced sufficient evidence to meet her prima facie burden on summary judgment and shift the burden to IAS.

The declarations that IAS provided the trial court do not change this conclusion or erase the issue of fact which Ms. Cardenas has created. Ms. Cardenas has denied the accuracy of each declaration and provided sufficient facts to question the veracity of each Declarant. Specifically:

Mohamed Shibly: Mr. Shibly's Declaration establishes that he is routinely employed by IAS, and in fact, is currently employed back on the North Star.²¹³ Mr. Shibly claims that no one asked him to write the statement he provided Capt. Hearn in 2004, yet Capt. Hearn testified that he asked for the statement.²¹⁴ Mr. Shibly also claims that he did not return to the North Star because of Ms. Cardenas, yet he detached from the ship for a regularly scheduled vacation, from which Capt. Hearn expected him

²¹² CP, at 878 (183:15-184:22).

²¹³ CP, at 85-89.

²¹⁴ CP, at 882 (216:5-12).

to return, and he subsequently asked for an extension of that vacation.²¹⁵ Last, his assertion that Capt. Hearn and Mr. Glenn treated everyone the same is of little value: he does not aver that he ever observed either man interact with Ms. Cardenas.

Richard Cadigan: Mr. Cadigan was promoted to the position of Captain of the North Star when Capt. Hearn took another position within AIS.²¹⁶ His declaration is limited to discussing Ms. Cardenas' reaction to the "counseling/warning letters,"²¹⁷ but his account is in stark contrast with the testimony of Capt. Daly, *infra*, who found Ms. Cardenas to always be receptive to counseling and never defensive.

Julito Crodua: Mr. Crodua provided a previous statement that he had no issues working with Ms. Cardenas, felt she had been "doing a good job [in] the galley," however, he did feel she could use some help with "management communications."²¹⁸ Yet, to support IAS' motion for summary judgment, Mr. Crodua now claims Ms. Cardenas "was not able to do her job because of her lack of communication skills."²¹⁹ Mr. Crodua does not provide any explanation for this clear disparity.

²¹⁵ CP, 828-29 (47:5-51:5), 997-98 ¶ 46. Mr. Shibly fails to reveal that he and Ms. Cardenas had a previous positive work experience as steward/cook. CP, at 984 ¶ 12.

²¹⁶ CP, at 919 (44:12-45:3).

²¹⁷ CP, at 32-33.

²¹⁸ CP, at 49.

²¹⁹ CP, at 47 ¶ 17.

Mr. Crodua also now asserts that Capt. Hearn “treated Veronika just like everyone else, always greeting her when he saw her.”²²⁰ Such testimony is not only contested by Ms. Cardenas, but it is also contestable given Capt. Hearn's acrimonious feelings towards Ms. Cardenas who he viewed as "the most deceiving person" he has ever sailed with, "a person of serious emotional concern," and "a threat."²²¹

Else David: Ms. David inaccurately claims she worked aboard the North Star with Paula Kaleikini and Capt. Hearn. The only female steward Ms. David worked with aboard the North Star was Ms. Cardenas.²²² Ms. David also asserts Capt. Hearn treated Ms. Cardenas with respect, and “just like the rest of the crew.” For the same reasons discussed above, this vague assertion is assailable.

Ms. David claims to have not liked working with Ms. Cardenas saying "she would accuse me of things I did not do." The two instances she cites are contested by Ms. Cardenas, and Ms. David has provided inconsistent statements regarding one of the alleged instances.²²³

Last, Ms. David omits revealing that she and Ms. Cardenas had

²²⁰ CP, at 46 ¶ 12.

²²¹ CP, at 769-770, 779.

²²² CP, at 761-763, 52 ¶ 6.

²²³ CP, at 52-53 ¶¶ 9-11. Ms. David now asserts she was accused of locking Ms. Cardenas in the galley freezer, but previously asserted it was the vegetable box. CP, at 53 ¶ 11; CP, at 59. Ms. Cardenas does not believe it is possible to lock someone in either compartment, accidentally or otherwise. CP, at 1009, ¶ 72.

been friends, and that their last interaction involved the two women discussing personal issues Ms. David was experiencing at the time.²²⁴

Courtney Henry: CE Henry claims Ms. Cardenas was "extremely difficult to work with," but supports this strong assertion with only vague claims she would complain to him about things unrelated to him or his department, and at some point she asked him to clean the galley grease trap.²²⁵ CE Henry has also changed his representation regarding Ms. Cardenas' response to his refusal to turn off the freezer fans in August 2004: he now asserts Ms. Cardenas made a "direct threat...to take some action against the company," whereas previously he had interpreted her response to be "IAS would have to pay her doctor bills if she got sick."²²⁶

Don Anderson: Mr. Anderson provides no substantive documents or notes to support his conclusory statements about conduct either he or another union representative engaged in.²²⁷ Mr. Anderson's Declaration is devoid of details of the investigation he claims to have completed.

