IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VERONIKA CARDENAS, Appellant, v. INTEROCEAN AMERICAN SHIPPING CORPORATION, Respondent.	No. 40382-0-II UNPUBLISHED OPINION

Worswick, J. — Interocean American Shipping Corp. (IAS) terminated Veronika Cardenas from her position as ship's steward on an IAS vessel. Cardenas sued, alleging gender discrimination and retaliation. She also moved to strike evidence relating to her subsequent employment on another vessel. The trial court denied Cardenas's motion to strike and granted summary judgment to IAS on both the discrimination and retaliation claims. Cardenas appeals, arguing that genuine issues of material fact precluded summary judgment on her discrimination and retaliation claims and that the trial court erred in denying her motion to strike. We affirm as to Cardenas's discrimination claim, holding that she failed to produce sufficient evidence of her

prima facie case. But we reverse as to Cardenas's retaliation claim, holding that she raised a genuine issue of material fact on this claim.

FACTS[1]

In 1989, Cardenas served aboard the ship Westward Venture with John Hearn, and had an affair with Hearn during the voyage. In August 2004, Cardenas joined the crew of the IAS ship North Star as the ship's steward, a job that entails managing the ship's galley and its staff. Cardenas served three tours aboard the North Star. Hearn was the captain on her first and third tours, while John Daly was the captain on her second tour.

According to Cardenas's deposition testimony, Hearn avoided her or ignored her when he served as captain on the North Star, treating her with less kindness and respect than he showed the other crew members, including other female crew members. Cardenas believed that this was because he was attracted to her. Cardenas also believed that Hearn treated other female crew members more favorably because one was married and the others were not as attractive as she.

During her service aboard the North Star, Cardenas received four written warnings, three from Hearn and one from Daly. The first warning was based on Cardenas's leaving the North Star without permission; the rest were based primarily on her poor management skills and her interpersonal conflicts with crew members. The record also contains six written crew complaints, all of which asserted that Cardenas had trouble maintaining harmonious relations with fellow crew members.

[1] Because this case comes to us on an order for summary judgment, we set forth the relevant facts in the light most favorable to the nonmoving party, Cardenas. *See Jones v. Dep't of Health*, 170 Wn.2d 338, 342 n.1, 242 P.3d 825 (2010).

Cardenas submitted her deposition testimony and declaration contesting details of the incidents for which she received warnings aboard the North Star. But at her deposition, Cardenas either admitted or failed to contest many incidents indicative of serious performance problems. Cardenas admitted to mistakenly leaving the North Star without permission. She admitted to having a contentious relationship with two members of her department. She admitted that there was high turnover in her department, and that this was a legitimate reason for the captain to be concerned. She admitted to leveling accusations of misconduct against fellow crew members.

The record also reflects that Cardenas refused to accept any responsibility for the issues for which she was warned, including the issues she later admitted responsibility for at deposition. Moreover, Captain Daly testified at his deposition that he repeatedly counseled Cardenas about her poor management skills, that he repeatedly told her not to interrupt him on the ship's bridge, and that her performance never improved on either account. Cardenas did not contest these assertions.

Several weeks before her termination, Cardenas called IAS's vice-president of human resources, Robert Rogers. In this call, Cardenas complained that Hearn was treating her differently from the men by not talking to her, not saluting her, or not treating her "like a person." 5 Clerk's Papers (CP) at 976.

Cardenas was terminated on October 28, 2005. She received a termination letter, identifying the following performance problems: saving leftovers for longer than 48 hours in violation of her union contract, unsafely thawing meat in the galley sinks overnight, and failing to provide particular leftovers with the "night lunches" (food set out for the crew at late hours), also in violation of her contract. 4 CP at 611. At her deposition, Cardenas admitted saving leftovers for more than 48 hours and failing to put them out with the night lunches, against the plain requirements of her union contract.[2] She also admitted that meat was left to thaw in the sinks, but she contested whether she was responsible and whether this practice was unsafe. Also at her deposition, Cardenas testified that Hearn told her she was being fired for "call[ing] the company." 5 CP at 975.

PROCEDURAL HISTORY

Cardenas sued IAS for gender discrimination and retaliation. IAS moved for summary judgment on Cardenas's discrimination and retaliation claims. IAS submitted the declaration of Captain Eleish Higgins of the Seabulk Arctic, a ship Cardenas served on as steward after she was terminated from the North Star. Higgins's declaration included attached exhibits documenting crew complaints against Cardenas from the Seabulk Arctic. Cardenas moved to strike the

[2] In her declaration, Cardenas asserted that she was not required to use leftovers within 48 hours or serve particular leftovers with the night lunches. But the contract is unambiguous, using language that indicates mandatory compliance. Moreover, at her deposition, Cardenas admitted that the contract rules were mandatory and that she had not complied. To defeat summary judgment, a party may not create a genuine issue of fact with a self-serving declaration that contradicts unambiguous deposition testimony without explanation. *Klontz v. Puget Sound Power & Light Co.*, 90 Wn. App. 186, 192, 951 P.2d 280 (1998) (quoting *Marshall v. AC & S Inc.*, 56 Wn. App. 181, 185, 782 P.2d 1107 (1989)).

declaration and attached exhibits, which the trial court denied.

