

NO. 40382-0-II

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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VERONIKA CARDENAS,

Appellant,

vs.

INTEROCEAN AMERICAN SHIPPING  
CORPORATION,

Respondent.

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**BRIEF OF RESPONDENT  
INTEROCEAN AMERICAN SHIPPING  
CORPORATION**

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## I. INTRODUCTION

The trial court properly granted Respondent Interocean American Shipping Corporation's ("Interocean") motion for summary judgment dismissal of Plaintiff Veronika Cardenas's ("Cardenas") discrimination and retaliation claims. Interocean discharged Cardenas for a host of legitimate, non-discriminatory and non-retaliatory reasons: Cardenas defied direct orders from her superiors, mistreated her subordinates, falsely accused coworkers of misconduct, mismanaged her department, violated Interocean policies, all while adamantly refusing to accept any responsibility for, or improve, her behavior, and causing unprecedented crew disharmony and turnover. These facts are established through the sworn testimony (deposition and declaration) of 10 of Cardenas's former coworkers<sup>1</sup> and the declaration of her own union representative who investigated her claims.<sup>2</sup> This impressive body of evidence conclusively demonstrates Plaintiff was not performing satisfactorily and that Interocean terminated Cardenas's employment for the above reasons.

For her part, Cardenas relies *exclusively* on her lengthy, self-serving declaration in which she does not deny the underlying events, but

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<sup>1</sup> See CP 32-89 (declarations of Richard Cadigan, Julito Crodua, Courtney Henry, Eleish Higgins, and Mohamed Shibly), CP 142-237 (Jack Hearn deposition), CP 382-421 (Mark Daly deposition), CP 458-489 (John Glenn deposition), and CP 492-531 (Harry Poole deposition).

<sup>2</sup> CP 11-30 (Declaration of Don Anderson).

blames others for her troubles and the witnesses exaggerating the incidents. Cardenas has not established a genuine issue of material fact that she was performing satisfactorily or that her gender played a role in Interocean's decision to discharge her. In fact, Plaintiff *does not even argue* that Interocean's termination decision was based on her gender, and she candidly admits that the behavior about which she complains (her supervisor ignored her) was not based upon her gender. Under these circumstances, the summary judgment dismissal of Cardenas's gender discrimination claim was appropriate and should be affirmed.

Cardenas's retaliation claim also fails as a matter of law because she did not engage in any protected activity by opposing any discriminatory conduct prohibited by RCW 49.60. Instead, she voiced only generalized concerns about the bases for the numerous warning and counseling letters she received and her alleged difficulties communicating with one of her supervisors. Those concerns are not protected activities as a matter of law. Additionally, in light of the overwhelming evidence supporting Interocean's performance-based discharge of Cardenas, no reasonable fact finder could conclude that decision was based upon non-existent retaliatory motivations.

The trial court did not abuse its discretion in denying Cardenas's Motion to Strike the Declaration of Captain Eleish Higgins and Exhibits

thereto because Cardenas waived any objection thereto by submitting her own evidence of her performance under Captain Higgins and because the evidence is admissible to refute Cardenas's theory that Captain Hearn orchestrated a conspiracy to get her fired. Even if the trial court abused its discretion in admitting the Higgins material, however, that decision was harmless error not warranting reversal of the summary judgment ruling.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

1. The trial court did not err in dismissing Cardenas's claim of gender discrimination claim where the evidence on summary judgment showed that: (a) Cardenas was not doing "satisfactory work," (b) Interocean terminated her employment for legitimate nondiscriminatory reasons, and (c) those reasons were not pretexts for gender discrimination.

2. The trial court did not err in dismissing Cardenas's retaliation claim where the evidence before the trial court demonstrated that: (a) Cardenas did not engage in a protected activity, (b) even if she did, there is no nexus between it and her termination, (c) Interocean had legitimate, non-retaliatory reasons for terminating Cardenas, and (d) there is no evidence that those reasons were pretexts for retaliation.

3. The trial court did not abuse its discretion in admitting the Declaration of Eleish Higgins and Exhibits thereto on summary judgment where: (a) Cardenas waived any objections to their admissibility by

repeatedly raising the issue of her non-Interocean employment record, and (b) the evidence is admissible to refute Cardenas's wild conspiracy theory.

4. Even if the trial court improperly admitted the Higgins Declaration and Exhibits, reversal of the summary judgment ruling is not appropriate because the evidence was cumulative and, at most, harmless error.

### III. STATEMENT OF THE CASE

The following facts are undisputed.

#### A. InterOcean, the SIU, and the Steward Position

InterOcean manages privately owned vessels transporting goods between Tacoma, Washington and Anchorage, Alaska. Each vessel on that route sails with about 25 sailors, including licensed and unlicensed crewmembers such as the Steward.<sup>3</sup> CP 93. The Steward and other unlicensed crewmembers are members of a labor union called the Seafarer's International Union ("SIU"). The SIU exclusively determines which of its members get jobs based on seniority and other factors.<sup>4</sup>

The Steward is responsible for all aspects of the Steward Department, including supervision of the Cook and the Steward Assistant.<sup>5</sup> The Steward's other duties include requisitioning food and supplies, preparing all food menus, inventorying and rotating stocks,

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<sup>3</sup> CP 93.

<sup>4</sup> CP 245 (32:12-25), CP 420-427.

<sup>5</sup> CP 254 (48:15-21); *see also* CP 537-544; CP 546-560.

receiving and storing supplies, and preparing certain foods.<sup>6</sup> The Steward reports to the Captain.<sup>7</sup>

Stewards must comply with the Standard Freightship Agreement (“SFA”)—the labor contract between the SIU and Interocean—and Interocean’s Operations Manual (“OMV”).<sup>8</sup> Both the SFA and OMV contain very specific rules concerning the food handling and personnel management.<sup>9</sup>

**B. Summary of Cardenas’s Employment at Interocean**

Cardenas worked briefly as a cook and steward on several Interocean-managed vessels between 1989 and 1990. She then worked on the *North Star* between 2004 and 2005 when the events at issue occurred. While none of the pre-2004 events are material to this appeal, Interocean notes that: (a) Cardenas did not tell anyone at Interocean about her 1989-1990 relationship with Captain Hearn until *after* she was terminated 15 years later;<sup>10</sup> and (b) Captain Hearn did not make the decision to relieve Cardenas of her duties on the *Cape Edmont* in 1990.<sup>11</sup>

In 2004, the SIU awarded Cardenas the Steward position on the *North Star*. She worked on that vessel for three, several-month tours

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<sup>6</sup> *Id.*

<sup>7</sup> CP 388 (47:19-47:23); CP 257 (66:16-19).

<sup>8</sup> *See* CP 534-544 (OMV) and CP 545-560 (SFA); CP 247-250 (35:24-38:14).

<sup>9</sup> *See, e.g.*, CP 538 (IAS000919), CP 543 (924); CP 560 (IAS000058).

<sup>10</sup> CP 631-632 (response to Interrogatory 3); CP 267-268 (106:21-107:9).

<sup>11</sup> CP 150-151 (87:25-88:18); CP 152 (90:22-24).

between August 2004 and October 2005 when Captains Jack Hearn and Mark Daly served as the *North Star's* Masters on an alternating basis.<sup>12</sup> During that time, Harry Poole and Courtney Henry alternately served as the vessel's Chief Engineers, and John Glenn primarily served Bosun.<sup>13</sup>

**C. Cardenas's Insubordination, Mistreatment of Co-Workers, and Other Problems During Her First Tour on the North Star**

1. Cardenas's Insubordination Leads to First Warning Letter.

During Cardenas's first tour, she engaged in serious misconduct which resulted in verbal counseling and 2 warning letters.<sup>14</sup> Shortly after Cardenas joined the *North Star*, Captain Hearn advised her that she must attend a special meeting the next day with a company official to help Cardenas learn the vessel's computer food requisition and inventory system.<sup>15</sup> Cardenas knew that it was important for her to understand the computer system to perform her job.<sup>16</sup> Nevertheless, Cardenas asked Captain Hearn if she could skip the meeting.<sup>17</sup> In terms "crystal clear" to Cardenas, Captain Hearn denied her request.<sup>18</sup>

Despite Captain Hearn's denial of Cardenas's request, she skipped the meeting, immediately departing the vessel when it arrived at port and not

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<sup>12</sup> CP 562-564.

<sup>13</sup> See, e.g., CP 562-564.

<sup>14</sup> CP 566-567, CP 569.

<sup>15</sup> CP 157-161 (109:3-113:12); CP 565-567; CP 289-294 (182:2-187:14).

<sup>16</sup> CP 256 (65:9-24).

<sup>17</sup> CP 158-159 (110:23-7); CP 566-567, CP 292-293.

<sup>18</sup> CP 157-161 (109:3-113:12); CP 565-567. CP 293-294 (186:1-187:14), CP 305 (206:23-25).

returning until late in the evening.<sup>19</sup> Although Cardenas claims she was confused by Captain Hearn's markings on a timesheet that she improperly completed, she admits that she did not ask for, but should have sought, clarification, and that the incident was "a big mistake on [her] part."<sup>20</sup>

After trying unsuccessfully to verbally counsel Cardenas on the issue,<sup>21</sup> Captain Hearn issued Cardenas a warning letter—a non-disciplinary performance-improvement plan<sup>22</sup>—in which he recounted his express directions to Cardenas and her failure to abide by the same.<sup>23</sup> The warning letter noted that: "In accordance with the policy of this company, further offenses or concerns for the fair and good management of your department can result in your dismissal."<sup>24</sup>

Captain Hearn tried to explain the warning to Cardenas, in the presence of the Chief Mate and Bosun. Rather than taking responsibility for admittedly making a "big mistake," Cardenas was "argumentative and disruptive," and, by her own account, "defensive."<sup>25</sup>

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<sup>19</sup> CP 566-567; CP 157-161 (109:3-113:12); CP 294 (187:9-14).

<sup>20</sup> CP 296 (190:12-21), CP 298-299 (192:22-193:12), CP 300-301 (195:18-196:2), CP 306 (208:3-11). Because Cardenas missed the important computer training meeting, the Chief Mate and the Chief Engineer subsequently had to spend long periods of time helping Cardenas with the system. CP 193-194 (206:16-207:8).

<sup>21</sup> CP 166-167 (142:18-143:24).

<sup>22</sup> Warning letters are not discipline, but guidance to improve and correct performance. CP 143 (50:5-9), CP 146 (53:4-6); CP 384-385 (31:16-32:7).

<sup>23</sup> CP 566-567.

<sup>24</sup> *Id.*

<sup>25</sup> CP 168-172 (144:13-148:5); CP 301-302 (196:23-197:20).

2. Cardenas's Mistreatment of Subordinates Leads to Her Second Warning Letter, and a Poor Performance Evaluation.

During her first month on the *North Star*, Cardenas supervised Chief Cook Mohamed Shibly.<sup>26</sup> Shibly had the desirable “permanent” assignment to the *North Star*—meaning he had the option of returning to it after each vacation, rather than having to repeatedly “put in” for new jobs at the SIU.<sup>27</sup> As Shibly attests in his declaration (CP 85-89), he immediately experienced problems with Cardenas which worsened to the point that he ultimately gave up his permanent assignment:

Ms. Cardenas was a difficult person to work with. I had difficulties with her from the first day she arrived on the vessel. She did not treat me well at all, and she accused me of things that I did not do. For example, she accused me of talking bad about her behind her back in Arabic.<sup>[28]</sup> However, I never did this, and I do not speak Arabic. She also wrongly accused me of spraying chemicals throughout the whole galley. That also was not true.