Mr. Anderson also inaccurately perceived and reported the "progressive discipline" Ms. Cardenas is alleged to have received, saying that she had received prior performance "warnings" on March 2, 2005,

²²⁴ CP, at 1009-10 ¶ 72.

²²⁵ CP, at 61-62 ¶ 3.

²²⁶ CP, at 62 ¶ 4; CP, at 64.

²²⁷ CP, at 11-16 ¶¶ 2, 11, 12, 13.

September 4, 2005, September 28, 2005, October 9, 2005, and a final warning with discharge on October 28, 2005.²²⁸ Obviously, this is incorrect, but certainly creates a much more compelling case of the progressive discipline he touts than what actually occurred.

Last, Mr. Anderson boldly asserts Ms. Cardenas never complained to the union of improper treatment by Capt. Hearn or that her termination was retaliatory.²²⁹ This is not supported by the record, which includes Ms. Cardenas' testimony that no one from her union, including Mr. Anderson, spoke to her after she was terminated from the North Star.²³⁰

Eleish Higgins: Capt. Higgins does not disclose a prior, highly positive performance review of Ms. Cardenas.²³¹ Capt. Higgins also omits that only months before her alleged negative tour with Ms. Cardenas, she and her employer, Seabulk, unsuccessfully tried to prevent Ms. Cardenas from obtaining customary between-tour unemployment benefits.²³²

In sum, as the above discussion highlights, there is sufficient basis to allow Ms. Cardenas to argue to a trier of fact that each of the above

²²⁸ CP, at 24.

²²⁹ CP, at 14-15 ¶ 13.

²³⁰ CP, at 335 (282:1-25), 975 (415:18-419:12).

²³¹ CP, at 1014-15. Ms. Cardenas contested the contents of her second evaluation from Capt. Higgins. CP, at 1031-32.

²³² CP, at 1009 ¶ 71. Five days into a second tour, Capt. Higgins complained of issues between Ms. Cardenas and a new cook. Seabulk personnel department encouraged Capt. Higgins to write a performance review of Ms. Cardenas to “sock it to her!” and keep Ms. Cardenas off other Seabulk ships. CP, at 70-71.

declarations are skewed and the result of bias. Therefore, the declarations submitted to the trial court do not alter the conclusion that Ms. Cardenas met her burden of producing sufficient evidence to raise an issue of fact on the elements of her prima facie case.

ii. **Ms. Cardenas raised an issue of fact regarding whether the reason offered for her termination was pretextual.**

Ms. Cardenas asserts her termination was based upon contrived allegations of deficient performance, but concedes IAS has met its burden of producing a legitimate, nondiscriminatory reason for that action. As such, the burden shifts back to Ms. Cardenas to produce sufficient evidence to raise an issue of fact on whether IAS' reason is pretextual.

Ms. Cardenas may prove pretext by either direct or circumstantial evidence "[b]ecause employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily resort to circumstantial evidence to demonstrate retaliatory purpose."²³³ Additionally, to meet her burden on pretext, Ms. Cardenas may rely upon the same evidence she produced to establish her prima facie case.²³⁴

Ms. Cardenas establishes pretext by producing "evidence that raises a genuine issue of material fact on the question of whether the

²³³ Estevez v. Faculty Club of Univ. of Wash., 129 Wn. App. 774, 120 P.3d 579 (2005).

²³⁴ Milligan, 110 Wn. App., at 637.

reasons given by [IAS] for discharging [her] are unworthy of belief."²³⁵ Indeed,

“the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as ‘affirmative evidence of guilt.’”²³⁶

Therefore,

"[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination."²³⁷

For summary judgment, Ms. Cardenas meets her pretext burden by providing sufficient evidence to raise an issue of fact regarding whether IAS' reason (1) has no basis in fact; (2) even if based in fact, IAS was not motivated by that reason; or (3) the reason was insufficient to motivate IAS to terminate her.²³⁸ In this case, the evidence and argument Ms. Cardenas provides above challenging IAS' claim that she was not performing adequately, also allows her to meet her burden on pretext.

²³⁵ Sellsted v. Washington Mutual, 69 Wn. App. 852, 859, 851 P.2d 716 (1993).