The trial court found that Cardenas had failed to introduce any evidence that she was terminated based on her gender. The trial court also found that, although Cardenas had produced some evidence that she was terminated for complaining about being treated differently from the men, this evidence was insufficient to create a genuine issue of material fact as to her retaliation claim. The trial court therefore granted summary judgment to IAS as to both of Cardenas's claims. Cardenas appeals.

ANALYSIS

I. Standard of Review

We review a grant of summary judgment de novo. *Briggs v. Nova Servs.*, 166 Wn.2d 794, 801, 213 P.3d 910 (2009). Summary judgment is appropriate where, viewing all facts and resulting inferences most favorably to the nonmoving party, the court finds no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Briggs*, 166 Wn.2d at 801. "A genuine issue of material fact exists where reasonable minds could differ on the facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008).

II. Discrimination

The Washington law against discrimination (WLAD) forbids employers to discharge employees based on protected status, including sex. RCW 49.60.180(2). To survive a motion for summary judgment, an employee asserting a claim of discrimination must make out the prima facie case. *Milligan v. Thompson*, 110 Wn. App. 628, 636, 42 P.3d 418 (2002). The elements of

a prima facie case of discrimination are that the employee (1) belonged to a

protected class, (2) was discharged or suffered adverse employment action, (3) had been doing satisfactory work, and (4) was replaced by someone not in the protected class.[3] *Milligan*, 110 Wn. App. at 636.

The parties dispute whether Cardenas met her burden to show a prima facie case of discrimination. We hold that Cardenas has failed to create a genuine issue of material fact as to the third element of her prima facie case, that she had been doing satisfactory work.

The following facts regarding Cardenas's performance are undisputed: She left the North Star without permission; she had a poor working relationship with several subordinates; there was unusually high turnover in her department; she repeatedly interrupted Daly on the bridge; Daly was required to counsel her repeatedly about her management skills; she saved leftovers for more than 48 hours in violation of her union contract; she failed to put leftovers out with night lunches; and she refused to accept responsibility for each incident, including the incidents that she later admitted to in her deposition. Furthermore, both captains and six crew members who gave deposition testimony or submitted declarations found her management skills deficient.

These undisputed facts show that there is no genuine issue of fact as to whether Cardenas's performance was satisfactory. Even taking the facts in the light most favorable to Cardenas, she is unable to meet her burden as to the third element of her prima facie case.

[3] Relying on *Enders/Maden v. Super Fresh*, 594 F. Supp. 2d 507, 512, (D. Del. 2009), IAS asserts that because a union, and not IAS, decided who would replace Cardenas, we should replace the fourth element of the prima facie discrimination case with the more general question of whether the circumstances give rise to an inference of discrimination. Because we hold that Cardenas has failed to meet her burden on the third element of the prima facie case, we decline to reach this argument.

Summary judgment for IAS on this claim was therefore appropriate, and we affirm as to Cardenas's gender discrimination claim.

III. Retaliation

RCW 49.60.210(1) forbids employers to discharge or otherwise discriminate against an employee in retaliation for opposing practices forbidden by the WLAD. To avoid summary judgment, the employee must first show a prima facie case of retaliation: (1) The employee engaged in a statutorily protected activity, (2) the employer took adverse employment action against her,[4] and (3) there is a causal link between the protected activity and the adverse action. *Milligan*, 110 Wn. App. at 638. Once a prima facie case is established, the burden then shifts to the employer to show a legitimate purpose for the adverse employment action. *Milligan*, 110 Wn. App. at 638. If the employer shows a legitimate purpose, the burden shifts back to the employee to show that this legitimate reason was a pretext for retaliation. *Milligan*, 110 Wn. App. at 638.

To show the first factor of a prima facie retaliation case, that she engaged in protected activity, the employee must show that she opposed conduct that was *arguably* a WLAD violation. *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798, 120 P.3d 579 (2005). She need not show that the conduct opposed was actually illegal. *Estevez*,

[4] Adverse employment action means a tangible change in employment status, such as "hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 760, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998).

129 Wn. App. at 798. The WLAD prohibits disparate treatment based on protected status.[5] *Davis v. W. One Auto. Group*, 140 Wn. App. 449, 458-59, 166 P.3d 807 (2007).

Cardenas called Rogers to complain that Hearn was treating her differently from the men by not talking to her, not saluting her, and not treating her "like a person." This was arguably a complaint of disparate treatment.

As a department head, Cardenas needed a good working relationship with the vessel's captain. Cardenas produced evidence that, while Hearn treated the male crew members (including the other department heads) with kindness and respect, he largely avoided and ignored her. Because Cardenas was similarly situated to the male department heads, she was at least arguably treated less favorably in the conditions of employment, making her call to Rogers arguably a complaint of disparate treatment. Taking the evidence in the light most favorable to Cardenas, she has met her burden to show that her call to Rogers was protected activity.