My difficulties in working with Ms. Cardenas were so bad that I no longer wanted to work on the *North Star* with her. Although I was assigned as the permanent Cook on the *North Star* (a desired position), I gave up that job (i.e., did not reclaim it) so I did not have to work with Ms. Cardenas again. . . .<sup>29</sup>

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<sup>26</sup> CP 86 (¶7).

<sup>27</sup> CP 86 (¶7).

<sup>28</sup> Cardenas admits that she thought Shibly and Ahmed were talking about her in Arabic and that she accused them of the same. CP 311-312 (215:21-216:15).

<sup>29</sup> CP 86 (¶¶7,7). Mr. Shibly's declaration has two paragraphs labeled 7.

Shibly left the *North Star* “very upset” about his working situation with Cardenas.<sup>30</sup> He complained to Captain Hearn about Cardenas, and voluntarily<sup>31</sup> submitted a written statement to Hearn describing some of the problems he experienced working with her.<sup>32</sup> In it, Shibly wrote:

This Steward Veronika, she started problem [sic] on the day she walk [sic] in the galley. She has bad attitude and no personality with her own department. She don't know how to talk to her coworkers in the galley.<sup>33</sup>

Although Shibly has since returned to working on the *North Star*, he would not have done so if Cardenas was still working on the vessel.<sup>34</sup>

Shibly's replacement was Muhamad Sani.<sup>35</sup> Sani lasted only 2 weeks working under Cardenas.<sup>36</sup> Bosun Glenn observed Sani and Cardenas embroiled in a heated argument at the conclusion of which Sani declared: “I quit. I can't work this way.”<sup>37</sup> Appearing “very agitated,” Sani told Captain Hearn he quit without explanation.<sup>38</sup> After that, Sani never returned to the *North Star*.<sup>39</sup>

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<sup>30</sup> CP 86-87 (¶8).

<sup>31</sup> According to Shibly, nobody asked him to write or submit his statement. CP 86-87 (¶8).

<sup>32</sup> CP 86-87 (¶8); CP 173 (152:4-19).

<sup>33</sup> CP 86-89. Cardenas admitted that she “had problems with Shibly” and to having several disputes with him that caused him to get “upset.” CP 306-310 (208:12-212:6), CP 316 (224:1-8).

<sup>34</sup> CP 87 (¶9).

<sup>35</sup> CP 562-564, CP 177 (156:15-18).

<sup>36</sup> CP 563, CP 177 (156:15-18), CP 178 (159:6-10).

<sup>37</sup> CP 471-472 (79:5-80:20).

<sup>38</sup> CP 179-180 (163:8-164:14).

<sup>39</sup> CP 561-564.

Steward Assistant Nasser Ahmed repeatedly complained to Captain Hearn and Bosun Glenn that he was unhappy with Cardenas's management of the Steward Department and working under her.<sup>40</sup> Cardenas admits to having disagreements with Ahmed.<sup>41</sup> Ahmed never returned to the vessel after working with Cardenas<sup>42</sup> because he no longer wanted to work with her.<sup>43</sup> By the end of Cardenas's first tour on the *North Star*, 5 chief cooks had rotated off the vessel in less than four months, a "highly unusual" event.<sup>44</sup> Cardenas admits that Captain Hearn had good reason to be concerned about the high turnover in her department.<sup>45</sup>

In fact, Captain Hearn did become very concerned that Cardenas was not working well with her personnel.<sup>46</sup> When he tried to discuss galley issues with Cardenas, however, she yelled at him, claiming the galley was not clean and that *he* needed to inspect it.<sup>47</sup>

Following that unsuccessful verbal counseling session, Captain Hearn issued Cardenas another letter of warning.<sup>48</sup> In it, Captain Hearn

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<sup>40</sup> CP 174-176 (153:23-155:25); CP 469-470 (73:24-74:9).

<sup>41</sup> CP 311-314.

<sup>42</sup> CP 199 (52:4-15); CP 561-564.

<sup>43</sup> CP 468-469 (72:6-73:5); CP 473 (86:18-21); *see also* CP 587-588.

<sup>44</sup> CP 562-564, CP 428-429 (92:25-93:4).

<sup>45</sup> CP 315 (220:12-19).

<sup>46</sup> CP 185-187.

<sup>47</sup> CP 188-192; *see also* CP 318 (230:1-4); CP 155-156 (103:9-104:23).

<sup>48</sup> CP 569.

expressed his concerns that Cardenas was “not working well with people in her department” and reminded her that she was responsible for galley cleanliness and for managing Steward Department personnel in a manner that fostered “crew harmony.” *Id.* This warning letter also stated: “In accordance with the policy of this company, further offenses or concerns for the fair and good management of your department can result in your dismissal.”<sup>49</sup>

Chief Mate Richard Cadigan and Bosun John Glenn witnessed the meeting at which Captain Hearn delivered the warning letter to Cardenas.<sup>50</sup> Cadigan recalls Cardenas’s reaction in this meeting as the same as the others he witnessed—“argumentative, defensive, and uncompromising.”<sup>51</sup>

Cardenas continued to mistreat other personnel during her first *North Star* tour. Chief Engineer Harry Poole saw Cardenas “badgering” and “browbeating” coworkers.<sup>52</sup> According to Poole, Cardenas had a “pattern” of “talking down” to her subordinates as if they were “dumb.”<sup>53</sup>

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<sup>49</sup> *Id.*

<sup>50</sup> CP 569.

<sup>51</sup> CP 32-33 (¶5).

<sup>52</sup> CP 499-501 (58:19-60:21).

<sup>53</sup> CP 508-509 (67:8-68:12), CP 528-529 (129:16-130:10).

Members of the engine department also complained to Poole that Cardenas gave them “a lot of trouble.”<sup>54</sup>

Because Poole viewed Cardenas’s conduct as intolerable and in violation of the company’s anti-harassment policy, he advised Captain Hearn<sup>55</sup> and memorialized his concerns in a letter to Robert Rogers, Interocean’s Vice President of Human Resources.<sup>56</sup> In it, Poole wrote in part:

On two other occasions I witnessed her badgering crew members while getting their meal. On these occasions she was upset about the time the ship was leaving dock in Anchorage and the fact that the captain had called for an early meal. In this case she should have gone directly to the Captain and not a crewmember.

I have witnessed the manner in which she deals with others working in the galley. I personally would seek employment on another vessel if my treatment was as witnessed with her. From my years managing engine room personnel I feel that she does not know how to treat others in the job environment.<sup>57</sup>

The other Chief Engineer, Courtney Henry, similarly found it “extremely difficult to work with” Cardenas.<sup>58</sup> According to Henry, Cardenas frequently came to his office to complain about things that had

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<sup>54</sup> CP 509-511 (68:23-70:17).

<sup>55</sup> CP 499-506 (58:19-65:13).

<sup>56</sup> CP 499-500 (58:19-59:11); CP 198 (23:1-23); CP 573-574.

<sup>57</sup> CP 573-574.

<sup>58</sup> CP 61-62.

nothing to do with him or his department, and she became so bothersome that Henry had to tell the Captain and have her report directly to him.<sup>59</sup>

As required by Interocean policy, Captain Hearn completed a performance evaluation for Cardenas and other crewmembers when he detached from the vessel on September 29, 2004.<sup>60</sup> Captain Hearn rated Cardenas's "leadership and ability to work with crew" as "poor."<sup>61</sup> Additionally, the evaluation noted Cardenas needed to remedy "crew management problems" and improve her interface with other department heads.<sup>62</sup> The evaluation also noted that Cardenas became "defensive" during issuance of warning letters and did not recommend her for re-assignment to the vessel.<sup>63</sup>

**D. Cardenas's Continued Mistreatment of Co-Workers and Inappropriate Conduct During Her Second North Star Tour**

Cardenas's next tour on the *North Star* took place largely under Captain Daly, who Cardenas believes is good and honest.<sup>64</sup> Cardenas's workplace problems under Captain Daly started immediately, requiring him to start counseling her "the immediate day she and [Captain Daly]

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<sup>59</sup> CP 62-63 (¶3).

<sup>60</sup> CP 570-572.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> CP 337 (286:2-23).

worked together.”<sup>65</sup> Cardenas inappropriately and repeatedly interrupted Captain Daly while he was on the bridge “conning” the vessel.<sup>66</sup> Captain Daly repeatedly counseled Cardenas on this subject, but, according to Daly, she just didn’t get it.<sup>67</sup>

Like Captain Hearn, Captain Daly thought that Cardenas mistreated her subordinates.<sup>68</sup> Captain Daly recalled that Cardenas was “not a good manager of people” and would, at times, avoid her subordinates and, at other times, not treat them with the “proper kindness, courtesy, and respect.”<sup>69</sup> Under Daly, this problem “repeated itself...no matter who the people [sic] might be underneath her.”<sup>70</sup>

Despite continuous counseling from Daly about proper crew treatment, Cardenas “verbally abused” one of her subordinates. Several crewmembers observed Cardenas shouting and screaming at Steward Assistant Mohammed Hussain.<sup>71</sup> After Daly completed an investigation,<sup>72</sup> he concluded that Cardenas had “verbally abused” Hussain.<sup>73</sup> Even Cardenas’s friend, Chief Cook Julito Crodua, found Cardenas’s treatment

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<sup>65</sup> CP 413-414 (96:18-97:3).

<sup>66</sup> CP 391-393 (52:3-54:14); CP 389-390 (50:6-51:18).

<sup>67</sup> CP 391-393 (52:3-54:14).

<sup>68</sup> CP 395-399.

<sup>69</sup> CP 416-417 (101:1-102:19).

<sup>70</sup> CP 395-396 (62:13-63:4).

<sup>71</sup> CP 463-466; CP 482-487; CP 45 (¶¶8-9).

<sup>72</sup> Captain Daly interviewed several crewmembers who observed the argument (CP 406-408 (84:13-86:10)).

<sup>73</sup> CP 406-408 (84:13-86:10). *See also* CP 45 (¶¶8-9).

of Hussain was inappropriate and unprecedented.<sup>74</sup> Cardenas blames Hussain for the incident but admits arguing with and yelling at him.<sup>75</sup>

After the conclusion of his investigation, Captain Daly issued Cardenas a warning letter in which he wrote:

At approximately 1830 on the evening of February 28th you were observed by the Bosun John Glenn verbally abusing St/Asst Mohamed Hussain in the Galley. There is never an acceptable reason to verbally abuse anyone in your department or on this vessel. I have had numerous talks with you about your behavior towards other members of your department. Also on September 28, 2004, Captain Jack Hearn issued a warning letter for numerous reasons. In that letter he advised you to 'mange [sic] personnel with proper courtesy and leadership in order to provide fair oversight of their duties.'<sup>76</sup>

This warning letter, like the ones before it, also expressly provided that: "This shall further advise you that a repetition of this offense, or any other act of misconduct will be grounds for your immediate dismissal."<sup>77</sup>

Cardenas replied to Captain Daly's warning letter with argument and rebuttal which only "frustrated" Captain Daly and led him to feel that Cardenas was "missing the point."<sup>78</sup> According to Bosun Glenn, who witnessed each of Ms. Cardenas's warning/counseling letter sessions,

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<sup>74</sup> CP 45 (¶9).