²³⁶ Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 147, 120 S.Ct. 2097 (2000), citing, Wright v. West, 505 U.S. 277, 296 (1992).

²³⁷ Reeves, 530 U.S., at 147, citing, St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511 (1993).

²³⁸ Renz v. Spokane Eye Clinic, P.S., 114 Wn. App. 611 (2002).

That is, the above facts and argument cast sufficient doubt on the reasons put forth by IAS to raise an issue of fact regarding whether IAS' stated reasons "are unworthy of belief," and whether those reasons were the true motivation for her termination.

- c. **The trial court erred when finding that Ms. Cardenas failed to raise an issue of fact on the elements of her retaliation claim.**

Retaliation claims are governed by the same burden shifting test set out above.²³⁹

- i. **Ms. Cardenas raised issues of fact on the challenged elements of her prima facie case:**

To make out a prima facie case of retaliation, a plaintiff must provide evidence of (1) protected activity, (2) subsequent adverse action, and (3) nexus between the protected activity and the adverse action.²⁴⁰ The facts set forth above allow Ms. Cardenas to meet her burden of producing sufficient evidence to raise an issue of fact on the contested elements.

Protected conduct: "To determine whether an employee was engaged in protected opposition activity, the court must balance the setting in which the activity arose and the interests and motives of the employer and employee."²⁴¹ In addition, "[i]t is not necessary that the conduct

²³⁹ Renz, 611 Wn. App., at 618.

²⁴⁰ See, Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994).

²⁴¹ Kahn v. Salerno, 90 Wn. App. 110, 951 P.2d 321 (1998).

complained of actually be unlawful. "[A]n employee who opposes employment practices reasonably believed to be discriminatory is protected by the "opposition clause" whether or not the practice is actually discriminatory."²⁴² As such, Ms. Cardenas' ability to prove that she was actually being subjected to unlawful conduct "is not dispositive of the viability of her retaliatory discharge claim. Rather, she need only demonstrate that her belief was reasonable under the circumstances."²⁴³

Ms. Cardenas has produced sufficient facts to raise an issue of fact regarding whether she engaged in protected conduct:

- Prior to the meeting at which Capt. Hearn provides Ms. Cardenas with the "Steward Issues" document, he expressed concern to Mr. Rogers that he would be accused of "harassing" Ms. Cardenas if he confronted her about alleged performance deficiencies;
- Capt. Hearn's concern was the result of Ms. Cardenas' prior complaints of unwarranted discipline which he believed to be based upon her feelings that he was targeting her because of her sex or national origin. Mr. Rogers was aware of Ms. Cardenas' prior complaint and Capt. Hearn's resulting concern;
- Capt. Hearn and Mr. Rogers had also previously exchanged emails in which they discussed advice of counsel and strategy regarding potential litigation by Ms. Cardenas;
- At the meeting at which Capt. Hearn issued Ms. Cardenas the Steward Issues document, as anticipated, Ms. Cardenas complained of being targeted, and told Capt. Hearn that she was

²⁴² Renz, 114 Wn. App., at 619, citing Graves v. Dep't of Game, 76 Wn. App. 705, 712, 887 P.2d 424 (1994).

²⁴³ Estevez v. Faculty Club of the Univ. of Wash., 129 Wn. App. 774 (2005).

calling Mr. Rogers to complain. Ms. Cardenas told Capt. Hearn that she had "a right to call Mr. Rogers because it is posted;"

- Mr. Rogers is listed as the contact person only on IAS' discrimination and harassment posting;
- Capt. Hearn emails Mr. Rogers, his personal friend, and gave him a "heads up," and Mr. Rogers replied with a warning to Capt. Hearn about hostile work environment;
- Ms. Cardenas followed through with her complaint to Capt. Hearn by calling Mr. Rogers. During that call she complained about her disparate, hostile work environment, being targeted for unwarranted discipline, and her suspicions regarding Capt. Hearn's ill-motivation to get her off his ship;
- Mr. Rogers took no notes during his call with Ms. Cardenas because he did not want to create a document which he feared could be later used at his deposition;

Given the timing, context, and content of Ms. Cardenas' complaints to Capt. Hearn and Mr. Rogers, there is sufficient evidence to raise an issue of fact regarding whether Ms. Cardenas engaged in protected conduct. That is, when properly viewed, the evidence creates a question of fact regarding whether Ms. Cardenas had a reasonable belief she was complaining about unlawful conduct when complaining of ill-motivated and targeted discipline, and a disparate, hostile treatment that affected her working conditions and environment.²⁴⁴

Nexus: The required nexus may be established by evidence that

²⁴⁴ Renz, 114 Wn. App., at 619.