Cardenas also produced evidence of a causal link between her protected activity and her subsequent termination. At her deposition, she testified that Hearn told her she was being fired for "call[ing] the company." This creates a genuine issue of material fact as to whether Cardenas was terminated as a direct consequence of engaging in protected activity and shifts the burden to IAS to show a legitimate reason for her termination. IAS has shown a legitimate reason for

[5] To show disparate treatment, "an employee must show that (1) the employee belongs to a protected class and that (2) the employer treated the employee less favorably in the terms or conditions of employment (3) than a similarly situated, nonprotected employee (4) who does substantially the same work." *Davis v. W. One Auto. Group*, 140 Wn. App. at 449, 459, 166 P.3d 807 (2007).

terminating Cardenas based on the poor performance outlined above. Because IAS has shown a legitimate reason for termination, the burden shifts back to Cardenas to show that IAS's reason is a pretext for retaliation. Pretext may be shown by the same evidence used to show the prima facie case. *Milligan*, 110 Wn. App. at 637. Cardenas's testimony that Hearn informed her she was being fired for "call[ing] the company" meets her burden to show that IAS's reason for termination was pretextual. Summary judgment was therefore inappropriate on this claim and we reverse the trial court's grant of summary judgment on this ground.[6]

IV. Motion To Strike

Cardenas finally argues that the trial court erred by denying her motion to strike Eleish Higgins's declaration and the attached exhibits. We disagree.

We generally review an order on a motion to strike for abuse of discretion. *Southwick v. Seattle Police Officer John Doe No. 1*, 145 Wn. App. 292, 297, 168 P.3d 1089 (2008). But we apply de novo review to rulings made in conjunction with a summary judgment motion. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). A trial court may not consider inadmissible evidence on summary judgment. *Allen v. Asbestos Corp. Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007).

Cardenas argues that the trial court should have granted her motion to strike because the declarations contained inadmissible hearsay and were inadmissible character evidence. IAS argues

[6] We emphasize that, in holding that Cardenas has met her summary judgment burden as to retaliation, we do not weigh the credibility of her evidence and we make no comment on it. *See Jones*, 170 Wn.2d at 354 n.7.

that Cardenas waived this objection by introducing similar evidence showing that she had never been disciplined before her employment on the North Star. We affirm the trial court's denial of Cardenas's motion to strike.

A. Waiver

As a preliminary matter, IAS relies on *Sevener v. Nw. Tractor & Equip. Corp.*, 41 Wn.2d 1, 15, 247 P.2d 237 (1952), to argue that Cardenas waived her objection to inadmissible evidence by using said evidence for her own purposes or by introducing similar evidence. But a party does not waive its objection by introducing evidence to explain or rebut the inadmissible evidence. *Sevener*, 41 Wn.2d at 15. We hold that Cardenas did not waive her challenge to the Higgins declaration and attached exhibits.

Here, Cardenas introduced evidence that she had no history of employment discipline *before* her employment with IAS. In contrast, the Higgins declaration relates to Cardenas's performance *after* IAS terminated her. Furthermore, Cardenas offered evidence asserting that she received a prior positive evaluation from Higgins and that her subsequent termination was related to Seabulk's attempt to deprive her of customary benefits. This was evidence to explain or rebut the Higgins declaration; it was not reliance on the Higgins declaration. Because Cardenas did not introduce similar evidence or rely on the Higgins declaration except to explain or rebut it, Cardenas has not waived her objection under *Sevener*.

B. ER 404(b)

Cardenas argues that the declaration and attached exhibits were inadmissible under ER 404(b). Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to show a

person's character in order to show that she acted in conformity therewith. But such evidence may be admitted for other purposes, such as to rebut a material assertion by a party. *State v. Hernandez*, 99 Wn. App. 312, 321, 997 P.2d 923 (1999). Here, Cardenas asserts that the disciplinary action against her was a pretext for discrimination. By making this claim, she is asserting that Hearn colluded with other crew members to build the case for her baseless termination. That Cardenas's employers at a subsequent job had the same complaints about Cardenas's performance rebuts this assertion because it makes collusion aboard the North Star less likely. This rebuts a material assertion by Cardenas and does not simply show that she has a propensity for poor job performance. The declaration was thus admissible under ER 404(b).

C. Hearsay

Cardenas also asserts that the exhibits attached to the Higgins declaration contain hearsay. But a statement is not hearsay unless it is admitted for the truth of the matter asserted. ER 801(c). The trial court ruled that the statements were not hearsay because they were not admitted for the truth of the matter asserted, but rather to show the information coming to Higgins regarding Cardenas's performance. The trial court was correct. The exhibits are admissible not to show that they are true, but rather to show the basis for Higgins's belief that Cardenas performed poorly aboard the Seabulk Arctic. As such, the exhibits were admissible for a non-hearsay purpose. The trial court properly denied Cardenas's motion to strike and we affirm.

Affirmed in part, reversed in part.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Hunt, J.

Penoyar, C.J.