<sup>75</sup> CP 338-339 (294:24-295:24).

<sup>76</sup> CP 585; *see also* CP 398-399 (67:13-68:24); CP 409 (88:1-8).

<sup>77</sup> CP 585.

<sup>78</sup> CP 410-412 (89:25-91:1).

Cardenas refused to accept that she was wrong and her attitude was: “Everybody is wrong but her.”<sup>79</sup>

Cardenas complained to the SIU about Captain Daly’s warning letter, and SIU Assistant Vice President Don Anderson investigated her concerns.<sup>80</sup> Anderson “determined the letter of warning was correct” and Cardenas did not raise any other complaints at that time.<sup>81</sup>

The next day, March 3, 2005, Bosun John Glenn voluntarily wrote a detailed complaint against Cardenas for “unprofessional and disrespectful conduct towards lower ratings in the steward department,” refusing to accept responsibility for actions, blaming others for her troubles, and for causing other employees to quit.<sup>82</sup> Including Glenn, a total of 13 crewmembers (i.e., *more than half of the vessel’s entire crew*) signed the complaint about Cardenas, attesting the “facts as true.”<sup>83</sup>

**E. Cardenas’s Inappropriate Conduct During Her Third Tour**

Cardenas next worked on the *North Star* from August 19 to October 28, 2005,<sup>84</sup> working under Captain Daly and then Captain Hearn.

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<sup>79</sup> CP 469 (73:13-16).

<sup>80</sup> CP 13 (¶9).

<sup>81</sup> CP 13 (¶9), CP 18-19.

<sup>82</sup> *Id.*

<sup>83</sup> CP 588.

<sup>84</sup> CP 562-64.

1. Cardenas Abuses Steward Assistant David.

In early October 2005, Cardenas accused Steward Assistant Else David of opening her email.<sup>85</sup> When David denied this, Cardenas yelled and screamed at David in front of other crewmembers, including Chief Engineer Harry Poole and Chief Cook Julito Crodua.<sup>86</sup> David asked Cardenas to leave her alone, but Cardenas persisted, causing David to become very upset and cry.<sup>87</sup> David relayed her concerns to Bosun Glenn who memorialized the incident in a written complaint which David signed.<sup>88</sup> Glenn then provided a copy of the complaint to Captain Hearn.<sup>89</sup>

Captain Hearn found David “in tears, distraught, and miserable” and feeling “harassed over the smallest things, [and] that Cardenas will blame her for everything ....”<sup>90</sup> David told Captain Hearn: “I don’t know why Veronika is harassing me this way.”<sup>91</sup> Cardenas admits that she publicly confronted David, but she blames David for overreacting.<sup>92</sup>

2. October 9, 2005 Counseling Letter and Meeting.

The David incident made clear to Captain Hearn that Cardenas had not improved her relations with coworkers as she was repeatedly

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<sup>85</sup> CP 51-57 (¶14).

<sup>86</sup> Id.; CP 512-513 (77:24-78:25); CP 45 (¶10).

<sup>87</sup> CP 53 (¶16).

<sup>88</sup> CP 54 (¶17), CP 57.

<sup>89</sup> CP 477 (112:3-18).

<sup>90</sup> CP 590; CP 205 (122:16-23), CP 207 (124:7-21).

<sup>91</sup> CP 208-209 (135:18-136:4).

<sup>92</sup> CP 344 (319:5-25).

instructed to do in prior warning letters and counseling sessions.<sup>93</sup> Thus, on October 9, 2005, Captain Hearn wrote a lengthy counseling memorandum as part of a “continued effort to assist” and help her “understand that [she] must improve [her] stewardship. . . .”<sup>94</sup> The memorandum outlined several areas of concern and supported each with specific events.<sup>95</sup> One issue concerned Cardenas’s “harassment and mistreatment” of subordinates.<sup>96</sup> On this issue, the memorandum cited past letters of warnings from both captains concerning mistreatment of galley staff, as well as Cardenas’s recent harassment of David, in violation of Article VIII of the SFA (which requires private consultations, not public admonishments, when bringing subordinates “to task”).<sup>97</sup>

The memorandum also addressed Cardenas’s “inability to communicate and coordinate work with other department heads, officers, and unlicensed personnel.”<sup>98</sup> Evidence cited in support of this problem included:

- Cardenas demanded that Chief Engineer Courtney Henry disable the freezer’s fans and chill unit and, when he declined to do so due to legitimate concerns about the

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<sup>93</sup> CP 215-216 (155:11-156:13).

<sup>94</sup> CP 592.

<sup>95</sup> CP 592-594.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*; CP 545-560 (at IAS000056).

<sup>98</sup> CP 593.

freezer's operability, Cardenas threatened action against the company.<sup>99</sup>

- Cardenas inexplicably failed to comply with Chief Engineer Poole's request to move lettuce away from the evaporator in the chill box so that it would not spoil.<sup>100</sup>
- Cardenas repeatedly interrupted the meal hours of licensed officers like Chief Engineers Harry Poole and Courtney Henry with work-related requests, despite being repeatedly advised that it was not appropriate to do so.<sup>101</sup>
- Cardenas repeatedly approached the captains at inopportune times while they were conning the vessel, and continued to do so despite being told to stop.<sup>102</sup>

Another issue raised in the memorandum was Cardenas's propensity to levy "verbal accusation[s]" against crewmembers, "without evidence, witness, or credible support."<sup>103</sup> For just a few examples, Cardenas publicly accused Bosun Glenn of smoking marijuana on the vessel without knowing whether he did or not,<sup>104</sup> falsely accused Glenn of stealing supplies from the ship,<sup>105</sup> falsely accused David of opening her email and locking her in a freezer,<sup>106</sup> and falsely accused Shibly of

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<sup>99</sup> CP 593, CP 62 (¶4), CP 64.

<sup>100</sup> CP 593, *see also* CP 525-526 (117:12-118:10), CP 607.

<sup>101</sup> CP 574 (36:17-40:6), CP 506-508 (65:17-67:11); CP 213-214. Cardenas admits to making a work-related request to Poole while he was getting his meal. CP 354 (347:16-22).

<sup>102</sup> CP 593, CP 389-393; CP 217-218 (159:18-160:3). Cardenas admits that she approached *North Star* captains while they were on the bridge and that it's only appropriate to do so in the case of an emergency. CP 340 (298:9-16), CP 349-350 (338:25-339:5).

<sup>103</sup> CP at 592.

<sup>104</sup> CP 376-379; CP 488-489 (167:7-168:6), CP 478-479 (116:21-117:18).

<sup>105</sup> CP 54 (¶17), CP 56-57; CP 488-489 (167:7-168:6).

<sup>106</sup> CP 53-59.

“talking bad about her behind her back in Arabic.”<sup>107</sup> SIU investigator Anderson found that Cardenas made “false accusations against her fellow crewmembers” which led to “disruption of harmony with the crew and officers.”<sup>108</sup>

Captain Hearn presented the October 9 memorandum to Cardenas during a meeting around that same date.<sup>109</sup> Also in attendance were Bosun Glenn, Chief Mate Cadigan, and Cardenas’s friend, Chief Cook Julito Crodua, whom Cardenas requested be present.<sup>110</sup> Captain Hearn, Glenn, and Cadigan each recall that Cardenas refused to accept any responsibility for her actions, was argumentative, defiant, uncompromising, and steadfastly refused to change her behavior, at one point saying: “[T]here’s nothing I can do.”<sup>111</sup> In fact, during this meeting Cardenas was “not only defensive but often, offensive”—labeling Chief Engineer Poole as “moody,” Bosun Glenn as “deceitful,” and Captain Hearn as not doing his job.<sup>112</sup> Cardenas admits that she refused to accept responsibility for any of

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<sup>107</sup> CP 86 (¶7).

<sup>108</sup> CP 14, 15 (¶¶12, 14).

<sup>109</sup> CP 210 (145:8-11).

<sup>110</sup> CP 592-594. In fact, Captain Hearn asked for unlicensed personnel to come to this meeting to support Cardenas and gave her the choice of personnel to represent her (she chose Crodua). CP 236 (223:5-18). CP 345-346 (328:16-329:2); CP 46 (¶14).

<sup>111</sup> CP 599-600; CP 480-481 (125:17-126:6); CP 33 (¶5).

<sup>112</sup> CP 595-597, CP 598-600.

the issues raised in the meeting and she does not contest the description of her behavior and statements by the attendees.<sup>113</sup>

During the meeting, Cardenas indicated that she was going to call Robert Rogers, VP of Human Resources.<sup>114</sup> Captain Hearn “encouraged” her to do so,<sup>115</sup> and advised Rogers to expect her call.<sup>116</sup>

Cardenas subsequently called Rogers and told him that she was having trouble communicating with Captain Hearn and that she did not agree with the warning and counseling letters.<sup>117</sup> Rogers recalls that Cardenas rambled, was difficult to understand, and raised “shipboard matters” which she needed to address directly with the Captain.<sup>118</sup>

### 3. Food Handling Issues and Cardenas’s Discharge.

During regular inspection in October 2005, Chief Engineer Poole discovered several food-handling problems on the *North Star* that caused him serious concern.<sup>119</sup> Specifically, on three separate occasions, Poole noticed that meats (chicken and beef) were being thawed at room temperature in the galley overnight in the same plastic tub.<sup>120</sup> After researching the issue, Poole discovered that this is a “very dangerous”

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<sup>113</sup> CP 347 (331:2-8).

<sup>114</sup> CP 596-597.

<sup>115</sup> *Id.*; CP 222 (171:5-11).

<sup>116</sup> CP 596-597.

<sup>117</sup> CP 355-358 (362:25-365:1).

<sup>118</sup> CP 437-439; CP 599-600.

<sup>119</sup> CP 607.

<sup>120</sup> CP 607.

practice because bacteria can form after a short period of time and because the packages could leak and contaminate each other.<sup>121</sup>

Around this same time, crewmembers had been complaining that the Steward Department had failed to incorporate leftovers into the night lunches as required by the SFA.<sup>122</sup> During his freezer inspections, Poole found that meal leftovers were wrapped in tin foil without any dates and therefore were not being incorporated into the night lunches.<sup>123</sup> Poole brought both issues to the attention of Captain Hearn, who shared his concerns.<sup>124</sup> Poole then drafted a summary of his findings.<sup>125</sup>

Captain Hearn investigated the matter by confirming that it is unsafe and improper to thaw frozen meats at room temperature and by personally viewing the thawing meats.<sup>126</sup> Captain Hearn then drafted “written orders” to Cardenas on how to safely thaw meet in a refrigerated room and to utilize leftovers as required by the SFA.<sup>127</sup> But he first sent a draft to Robert Rogers for his review.<sup>128</sup>

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<sup>121</sup> CP 607.

<sup>122</sup> CP 521-524 (106:6-109:17); *see also* CP 560 (at IAS000058).

<sup>123</sup> CP 607. The problem was that Cardenas was freezing leftovers, rather than ensuring that they were being incorporated into the night lunches, as required by SFA Steward Department Guide, rule 13. CP 233.