“the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged.”²⁴⁵ In this case, the above facts and argument establish Ms. Cardenas has met this element.

ii. **Ms. Cardenas raised an issue of fact regarding whether the reason offered for her termination was pretextual:**

Our courts find proximity in time between the termination and protected activity is a factor that suggests retaliatory motivation.²⁴⁶ In this case, Ms. Cardenas was fired less than two weeks after she told Capt. Hearn that she was going to call Mr. Rogers to complain about him, and then did so.

In addition, as previously established, Ms. Cardenas engaged in the same conduct set forth in the Letter of Discharge the entire time she served on the North Star. Capt. Hearn testified that he is required to conduct routine inspections of the galley and that he did so daily.²⁴⁷ As such, the timing of Capt. Hearn alleged "discovery" of Ms. Cardenas' long-standing practice allows for the inference that he was simply looking for evidence to support Ms. Cardenas' termination, or as he said “a good opportunity to terminate Ms. Cardenas.”²⁴⁸

²⁴⁵ Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

²⁴⁶ Estevez, 129 Wn. App. at 799.

²⁴⁷ CP, at 878 (183:15-184:22).

²⁴⁸ CP, at 808.

Moreover, that IAS may have had some legitimate motivation to terminate Ms. Cardenas is not fatal to her ability to show pretext. To defeat a motion for summary judgment, Ms. Cardenas does not need to show that a retaliatory motive was the employer's sole reason, or even its chief reason for her termination. Rather, Ms. Cardenas need only produce evidence sufficient to raise an issue of fact regarding whether retaliation was a substantial factor.²⁴⁹ That is, a factor that "so much as tips the scales one way or the other."²⁵⁰ There is sufficient evidence to allow Ms. Cardenas to raise an issue of fact as to whether her complaint to Capt. Hearn and subsequent call to Mr. Rogers was just such a "tipping" point. That is, prior to this conduct, Ms. Cardenas had clearly not engaged in conduct which IAS felt justified her termination.

Last, Ms. Cardenas has provided direct evidence that Capt. Hearn was terminating her because of her call to Mr. Rogers. As set forth in the above facts, when Ms. Cardenas refused to sign the resignation letter that Capt. Hearn had prepared for her, he told her that she was either going to resign or be fired because she "had called the company."

²⁴⁹ Renz, 114 Wn. App, at 621.

²⁵⁰ Id.

Based upon the above, Ms. Cardenas has produced sufficient evidence to raise an issue of fact regarding whether IAS' reasons for terminating her were pretextual.

Under such circumstances, summary judgment was not appropriate: “the burdens here are burdens of production, not burdens of persuasion. Appellate courts are not suited for, and therefore not in the business of, weighing and balancing competing evidence.”²⁵¹ Indeed, as stated by the Court in Carle, the trial court’s “job [in employment cases] is to pass upon whether a burden of production has been met, not whether the evidence *produced* is persuasive. That is the jury's role, once a burden of production has been met.”²⁵²

Indeed, Ms. Cardenas met her summary judgment burdens of production on both her discrimination and retaliation claims. Therefore, the trial court erred when granting IAS summary judgment.

2. The trial court abused its discretion when denying Ms. Cardenas' motion to strike the declaration and hearsay statements provided by an employer three years removed from Ms. Cardenas' employment with IAS.

To support its motion for summary judgment, IAS provided the

²⁵¹ Carle v. McChord Credit Union, 65 Wn. App. 93, 98-102, citing, No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 71 Wn. App. 844, 854 n.11, 863 P.2d 79 (1993) (“[I]t is axiomatic that on a motion for summary judgment the trial court has no authority to weigh evidence or testimonial credibility, nor may we do so on appeal.”).

²⁵² Renz, at 623.

above referenced declaration from Capt. Eleish Higgins. Ms. Cardenas moved to strike that Declaration, as well as the exhibits attached thereto. The trial court denied that motion.

a. Standard of review on evidentiary rulings.

"A trial court may not consider inadmissible evidence when ruling on a summary judgment motion."²⁵³ A ruling on a motion to strike such evidence is reviewed for abuse of discretion.²⁵⁴ A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds.²⁵⁵

b. The trial court abused its discretion when denying Ms. Cardenas' motion to strike.

Ms. Cardenas moved to strike the Higgins Declaration and the exhibits attached thereto on the basis that they were irrelevant, inadmissible hearsay, impermissible character evidence, and the admission would result in an inappropriate and unnecessary "trial within a trial."²⁵⁶

The trial court denied Ms. Cardenas' motion to strike the Higgins Declaration finding it "borderline of what Evidence Rule 404

²⁵³ King County Fire Protection Dists. Nos. 16, 36, & 40 v. Housing Auth., 123 Wn.2d 819, 826, 872 P.2d 516 (1994).