<sup>124</sup> CP 518 (100:6-11), CP 519-520 (102:15-103:3).

<sup>125</sup> CP 607.

<sup>126</sup> CP 226-227 (186:20-187:5), CP 229-232.

<sup>127</sup> CP 601-603, CP 604-605.

<sup>128</sup> CP 224-225 (182:22-183:18), CP 603, CP 605.

Rogers was fully aware of Cardenas's numerous and continuous performance problems, as documented in the warning letters and crewmember statements he had regularly received in his capacity as Human Resources VP.<sup>129</sup> Given the numerous and ongoing problems with Cardenas's employment, Rogers felt that the latest problem required discharging Cardenas, and he directed Captain Hearn to do the same.<sup>130</sup> Rogers based his decision not only on the food handling issues, but also upon all of the documented problems and issues that arose during Cardenas's three *North Star* tours.<sup>131</sup>

Rogers suggested Captain Hearn offer Cardenas the option to resign so that her employment record would not reflect termination.<sup>132</sup> Pursuant to Rogers's instruction, Hearn prepared discharge and resignation letters. The discharge letter recounted the food handling violations identified by Poole and confirmed by Hearn.<sup>133</sup> It also provided that Cardenas's employment was terminated due not only to the "seriousness" of the food-handling issues, but also due to the "frequency

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<sup>129</sup> CP 440-441, CP 446-455.

<sup>130</sup> CP 602; CP 223 (181:8-10); CP 440 (136:5-12).

<sup>131</sup> CP 441 (140:4-11), CP 446-455.

<sup>132</sup> CP 602; CP 442-443 (151:19-152:4).

<sup>133</sup> CP 610-611 (201:20-202:19).

of [other] issues, [and] [Cardenas'] reluctance to cooperate during recent counseling.”<sup>134</sup>

On October 28, 2005, Captain Hearn provided Cardenas with the discharge and resignation letters.<sup>135</sup> Cardenas refused to accept the Letter of Resignation,<sup>136</sup> and read the Letter of Discharge but refused to sign it.<sup>137</sup> Cardenas immediately blamed Crodua, telling him that she was fired because Crodua had “not marked the leftovers.”<sup>138</sup>

The day after Cardenas’s termination, Captain Hearn prepared and sent to Rogers a detailed, 3½ page document explaining the problems with Cardenas’s employment and his many efforts to address the same.<sup>139</sup>

**F. The SIU’s Investigations Uphold Interocean’s Decision to Terminate Cardenas**

The day after her termination, Cardenas filed a grievance with SIU challenging Interocean’s decision to terminate her employment under the SFA.<sup>140</sup> Her grievance did not allege discrimination or retaliation, or anything to that effect.<sup>141</sup> SIU Assistant Vice President Don Anderson investigated her grievance by interviewing Cardenas and “numerous

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<sup>134</sup> *Id.*

<sup>135</sup> CP 228 (188:20-23), CP 362-363 (376:15-377:10).

<sup>136</sup> CP 362-363 (376:15-377:10).

<sup>137</sup> CP 235 (213:5-14), CP 362-363 (376:15-377:10).

<sup>138</sup> CP 46-47 (¶15).

<sup>139</sup> CP 613-618.

<sup>140</sup> CP 14 (¶10), CP 21.

<sup>141</sup> *Id.*

crewmembers” about her work performance, and by reviewing files relating to Cardenas, including the warning and counseling letters.<sup>142</sup>

Anderson concluded that:

Cardenas was a disruptive presence on the vessel, that she was unable to get along with her fellow crewmembers, that she was not adequately performing her duties, and that she was creating a disharmonious environment on the North Star, in general, and in the Steward Department, in particular, by making false allegations against her fellow crewmembers. ....

The interviews with Ms. Cardenas’s fellow crewmembers were entirely consistent with the written warnings and documents that she had received. They confirmed that she mistreated and had numerous conflicts with other crewmembers and that her department mishandled food in violation of the Agreement....<sup>143</sup>

Anderson also noted at that time that: “the letter of discharge is correct, other incidents of allegations levied by the Chief Steward against fellow crew members show a pattern of disruption of harmony with the crew and officers....”<sup>144</sup>

Cardenas did not raise any claims of retaliation or discrimination in her grievance, and Anderson found no evidence of the same:

Based on the documentation and crewmember interviews, I had no reason to believe that the discipline or termination of Ms. Cardenas was pretextual or that the underlying facts had been fabricated. Moreover, neither those interviews nor my interview with Ms. Cardenas gave any indication

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<sup>142</sup> CP 14 (¶11).

<sup>143</sup> *Id.*, CP 14 (¶¶11, 12).

<sup>144</sup> CP 15 (¶14), CP 22-25.

that Ms. Cardenas had been discriminated or retaliated against. In particular, Ms. Cardenas never raised issues or claims of discrimination or retaliation, nor did she say anything to the effect that she was treated differently because she was a woman or that Captain Hearn (or anyone else) had told her that she was being fired because she had called Interocean management.<sup>145</sup>

After the SIU advised Cardenas of the result of the investigation and that it would not pursue her grievance,<sup>146</sup> the SIU received a letter from Cardenas's attorney in which she claimed, for the first time, that Captain Hearn retaliated against her because they had a relationship some 15 years earlier.<sup>147</sup> SIU reopened its investigation and Anderson re-interviewed *North Star* crew and officers. He found no evidence to substantiate Cardenas's retaliation claim and once again found that Cardenas's "presence on the ship was disruptive."<sup>148</sup> As a result, the SIU reaffirmed its decision to not pursue her grievance.<sup>149</sup>

#### IV. ARGUMENT

##### A. Standard of Review of Summary Judgment Ruling

Summary judgment rulings are subject to *de novo* review, meaning this Court engages in the same inquiry as the trial court: were there

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<sup>145</sup> CP 14-15 (¶13).

<sup>146</sup> CP 15 (¶15), CP 26-28.

<sup>147</sup> CP 15-16 (¶16).

<sup>148</sup> *Id.*, CP 16 (¶17).

<sup>149</sup> Cardenas subsequently filed an unfair labor practice charge against the SIU concerning its refusal to pursue her grievance against Interocean. CP 374 (423:9-11). The NLRB investigated and denied Cardenas's charge, finding that the SIU "made a reasonable effort to investigate" the charge. CP 620-625.

genuine issues of material fact and, if not, is the moving party entitled to judgment as a matter of law. *Grundy v. Thurston County*, 155 Wn.2d 1, 6-7, 117 P.3d 1089 (2005). On summary judgment, the party who bears the burden of proof on a particular issue cannot rest on its pleadings. *LaPlante v. State*, 85 Wn.2d 154, 158 (1975). Rather she must set forth “specific facts” showing there is a genuine issue for trial. CR 56(e). A “fact” in this sense is “an event, an occurrence, or something that exists in reality,” i.e., “an act, an incident, a reality as distinguished from supposition or opinion.” *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 360 (1988).

**B. The Trial Court Properly Dismissed Cardenas’s Gender Discrimination Claim**

In order to survive a motion for summary judgment on an employment discrimination claim, the plaintiff must meet two burdens: First, the employee must make out a prima facie case of gender discrimination. Typically, this requires that the employee put forward evidence that she (1) belonged to a protected class, (2) was discharged or suffered an adverse employment action, (3) had been doing satisfactory work, and (4) was replaced by someone not in the protected class. *Milligan v. Thompson*, 110 Wn. App. 628, 636 (2002). The precise elements will vary from case-to-case, however, and the ultimate question

is whether plaintiff's set of facts "would enable the fact-finder to conclude, in the absence of any further explanation, that it is more likely than not that the adverse employment action was the product of discrimination." *Ennis v. Nat'l Ass'n of Business and Educ. Radio, Inc.*, 53 F.3d 55, 58 (4th Cir. 2008). This may require the fourth element to be restructured to more broadly consider whether "her discharge occurred under circumstances that raise a reasonable inference of unlawful discrimination." *Id.* (citing *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)) (holding that plaintiff failed to satisfy the fourth prong where she offered no evidence to permit an inference that her termination related to her son's HIV-positive status); *Anica v. Wal-Mart Stores, Inc.*, 120 Wn. App. 481, 488 (2004) (adopting the *Ennis* formulation of prima facie case and holding that plaintiff failed to establish the fourth element); *accord Enders/Maden v. Super Fresh*, 594 F.Supp.2d 507, 512 (D. Del. 2009) (applying *Ennis* formulation in gender discrimination case).

If the employee fails to meet this burden, "the [employer] is entitled to prompt judgment as a matter of law." *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 181 (2001), *overruled in part on other grounds by McClarty v. Totem Elec.*, 157 Wn.2d 214 (2006). If, on the other hand, the employee meets her burden, the burden shifts to the employer to

“produce admissible evidence of a legitimate, nondiscriminatory explanation for the adverse employment action.” *Hill*, 144 Wn.2d at 181. Assuming the employer meets that burden, the burden shifts back to the employee to satisfy her second burden: demonstrating that the employer’s stated reason for the adverse action was a pretext for discrimination. *Id.* at 182. To satisfy this burden, the employee must present sufficient evidence to permit a reasonable trier of fact to conclude that the employer’s non-discriminatory explanation is not worthy of credence *and* that the employer was actually motivated by discriminatory intent. *Id.* at 184–85.

1. Cardenas Was Not Doing “Satisfactory Work” at the Time of her Termination.

In determining whether an employee was performing satisfactorily, the court should consider all of the evidence, including written evaluations, testimony of co-employees, and the results of any independent investigations. *See, e.g., Moser v. Indiana Dep’t of Corrections*, 406 F.3d 895, 900–01 (7th Cir. 2005); *Slusher v. Arlington County*, 673 F. Supp. 752, 755 (E.D. Va. 1987).<sup>150</sup> It is also appropriate to consider the employer’s subjective evaluations of performance. *Chen v.*

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<sup>150</sup> Because the WLAD is patterned after Title VII of the Civil Rights Act of 1964, federal court decisions interpreting that statute are persuasive authority for the construction of the WLAD. *Oliver v. Pac. Northwest Bell Tel. Co.*, 106 Wash.2d 675, 678, 724 P.2d 1003 (1986).

*State*, 86 Wash. App. 183, 190-91 (1997), *review denied*, 133 Wash.2d 1020, 948 P.2d 387 (1997).

On the other hand, however, an employee's "own self-evaluations and explanations" are generally "insufficient to raise a genuine issue of material fact." *Chen*, 86 Wash. App. at 191; *see also Mills v. First Fed. Saving & Loan Ass'n of Belvidere*, 83 F.3d 833, 843 (7th Cir. 1996). An employee cannot make out a prima facie case if she does not deny that the events leading to her termination occurred, but merely characterizes them as minor and/or baseless. *Moser*, 406 F.3d at 901.

Here, the record would not permit a reasonable trier of fact<sup>151</sup> to conclude that Cardenas's performance was satisfactory when her employment was terminated in late October 2005. As detailed above, in the 3 weeks preceding her termination, Cardenas had verbally abused her subordinate, Else David; reacted in a hostile, argumentative, and aggressive manner when Captain Hearn tried to counsel her on this and other performance issues; and then was responsible for food handling violations which took place under her watch. Although Cardenas tries to minimize her role in each event, she admits that each occurred.<sup>152</sup>

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<sup>151</sup> Cardenas failed to make a timely jury demand, thus any trial on this matter would have been before the trial court judge (Honorable Thomas Felnagle) who dismissed her claims on summary judgment.

<sup>152</sup> CP 344 (319:5-25) (publicly confronting David about opening an email, causing David to cry and become very emotional); CP 347 (refusal to take responsibility for any

Both of the people working directly under Cardenas at the time of her termination (Crodua and David) have declared, under oath, that Cardenas was not a satisfactory supervisor.<sup>153</sup> Crodua succinctly attested that:

I do not think Veronika was a good manager. She did not know how to talk to people without arguing with them and people did not like working with her because of her attitude. I think Captain Hearn tried to give her a chance to improve, but she was not able to do her job because of her lack of communication skills.<sup>154</sup>

Furthermore, Cardenas's failure to satisfactorily perform her job was confirmed by her own union representative, Don Anderson, who thoroughly investigated her discharge twice<sup>155</sup> and concluded that Cardenas was "not adequately performing her duties" at the time of termination.

The fact that Daly believed Cardenas was performing adequately 7 weeks earlier is irrelevant because "satisfactory performance" is measured at the time of discharge. *E.g.*, *Peele v. Country Mut. Ins. Co.*, 288 F.3d 319, 329 (7th Cir. 2002); *O'Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 547 (4th Cir. 1995), *rev'd on other grounds*, 517 U.S. 308 (1996). Cardenas's misleading suggestion that Daly disagreed with

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of the issues or make any promise to change or improve); CP 364-366 (handling food in violation of the SFA).

<sup>153</sup> CP 44-49 (Crodua), CP 51-59 (David).

<sup>154</sup> CP at 54 (¶17).

<sup>155</sup> CP 14 (¶12).

Rogers's decision to terminate her in late October 2005 critically omits that Daly's testimony concerned "**when [Daly] departed the vessel in September '05.**"<sup>156</sup> This, of course, does not demonstrate that Daly believed Cardenas should not have been fired seven weeks later for events about which he had no personal knowledge (Captain Daly was not on board the *North Star* when the intervening events leading to Cardenas's termination transpired in October 2005).<sup>157</sup>

The court should affirm dismissal of Cardenas's gender discrimination claim because she was not performing satisfactory work.

2. Interocean Did Not Replace Cardenas With "Someone Not In the Protected Class," But Tried To Replace Cardenas With a Female Steward.

This case is unusual in that Cardenas's replacement, as with all unlicensed crew, was chosen by her union, SIU, and not by Interocean.<sup>158</sup> As a result, the standard formulation of the fourth element of the prima facie case—the gender of Cardenas's replacement—is wholly irrelevant because there is no way in which a fact-finder could conclude, based on the gender of her replacement, that Cardenas's termination was the

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<sup>156</sup> CP 935 (115:12-25) (emphasis added).

<sup>157</sup> CP at 758 (showing Captain Hearn replaced Captain Daly on the *North Star* on September 10, 2005). And besides, as Cardenas points out, Captain Daly was not fully briefed by Captain Hearn or (at all) by Bob Rogers about Cardenas's numerous prior performance problems. Appellant's Opening Brief, p.38. In fact, Captain Daly had discussed with Captain Hearn only 1 of the 2 prior warning letters and was apparently unaware of the other warning letter or her poor performance evaluation. CP 919, 935 (114-115).

<sup>158</sup> See, e.g., CP 426-427.

product of discrimination. *Ennis*, 53 F.3d at 58. Accordingly, the Court must apply the more general formulation of the fourth element, which looks at all the circumstances surrounding the termination to determine whether they give rise to an inference of discrimination. *Enders/Maden*, 594 F.Supp.2d at 512.

In *Enders/Maden*, the court held that an employee who was “bumped” from full-time to part-time status after another employee with more seniority transferred to her store failed to satisfy the fourth prong of the prima facie case analysis because the “bumping” “was dictated by the terms of the [Collective Bargaining Agreement], which appear to confirm that ‘bumping’ is in fact, based on seniority.” 594 F.Supp.2d at 512. In other words, the plaintiff had failed to make out a prima facie case because no reasonable trier of fact could conclude that the employer was motivated by discriminatory animus simply because the employer complied with its obligations under the union contract. *Id.*

Similarly, no reasonable trier of fact could conclude that Interocean was motivated by discriminatory animus when it hired the replacement that it was obligated to hire under the SIU contract. This is especially so in this case because after Rogers decided to terminate Cardenas’s employment in October 2005, Hearn lobbied for Laura Cates or another female named Janet to be assigned as the *North Star*’s

Steward.<sup>159</sup> Simply put, no reasonable trier of fact could infer from the fact that *SIU* assigned a man to replace Cardenas that IAS's decision to terminate her was more likely than not the product of discrimination. See *Ennis*, 53 F.3d at 58. Moreover, as elaborated in the subsequent discussion of pretext, none of the other circumstances surrounding her discharge give rise to an inference of discrimination.

3. It is Undisputed that Interocean Had Legitimate, Non-Discriminatory Reasons for Terminating Cardenas's Employment.

Cardenas concedes that Interocean "met its burden of producing a legitimate, nondiscriminatory reason" for her termination. Appellant's Opening Brief at p.49.

4. Plaintiff Did Not Meet Her Burden of Showing that Interocean's Stated Reasons for Termination Were Pretexts for Gender Discrimination.

Cardenas gives shockingly short shrift at meeting her ultimate and most difficult burden: demonstrating Interocean's stated reasons for termination were pretexts for gender discrimination. Relying on carefully selected, partial quotations from *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), Cardenas claims she can meet and has satisfied

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<sup>159</sup> CP 602, CP 609. Additionally, both Captain Hearn and Bob Rogers sought to have Ms. Cates replace Ms. Cardenas as the *North Star's* Permanent Steward after Ms. Cates spent two months in late 2004 and early 2005 working aboard the vessel as Ms. Cardenas's relief. CP 200-201 (66:18-67:10); CP 575-577, CP 579; CP 204 (114:1-14); CP 580-583. Despite this effort, Cardenas was reassigned to the *North Star*. CP 430-436 (98:23-104:19); CP 562-564.

her burden of establishing pretext merely by “challenging [Interocean’s] claim that she was not performing adequately.”<sup>160</sup> Based upon this misunderstanding of her legal burden, Cardenas does not cite any evidence, *or even argue*, that Interocean’s termination decision was gender-based. Appellant’s Brief at p.49-50. She is legally and factually incorrect.

*a. The Hybrid Pretext Standard Applies.*

Legally, Cardenas does not tell the whole story. The controlling and seminal Washington authority on the pretext burden under the WLAD is *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172 (2001), a case that Cardenas does not even cite. *Hill* adopted the “hybrid-pretext” standard set forth in *Reeves* and, like *Reeves*, rejected the “pretext-only” standard upon which Cardenas apparently relies. *Hill*, 144 Wn.2d at 185. Under the “hybrid-pretext” standard, a prima facie case of discrimination plus evidence sufficient to disbelieve the employer’s explanation *may* be sufficient to require a trial, but as the Court explained, “that will not always be the case.” *Id.* at 185. A trial is not necessary where, although the plaintiff has established a prima facie case and set forth sufficient evidence to reject the defendant’s explanation, no rational factfinder could conclude that the action was discriminatory. *Id.* As the Court explained

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<sup>160</sup> Appellant’s Opening Brief at p.49-50.

in *Hill*, this would occur where the evidence reveals some other, nondiscriminatory reason for the employer's decision, or "if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred." *Id.* at 184-85 (quotation omitted).

Other relevant factors include "the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law." *Hill*, 144 Wn.2d at 186. But unless the "record contains *reasonable but competing* inferences of *both* discrimination and nondiscrimination," summary judgment must be granted. *Id.* (citations omitted).

This hybrid-pretext standard is well-illustrated by the Court's application of it to the facts in *Hill*. In that case, the plaintiff had established a prima facie case of age discrimination and raised a material question of fact regarding the accuracy of the employer's explanation for firing her by, *inter alia*, denying that she violated company policies as the employer claimed. Yet, despite this factual dispute, the Court found that judgment as a matter of law for the employer was required because the plaintiff "failed to present sufficient evidence to reasonably support even a circumstantial case of age discrimination." *Id.* at 189. Specifically, the

Court found it important that plaintiff had “presented no evidence or testimony that [her supervisor] or anyone else at [the employer] made derogatory ageist comments or otherwise discriminated against older workers.” *Id.* at 190. Moreover, the Court reasoned that, “although [plaintiff’s] testimony raised a question of fact regarding [the employer’s] explanation for firing her, its probative value in establishing Hill’s ultimate claim of age discrimination proved minimal.” *Id.*

On this latter issue, the Court noted that plaintiff’s denial that she violated company policies did not establish “suspicion of mendacity” by the employer and, regardless of whether the policy violation occurred or not, the employer was entitled to discharge her based upon its *perception* that she engaged in misbehavior. The Court succinctly reasoned:

**It is not unlawful for an at will employee to be discharged because he or she is perceived to have misbehaved, and courts must not be used as a forum for appealing lawful employment decisions simply because employees disagree with them.**

*Id.* at 451 n.9 (citations omitted) (emphasis added).

5. Cardenas Has Not Shown Interocean’s Reasons For Termination Were False.

Factually, Cardenas has not satisfied her burden under the hybrid-pretext standard. Even assuming that Cardenas has made out a prima facie case of gender discrimination, it is, at best, a very weak one because: (1) Interocean expressed serious concerns about Cardenas’s performance

and (2) Interocean, including Hearn and Rogers, repeatedly sought to replace Cardenas with *female* stewards, but the SIU unilaterally decided otherwise.

Moreover, Cardenas has not demonstrated that Interocean's termination reasons were false. In fact, she has admitted the occurrence of the final events which led to her termination: (1) a public argument with Else David<sup>161</sup> that caused David to become "very upset," break down and cry, feel harassed, and report the incident;<sup>162</sup> (2) Cardenas's outright refusal to accept any responsibility for the numerous issues raised in the October 9, 2005 counseling session,<sup>163</sup> which conduct the attendees unanimously viewed as defiant, argumentative, offensive, and uncompromising;<sup>164</sup> and (3) violating the SFA regarding food preparation and jeopardizing the health of the crew by failing to follow common sense food handling practices.<sup>165</sup> And, as summarized above, the occurrence of the many documented prior events are also undisputed.

The events upon which Interocean based its termination are not only admitted and documented in four warning and counseling letters from

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<sup>161</sup> CP 999-1000 (¶¶53-55).

<sup>162</sup> CP 53-59.

<sup>163</sup> CP 347 (331:2-8).

<sup>164</sup> CP 33 (¶5); CP 480-481 (125:17-126:6); CP 595-597, CP 598-600.

<sup>165</sup> CP 364-369 (387:4-13).

2 different masters,<sup>166</sup> but also detailed in the sworn deposition testimony of Hearn, Daly, Glenn, Poole, and Rogers, together with the letters and sworn declarations signed by *more than 20* of her former coworkers and her former union representative.<sup>167</sup> The sheer number of complaints and concerns raised about Cardenas (who is the only common denominator in these events) from so many different sources gave Interocean, at a minimum, “the perception” that she engaged in misbehavior. This perception was a lawful and unassailable basis for her termination. *Hill*, 144 Wn.2d at 451 n.9.