²⁵⁴ Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 365, 966 P.2d 921 (1998).

²⁵⁵ State v. Perrett, 86 Wn. App. 312, 936 P.2d 426, rev. denied, 133 Wn.2d 1019 (1997).

²⁵⁶ CP, at 1016-19, 1139-1142.

is attempting to keep out", but "probably admissible."²⁵⁷ The court also denied Ms. Cardenas' motion as to the exhibits written by individuals other than Capt. Higgins, finding the statements admissible "not to prove the truth or falsity of each one," but only "to show that Capt. Higgins had input coming to her."²⁵⁸ When so ruling, the trial court abused its discretion.

Capt. Higgins' Declaration and its attached exhibits deal exclusively with performance allegations that are three years – and many employers removed – from her last employment with IAS.²⁵⁹ Clearly, IAS offered this testimony only to help prove Ms. Cardenas engaged in the conduct it asserts she did during her employment on the North Star. The trial court abused its discretion when allowing the Declaration for this purpose.

In Dickerson v. Chadwell, Inc.,²⁶⁰ the plaintiff sued the owner of a tavern after he was severely injured in a fight with a patron he claimed the owner had over-served and failed to remove. The tavern owner/defendant claimed the plaintiff was injured outside the tavern by different patrons after being escorted from the premises for slapping his girlfriend and causing a commotion. Plaintiff denied having slapped his girlfriend.

²⁵⁷ RP, at 4-5.

²⁵⁸ RP, at 5.

²⁵⁹ Ms. Cardenas provided IAS with releases that allowed it unfettered access to her employment records for the past 20 years, including the Seabulk Arctic.CP, at 1143 ¶ 3.

²⁶⁰ 62 Wn. App. 426, 814 P.2d 687, rev. denied, 118 Wn.2d 1011 (1992).

To support his story, defendant planned on admitting evidence that plaintiff had on prior occasions slapped his girlfriend. Plaintiff moved to strike evidence of the prior slapping incidents, arguing such evidence was inadmissible under ER 404(b). The trial court agreed that the evidence was not admissible character evidence, but denied plaintiff's motion finding evidence of the other slapping incidents was admissible "for the purpose of tending to show whether or not [plaintiff] did slap [his girlfriend] on the night of the incident."

On appeal, the appellate court found the trial court's ruling improper:

"the effect of the [trial court's] ruling was to allow the prior slapping incidents to be used to show [plaintiff's] propensity for slapping [his girlfriend] and to thereby prove that it was more likely that he slapped [the girlfriend] during the incident in question. ER 404(b) prohibits use of prior bad acts for this purpose."²⁶¹

This ruling requires the same finding in this case. The trial court's ruling on Ms. Cardenas' motion to strike would have the same effect the appellate court found impermissible in Dickerson.

The trial court also erred when denying Ms. Cardenas' motion to strike the exhibits. In effect, the court found that even if false, the exhibits were admissible to show that "Capt. Higgins had input coming

²⁶¹ Id., at 430.

to her." Yet, this litigation does not involve Capt. Higgins, and if false, the exhibits are entirely irrelevant.²⁶² On the other hand, if true, the holding in Dickerson required the exhibits struck as impermissible ER 404(b) evidence.

Therefore, the trial court abused its discretion when denying Ms. Cardenas' motion to strike both the Declaration and its exhibits.

3. Ms. Cardenas is entitled to fees.

Ms. Cardenas requests fees pursuant to RCW 49.60, *et. seq.*, and RAP 18.1.

V. CONCLUSION

Based upon the foregoing, the trial court's rulings on Ms. Cardenas' motion to strike, and on IAS's motion for summary judgment must be reversed and this matter remanded for trial.

Dated this 14th of July, 2010.

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²⁶² See, Tortes v. King County, 119 Wn. App. 1, 13-14, 84 P.3d 252 (2003).

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IN THE COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

VERONIKA CARDENAS, an individual,

Appellant,

v.

INTEROCEAN AMERICAN SHIPPING
CORPORATION, a state of Delaware
corporation licensed to do business in the state
of Washington,

Respondent.

No. 40382-0-II

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that on July 14, 2010, I caused a copy of Appellant's Opening Brief, Motion for Extension of Time, Motion to File Over-Length Brief, and this Certificate of Service to be hand-delivered on the person listed below:

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Dated at Seattle, Washington this 14th day of July, 2010.

Margaret M. Boyle

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