For her part, Cardenas failed to submit even a single declaration, letter, or statement from a coworker to support her claims and theories. Instead Cardenas relies entirely on her lengthy self-serving declaration<sup>168</sup> in which she blames her subordinates and coworkers for their admitted conflicts and for “overreacting,”<sup>169</sup> asserts that her comments and events were “twisted” against her,<sup>170</sup> and that claims against her were

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<sup>166</sup> Bosun John Glenn has been a merchant marine for 42 years, serving as Bosun nearly 30 years. CP 459-460 (11:18-12:7). Aside from Ms. Cardenas, he has never seen any single person receive four warning/counseling letters. CP 467 (70:12-21). According to Mr. Glenn, employees are typically terminated after receiving one warning letter. *Id.*

<sup>167</sup> *See, e.g.*, CP 11-89 (declarations), CP 588 (Glenn complaint).

<sup>168</sup> CP 981-1010.

<sup>169</sup> *See, e.g.*, CP 993 (¶34, “Shibly, had a couple of performance issues”), CP 995-996 (¶¶42-43, Hussain yelled at her first and engaged in insubordination), CP 1001 (¶¶53-55 David yelled at her first and overreacted to their dispute).

<sup>170</sup> Appellant’s Opening Brief at p.13; CP 1004.

“overstated,”<sup>171</sup> while labeling herself a “hard working merchant marine.”<sup>172</sup> These types of conclusory, self-serving assertions are not “specific facts” required by CR 56, and they do not demonstrate pretext. *Grimwood*, 110 Wn.2d at 358-61; *Chen*, 86 Wash. App. at 190-91.<sup>173</sup> Cardenas has failed to create an issue of fact by minimizing the impact of and her role in undisputed events, blaming others, and offering her own performance evaluation. “[T]he employee’s perception of himself...is not relevant. It is the perception of the decision maker which is relevant.” *Grimwood*, 110 Wn.2d at 360 (internal alterations omitted).

Cardenas also has not undermined the declarations of six former co-workers and her former union representative, who each consistently and independently confirmed the problems which led to her termination. Cardenas feebly attempts to “question the veracity” of the witnesses by claiming their declarations omit certain facts and by concluding, without evidence, that they demonstrate *unspecified* “bias.”<sup>174</sup> Appellant’s Opening Brief at 44-49. But denying the credibility of opposing witnesses

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<sup>171</sup> Appellant’s Opening Brief at p.43.

<sup>172</sup> CP 637.

<sup>173</sup> See also *Parsons v. St. Joseph’s Hosp.*, 70 Wash. App. 804, 810–11 (1993). Accord *Moser v. Indiana Dep’t of Corrections*, 406 F.3d 895, 900–01 (7th Cir. 2005); *Mills v. First Fed. Saving & Loan Ass’n of Belvidere*, 83 F.3d 833, 843 (7th Cir. 1996).

<sup>174</sup> Cardenas would have the Court believe, without evidence, that the declaration of Else David (a woman) reflect “bias” against her own gender. Moreover, not only is Cardenas’s claim that Bosun Glenn “did not like her” (Appellant’s Opening Brief at p.23, n.112) inadmissible speculation but, even if true, it fails to demonstrate or suggest gender discrimination.

does not create an issue of fact or demonstrate pretext. *Ramirez v. Olympic Health Mgmt. Sys., Inc.*, 610 F.Supp.2d 1266, 1283 (E.D. Wash. 2009). Moreover, the allegedly omitted facts do not demonstrate bias, and they are largely immaterial.<sup>175</sup> Last, Cardenas cannot dispute the witnesses' *personal opinions* about her workplace behavior, such as the witnesses' individual (but universally held) beliefs that Cardenas abused and mistreated subordinates and coworkers. No rationale fact finder would find, as Cardenas posits, that so many different witnesses (including a woman) independently fabricated, or were grossly mistaken about, basic facts while secretly harboring gender biases.

In sum, even if Cardenas has successfully called into question *some* of the events leading up to her termination, there remains an "abundan[ce] of uncontroverted independent evidence that no discrimination occurred." *Hill, supra*. As the trial court aptly noted:

Well, [Interocean] has got Mt. Everest here to begin with, and when the plaintiff comes back to show pretext, they've got Mt. Rainier, but they've still got a mountain of

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<sup>175</sup> Cardenas's assertion that she once had good working relationships with some of these witnesses is immaterial and speculative. Similarly, her assertion that Shibly did not return to the *North Star* because he extended his vacation is also based upon inadmissible speculation. CP 997-98, ¶46. Conclusive on this subject is Shibly's personal recollection reflected in his sworn declaration that he did not return to the *North Star* to avoid working with Cardenas. CP ¶7. Also, contrary to Cardenas's assertion, Don Anderson's Declaration specifies in detail the extent of the SIU's investigations. CP at 11-30. In fact, Cardenas lost an unfair labor practice charge she brought against the SIU challenging its representation of her, with the NLRB finding that the SIU "made a reasonable effort to investigate" her grievance. *See* CP 622-625.

evidence, and there's still nothing to suggest there was discrimination at the core of this.

RP at 52:18-23.

6. There Is No Evidence of Gender Discrimination.

Critically, the voluminous summary judgment record is completely devoid of any evidence proving or suggesting that Interocean was motivated by a desire to discriminate against Cardenas based upon her gender. And Cardenas does not even bother to argue otherwise. There is no evidence that Cardenas or other women were denied opportunities, pay, or benefits afforded to only male employees, were subjected to sexual advances, or that there was any pervasive anti-female sentiment on the vessel.<sup>176</sup> Nor does Cardenas cite any evidence that Rogers's decision to terminate her employment was motivated by a gender bias on his part.

While Captain Hearn's motivations are irrelevant since he indisputably did not decide to terminate Cardenas's employment,<sup>177</sup> there is, in any event, no evidence of gender bias on his part. Critically,

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<sup>176</sup> Cardenas misrepresents her own testimony in her Opening Brief by claiming that Captain Hearn told her that "he thought she *should* have been home with children." Appellant's Opening Brief at p.42, n.211 (citing CP 986-87). Yet, Cardenas actually claims in her declaration that Captain Hearn allegedly told her that he thought that she "*would have* been home with children by this time," a significant difference. CP 987 (emphasis added). This is, at most, a stray and isolated comment that does not constitute circumstantial evidence of discrimination as a matter of law. *See, e.g., Kirby v. City of Tacoma*, 124 Wn. App. 454, 467 (2004) (holding that comments referring to older officers as the "old guard" and getting "grey-haired old captains to leave" were "stray remarks that would have given rise to an inference of discriminatory intent.").

<sup>177</sup> In fact, he initially recommended to Rogers that Cardenas merely receive "written orders" to properly handle food. CP 603, 605.

Cardenas does not even believe Captain Hearn's alleged behavior (avoidance and failure to "salute" or greet Cardenas) was based upon her gender.<sup>178</sup> Instead, Cardenas believes Captain Hearn wanted to avoid her due to their relationship 15 years earlier, a theory she came up with after she "could not come up with any other reason."<sup>179</sup> That Captain Hearn allegedly treated other female sailors (such as Else David)<sup>180</sup> like the male sailors (by greeting them, etc.), Cardenas claims, supports her theory that Hearn avoided her specifically due to their prior relationship.<sup>181</sup>

But even if Cardenas is correct, treating someone different as a result of a voluntary, romantic relationship is not gender-based discrimination. *E.g.*, *Taken v. Okla. Corp. Comm'n*, 125 F.3d 1366, 1369-70 (10th Cir. 1997); *DeCintio v. Westchester County Med. Ctr.*, 807 F.2d 304, 308 (2d Cir. 1986). This is true even if the relationship would not have occurred if Cardenas had been a man. *Campbell v. Masten*, 955 F. Supp. 526, 528 (D. Md. 1997).<sup>182</sup> To hold otherwise would enable every jilted lover to bring a sex discrimination suit whenever the former lovers

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<sup>178</sup> CP 371 (390:2-14); CP 372 (391:12-16).

<sup>179</sup> CP 706, 994 (¶36).

<sup>180</sup> CP 999 (¶52).

<sup>181</sup> CP 323-326.

<sup>182</sup> *Campbell* is strikingly similar to this case in that the plaintiff theorized that her supervisor and former lover subjected her to heightened scrutiny and orchestrated her termination because the supervisor perceived the plaintiff as a threat to his marriage. *Campbell*, 955 F. Supp. at 528. Even assuming that was true, however, the Court held that it did not and could not amount to gender discrimination because the alleged conduct was based upon the prior relationship, not on gender. *Id.* at 528-29.

happen to work for the same employer, turning the WLAD into a civility code, a step that courts have repeatedly warned against. *See, e.g., Adams v. Able Bldg. Supply, Inc.*, 114 Wn. App. 291, 297 (2002) (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

In sum, Cardenas has failed to meet her ultimate burden of “present[ing] evidence sufficient for a trier of fact to reasonably conclude that the alleged unlawfully discriminatory animus was more likely than not a substantial factor in the adverse employment action.” *Hill*, 144 Wn.2d at 187 (citations omitted). Dismissal of her gender discrimination claim should be affirmed.

**C. The Trial Court Properly Dismissed Cardenas’s Retaliation Claim**

The same burden-shifting analysis applicable to discrimination claims applies equally to retaliation claims. *Milligan*, 110 Wn. App. at 638. Thus, Cardenas must prove that (1) she engaged in a statutorily protected activity, (2) Interocean took an adverse employment action against her, and (3) there is a causal link between the activity and the adverse action. *Milligan*, 110 Wn. App. at 638. If she succeeds, the burden shifts to Interocean to set forth a legitimate, non-retaliatory reason for her discharge, after which the burden shifts back to Cardenas to present evidence that Interocean’s proffered reason is pretextual. When a

retaliation plaintiff's "evidence of pretext is weak or the employer's non-retaliatory evidence is strong, summary judgment is appropriate." *Id.* at 638-39.

1. Cardenas Did Not Engage in a Statutorily Protected Opposition Activity.

In order to make a prima facie case for retaliatory discharge, Cardenas must demonstrate that she engaged in "protected opposition activity" prior to her discharge. *Coville v. Cobarco Servs., Inc.*, 73 Wn. App. 433, 440 (1994). To be protected, "the opposition must be directed towards 'practices forbidden by [RCW 49.60.180],'" *id.*, specifically, discriminatory acts based on a protected ground, such as sex, RCW 49.60.180. Opposition towards conduct that is not forbidden by the WLAD is not protected. *Coville*, 73 Wn. App. at 440 (female employee did not engage in protected activity by complaining about a male employee masturbating at work). The burden is on Cardenas to present evidence that the reason she engaged in the opposition activity was that she believed that the underlying acts were unlawfully discriminatory. *Vasquez v. State*, 94 Wn. App. 976, 988 (1999) (plaintiff failed to make a prima facie case of retaliation where he failed to present evidence that reason he opposed a criminal investigation was that he thought the investigation was unlawfully discriminatory).

*Graves v. Department of Game*, 76 Wash. App. 705 (1994) is instructive. In that case, the plaintiff complained to her employer that her supervisor “was not properly supervising her or helping her adjust to the new position,” and was hostile towards her, that she did not like another supervisor’s attitude, and that she thought her supervisor was expecting too much of her. *Id.* at 709, 712. The court held that those complaints did not amount to protected activity because they were not complaints of sexual discrimination. *Id.* at 712. The court thus affirmed the trial court’s dismissal of her retaliation claim on summary judgment. *Id.*<sup>183</sup>

This case is virtually identical to *Graves*. The primary opposition activity that Cardenas claims to have engaged in is her phone call to Rogers after she received written guidance from Captain Hearn in early October 2005. But that phone call did not constitute protected activity because she was not complaining of unlawfully discriminatory conduct.

Cardenas testified that she called Rogers to report that: (a) she was “having trouble communicating” with Captain Hearn who she thought was “ignoring” her, (b) she “didn’t feel like she deserve[d]” the

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<sup>183</sup> Other courts interpreting Title VII have similarly held that generalized complaints of even “rude and unfair conduct” or “unfair treatment,” such as those here, without any reference to discriminatory conduct, do not constitute protected activity. *See Petersen v. Utah Dept of Corrections*, 301 F.3d 1182, 1189 (10th Cir. 2002); *Pool v. VanRheen*, 297 F.3d 899, 910 (9th Cir. 2002); *Barber v. CSX Distribution Services*, 68 F.3d 694, 702 (3d Cir. 1995).

counseling/warning letters, and (c) she did not feel welcomed.<sup>184</sup> Despite being given a full opportunity to describe *everything* she told Rogers, Cardenas unequivocally confirmed that she told him nothing else. CP 1098 (“**Q: Is that the extent of what you told Mr. Rogers? A: Yes.**”) (emphasis added). As in *Graves*, Cardenas’s generalized concerns about Captain Hearn’s critique of her workplace performance and alleged avoidance of her are not statutorily protected complaints of gender discrimination or harassment.

Importantly, Cardenas specifically testified that she *never* told Rogers that she thought she was being discriminated against in any way or targeted based upon her gender:

Q. Did you tell Mr. Rogers anything to the effect that you believe you were being written up or targeted because you were a woman?

A. No.

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Q. You didn’t ever tell Mr. Rogers anything to the effect of, I’m being discriminated against here?

A. No.

Q. Did you tell Mr. Rogers that you were being harassed?

A. Harassed. No.

Q. Did you tell Mr. Rogers anything about your past relationship with Captain Hearn?

A. No.

Q. You didn’t tell Mr. Rogers, Hey, I think this is all because of my relationship with Captain Hearn some 15-plus years ago?

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<sup>184</sup> CP 355-358, 1092-1098.

A. No.<sup>185</sup>

Cardenas reaffirmed in her lengthy declaration that: “I didn’t tell Mr. Rogers that I was feeling discriminated against or harassed....”<sup>186</sup>

Despite providing unequivocal testimony that she did not complain to Rogers of discrimination or gender-based targeting, *or anything to that effect*, Cardenas now claims, through her post-deposition declaration, that she told Rogers that Hearn treated her “the opposite” of male sailors by greeting them and socializing with them.<sup>187</sup> Cardenas cannot create an issue of fact in a desperate attempt to avoid summary judgment by subsequently contradicting her sworn deposition testimony. *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 184–85 (1989) (“When a party has given clear answers to unambiguous deposition questions which negated the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.”).<sup>188</sup>

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<sup>185</sup> CP 355-358 (362:25-365:1), CP 359 (369:1-17).

<sup>186</sup> CP1005 (¶61).

<sup>187</sup> CP 1005 (¶60).

<sup>188</sup> The Court should also disregard and cast a jaundiced eye upon the unsupported and false claims in her Opening Brief that: “Mr. Rogers is the contact person only on [Interocean’s] discrimination and harassment posting” and that Cardenas complained to Rogers about “hostile work environment” and “suspicions regarding Capt. Hearn’s ill-motivation to get her off his ship.” Appellant’s Opening Brief at p.53. Cardenas cites no evidence for the former, and the only “posting” in the record suggests employees call a third-party anonymous hotline to report “unethical activity, harassment, discrimination, or safety....” CP 794. In any event, this notice was not even posted until *after* Cardenas called Rogers. CP 1093-1094.

Even assuming Cardenas told Rogers that Captain Hearn did not talk to or greet her unlike other crewmembers, *including Else David*,<sup>189</sup> this does not amount to a complaint of gender discrimination or sexual harassment. To state a claim of gender discrimination under the WLAD, one must allege differential treatment in the “terms or conditions of employment” based upon sex. RCW 49.60.180. Unlawful sexual harassment requires a showing of (1) offensive and unwelcome conduct that (2) occurred because of sex, (3) that was serious enough to change the terms and conditions of employment, and (4) that can be imputed to the employer. *Glasgow v. Georgia Pacific Corp.*, 103 Wn.2d 401, 406-07 (1985). To constitute unlawful harassment, the plaintiff must have been subjected to more than teasing, offhand comments, or even “hostile and intimidating” and “vulgar” behavior, but must have borne the brunt of conduct so “deeply offensive” and objectively “abusive” that it affects the terms or conditions of employment.<sup>190</sup> Cardenas’s supposed complaint to Rogers that Captain Hearn “ignored” her and did not respond to her

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The latter assertion is simply not true—nowhere in Cardenas’s deposition or her lengthy declaration does she assert that she complained to Rogers of “hostile work environment” or “suspicions regarding Capt. Hearn’s ill-motivation to get her off the ship.” Opening Brief at p.53. And, as described above, she testified that she never told Rogers anything to that effect. CP 355-358 (362:25-365:1), CP 359 (369:1-17).

<sup>189</sup> CP 999 (¶52 “He treated [David] like the male sailors.”).

<sup>190</sup> See, e.g., *Kahn v. Salerno*, 90 Wn. App. 110, 118 (1998); *Washington v. Boeing Co.*, 105 Wn. App. 1, 10 (2000); *Herried v. Pierce County*, 90 Wn. App. 468, 473 (1998); see also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82, 118 S. Ct. 998, 140 L.Ed.2d 201 (1998).

greetings and the like, do not even approach the type of deeply offensive, abusive, and gender-based conduct necessary to give rise to complaints of unlawful harassment or gender discrimination.

The alleged “context” of Cardenas’s call does not transform it into a statutorily protected one. The mere fact that Cardenas called human resources does not establish or suggest that she engaged in a protected activity. Employees call human resources for a myriad of reasons that are obviously not limited to complaining about illegal conduct, including issues relating to time off, employee benefits, and employment policies.

It is unreasonable to assume, as Cardenas does, that Rogers “already knew” she was calling to complain about gender discrimination because he said he was “expecting” her call.<sup>191</sup> That Rogers allegedly said he was “expecting” her call simply reflects the fact that Captain Hearn had given him advance notice that she was going to call. In their only communication on this subject, Captain Hearn emailed Rogers to expect Cardenas’s call following their October 9, 2005 counseling session.<sup>192</sup> The email discusses Cardenas’s recalcitrance and defensiveness to the performance issues raised in the counseling session and makes absolutely no mention that Cardenas was concerned about discrimination or

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<sup>191</sup> CP 1005 (¶61).

<sup>192</sup> CP 596-597.

harassment, or anything to that effect.<sup>193</sup> Thus, there was no basis for Rogers to *assume* based on his email exchange with Captain Hearn that Cardenas would call to complain of gender discrimination.

That Captain Hearn had, *more than 10 months earlier*, advised Rogers that he had “no reason to feel prejudice or uncomfortable with [Cardenas] as a female or Hispanic” was in response to Cardenas’s ambiguous “totally personal” note on the bottom of the September 28, 2004 warning letter.<sup>194</sup> There is no evidence that Cardenas’s vague comment in September 2004 had anything to do with her termination more than 1 year later and Cardenas has abandoned her theory that it did.<sup>195</sup>

In sum, Cardenas did not engage in a protected activity when she called Rogers.

2. There Is No Causal Link Between a Protected Activity and Adverse Action.

Cardenas makes the most conclusory argument imaginable in trying to establish the nexus element: “the above facts and argument establish Ms. Cardenas has met this element.” Appellant’s Opening Brief

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<sup>193</sup> *Id.*

<sup>194</sup> CP 569, 765.

<sup>195</sup> Cardenas initially claimed that her retaliation claim was also premised on her ambiguous “totally personal” note on the September 28, 2004 warning letter. *See* CP 622-625 (response to Interrogatory No. 11). Yet, on appeal, she does not rely on that vague note to support her retaliation theory.

at 54.<sup>196</sup> In other words, Cardenas leaves the Court and Interocean to sift through 53 pages of briefing to determine the basis for her nexus theory. The Court should decline to do Cardenas's work for her.

Cardenas relies largely on the timing (approximately 2 weeks) between her telephone call to Rogers and her termination to imply a nexus between them. Her conclusory argument relies entirely on a "logical fallacy--post hoc, ergo propter hoc or 'after this, therefore because of this.'" *Anica v. Wal-Mart Stores, Inc.*, 120 Wash. App. 481, 491 (2004). "But coincidence is not proof of causation." *Id.* (rejecting retaliation plaintiff's argument that temporal proximity between protected activity and adverse employment action alone established retaliatory motive). Moreover, she completely ignores the superseding event that actually led to her termination—her admitted food-handling violations. The email communications between Captain Hearn and Rogers make clear that those incidents, and nothing else, were the proverbial straws that broke the camel's back and led to her termination.<sup>197</sup>

Cardenas improperly raises a new argument for the first time on appeal: that her retaliation theory is supported by Captain Hearn's alleged

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<sup>196</sup> This "argument" is based upon a supposed quote from *Wilmot v. Kaiser Aluminum*, 118 Wash.2d 46 (1991) ("the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged") which is not present in that decision. Appellant's Opening Brief at p.54.

<sup>197</sup> See CP 602-603.

statement at discharge that her employment was terminated because she had “called the company.” Captain Hearn denies making this statement,<sup>198</sup> and no rational trier of fact could find otherwise based upon the record. When given a full opportunity to testify to everything discussed in the discharge meeting with Captain Hearn, Cardenas never mentioned his alleged comment.<sup>199</sup> Further, immediately after the discharge meeting, Cardenas told Crodua that she had been fired, *not because she called Interocean*, but because Crodua “had not marked the leftovers.”<sup>200</sup> Cardenas never raised this theory in her SIU grievances, even after she retained an attorney and alleged retaliation based upon her prior relationship with Hearn.<sup>201</sup> Last, in response to an interrogatory asking Cardenas to “describe in full detail all facts” supporting her retaliation claim, including “the basis for your assertion that your termination was related to your engagement in protected activity(ies),” Cardenas did not mention the alleged Hearn statement.<sup>202</sup> On this record, reasonable minds could reach only one conclusion—no such statement was ever made. *Michelson v. Boeing Co.*, 63 Wn. App. 917, 920 (1991) (“[A] trial court

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<sup>198</sup> Hearn vehemently denies that he told Cardenas that she was discharged because she had called Rogers. CP 237 (252:3-18).

<sup>199</sup> CP 361-363.

<sup>200</sup> CP 46-47 (¶15).

<sup>201</sup> CP 11-30, CP 15-16 (¶16).

<sup>202</sup> CP 634 (Interrogatory 11).

may decide a factual issue as a matter of law if there is only one conclusion that reasonable minds could reach.”).

Even assuming Hearn made this statement, no reasonable trier of fact could find her call to Rogers actually was a motivating factor in *Rogers’s decision* to terminate her employment. The email correspondence between Captain Hearn and Rogers just prior to and immediately following the Cardenas-Rogers call reveals no scheme or plan by either to take action against Cardenas for calling Rogers.<sup>203</sup> To the contrary, Captain Hearn “encouraged” Cardenas to call Rogers,<sup>204</sup> and, after the call, Rogers did not instruct Hearn to fire her for the phone call or indicate that he would.<sup>205</sup> Instead, she was allowed to continue working for the company for several more weeks until the food handling issue was discovered by Poole. Moreover, the Rogers-Hearn emails that followed that event show that the food handling issue was the real issue that triggered her discharge.<sup>206</sup> Last, Hearn’s detailed, contemporaneous post-termination memorandum to Rogers did not mention or suggest her call to Rogers was problematic or played any role in the termination.<sup>207</sup> In short,

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<sup>203</sup> CP 596-597, CP 599-600.

<sup>204</sup> CP 222 (171:5-11); CP 595-597.

<sup>205</sup> CP 599.

<sup>206</sup> CP 602-03.

<sup>207</sup> CP 615-618.

the record does not demonstrate any intent by Rogers or Hearn to discharge Cardenas due to her phone call with Rogers.

3. Interocean's Termination Reasons Were Not Pretext for Retaliation.

As detailed above, Cardenas has not demonstrated that InterOcean's reasons for terminating her employment were pretexts for some other illicit motivation. And even if the Court were to consider the alleged Hearn comment, it is, at best, "weak" evidence that is woefully insufficient to satisfy Cardenas's burden in light of the "abundant and uncontroverted evidence" that she was terminated due to her documented performance problems.

**D. The Admission of the Declaration of Eleish Higgins and Exhibits Thereto Do Not Require Reversal**

1. Cardenas Waived Her Objection To The Higgins Declaration And Exhibits.

A party waives her objection to the admission of evidence "by subsequently using it for [her] own purposes, or by introducing evidence similar to that already objected to." *Sevener v. Nw. Tractor & Equip. Co.*, 41 Wn.2d 1, 15 (1952).

Cardenas waived her objection to the admission of Higgins Declaration and Exhibits by affirmatively raising her disciplinary and performance history beyond InterOcean, and her employment experiences at Seabulk. In her trial court briefing, Cardenas claimed to be "a hard

working merchant marine” who “never suffered performance discipline until being employed by [Interocean],”<sup>208</sup> she submitted a prior “positive” performance review completed by Captain Higgins,<sup>209</sup> and she described other issues relating to her employment at Seabulk.<sup>210</sup> Even on appeal, Cardenas continues to reference and rely upon her prior “positive performance review” she received from Higgins.<sup>211</sup> By repeatedly relying upon evidence of her work performance at Seabulk, Cardenas has waived any objection to the admissibility of this evidence.<sup>212</sup>

2. The Trial Court Did Not Abuse Its Discretion In Admitting the Declaration and Exhibits Into Evidence.

Trial court evidentiary decisions, including those made in the course of summary judgment proceedings, are reviewed for abuse of discretion. *Sunbreaker Condominium Ass’n v. Travelers Ins. Co.*, 79 Wn. App. 368, 372 (1995). “A trial court abuses its discretion if its decision is

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<sup>208</sup> CP 637.

<sup>209</sup> CP 1009 (¶71), CP 1014 (prior Seabulk performance evaluation attached to Cardenas Declaration), CP 1042 (prior Seabulk performance evaluation attached to Margaret Boyle Declaration), CP 701 (reliance on prior Seabulk performance evaluation).

<sup>210</sup> CP 1017-1018.

<sup>211</sup> Appellant’s Opening Brief at p.48.

<sup>212</sup> This is not a case where the objecting party introduced the evidence after the court ruled on a motion to strike or motion in limine. Although there is no waiver in that situation, the no-waiver rule does not apply in cases such as this one where “the trial court [had not] made a final and unequivocal ruling on the motion.” *Dickerson v. Chadwell, Inc.*, 62 Wn. App. 426, 431 (1991). If Cardenas did not think that the Higgins Declaration and Exhibits were admissible, she could have, for example: (1) filed a motion to strike and note it to be heard before her summary judgment response was due, (2) filed a motion to strike and forego any reference in her summary judgment response to the Higgins materials. Instead, Cardenas chose to simultaneously move to strike the Higgins materials while repeatedly trying to address and rebut those materials with her own evidence.

manifestly unreasonable or is based on untenable grounds, or for untenable reasons.” *In re Personal Restraint of Duncan*, 167 Wn.2d 398, 402 (2009) (quotations omitted). “A trial court’s decision is manifestly unreasonable if it adopts a view that no reasonable person would take.” *Id.* It is not enough that the appellate court disagrees with the trial court, and the appellate court cannot substitute its judgment for the trial court’s. *Minehart v. Morning Star Boys Ranch, Inc.*, 232 P.3d 591, 594 (2010).

Cardenas argues that the trial court abused its discretion by admitting the Higgins Declaration and Exhibits<sup>213</sup> in contravention of ER 404(b), which prohibits the use of evidence of other acts “to prove the character of a person in order to show action in conformity therewith.” ER 404(b). However, that rule permits use of evidence of other acts for a multitude of other reasons. *Id.* Essentially, “[s]o long as the evidence is relevant to an issue other than propensity and its probative value is not outweighed by its potential for unfair prejudice, it may be admitted.” ARONSON, LAW OF EVIDENCE IN WASHINGTON 404-53 (2009).

Interocean offered the evidence to, in part, rebut Cardenas’s theory that Captain Hearn had orchestrated a conspiracy to get her fired<sup>214</sup> and

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<sup>213</sup> CP 66-83.

<sup>214</sup> *See, e.g.*, CP 353 (Cardenas believes Hearn conspired with Poole); CP 327-328 (240:22-241:13) (Cardenas believes Glenn “orchestrated” events with Captain Hearn); CP 360 (Cardenas believed Hearn conspired with Shibly).

that the complaints about her were the result of said conspiracy.<sup>215</sup> The Higgins materials are relevant to rebutting Cardenas's conspiracy theory because they demonstrate that Cardenas continued to believe, without evidence, that her problems at work were caused by Captain Hearn, even three years later, and multiple employers removed. Especially relevant for this purpose is Exhibit C to the Higgins Declaration, which reflects Cardenas's statement to Higgins at the time of termination that she "was in cahoots with a Capt. Hearn (no idea who he is) to get her off the ship."<sup>216</sup> Moreover, the documents, especially the letters from other crewmembers, are relevant to undermine the conspiracy theory because if Cardenas's theory were true, all of these individuals would have to be part of the alleged Hearn conspiracy as well. Cardenas's conspiracy theory—that Captain Hearn was behind all of the complaints about her—is severely undermined by this evidence. Thus, the evidence is relevant to an issue other than propensity and was properly admitted.<sup>217</sup>

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<sup>215</sup> CP 32, lines 15-20 (Interocean motion for summary judgment argument relying on Higgins declaration to refute Cardenas's conspiracy theory); CP 13, lines 10-15, n.21 (same argument on reply).

<sup>216</sup> CP 77.

<sup>217</sup> There is no unfair prejudice presented by the admission of the Higgins Declaration and Exhibits because: (1) the evidence was considered by the trial judge on a motion for summary judgment and not by a jury at trial, (2) unlike evidence of a party's criminal record, there is nothing inherently inflammatory about the Higgins Declaration and Exhibits which detail Cardenas's statements and perceptions about her workplace behavior, and (3) the evidence is substantially similar to multiple other clearly admissible declarations concerning Cardenas's workplace behavior.

3. Even if the Trial Court Erred, the Summary Judgment Order Must Stand Because Any Error Did Not Prejudice or Harm Cardenas.

Even if this Court concludes that the Higgins materials should have been excluded, the trial court cannot be reversed unless Cardenas was prejudiced by the error. *See Wallace Real Estate Inv., Inc. v. Groves*, 72 Wn. App. 759, 771 (1994). “Error is not ‘prejudicial unless it affects, or presumptively affects, the outcome of the trial.’” *Id.* Specifically, a party is not prejudiced by the improper admission of evidence “if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins v. Reich*, 142 Wn. App. 557, 571 (2008); *see also Brown v. Spokane County Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196 (1983).

The order granting summary judgment must stand because Cardenas was not prejudiced by the admission of the Higgins Declaration and Exhibits. Even without this evidence, the record contains more than sufficient evidence of Cardenas’s poor work performance and behavior to justify her termination and rebut any presumption of pretext. The Higgins materials contribute something new in that they show that her problems continued long after she left the *North Star*, but because they describe conduct that is virtually identical to that described in the other evidence, they are essentially cumulative.

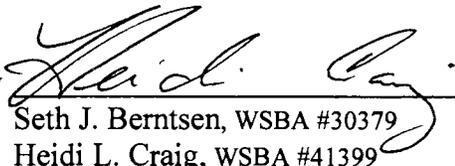
And even if they are not cumulative, their contribution is insignificant. In fact, the trial court judge expressly noted that he was *not* affording the Higgins materials “a great deal of weight... .”<sup>218</sup> Given this and all of the evidence before the trial court, it is highly unlikely that the trial court would have denied the Motion for Summary Judgment if the Higgins materials had been excluded. In other words, it is highly improbable that the Higgins Declaration and Exhibits had any effect on the outcome of the trial court proceedings, and as a result, Cardenas was not prejudiced by the admission of the evidence. Accordingly, the trial court order granting summary judgment must be affirmed, regardless of whether the materials were improperly admitted.

## V. CONCLUSION

For the foregoing reasons, Interocean respectfully requests that the Court affirm the trial court’s rulings.

DATED this 13 day of August, 2010.

GARVEY SCHUBERT BARER

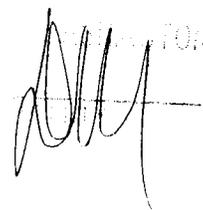
By   
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<sup>218</sup> RP 4, lines 1-4.

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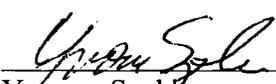
**CERTIFICATE OF SERVICE**

I, Yvonne Szehner, certify under penalty of perjury under the laws of the State of Washington that, on August 13, 2010, I caused to be served the foregoing document, **BRIEF OF RESPONDENT INTEROCEAN AMERICAN SHIPPING CORPORATION**, on the person(s) listed below in the manner shown:

Margaret M. Boyle, Esq.  
Themis Litigation Group  
1823 Tenth Avenue West  
Seattle, WA 98119

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| <input type="checkbox"/>            | <i>By United States Mail, First Class</i> | <input type="checkbox"/> | <i>By Facsimile</i> |
| <input checked="" type="checkbox"/> | <i>By Legal Messenger</i>                 | <input type="checkbox"/> | <i>By Email</i>     |

Dated this 13<sup>th</sup> day of August, 2010 at Seattle, Washington.

  
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Yvonne Szehner