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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 BOUALEM HABIB,

10 Plaintiff,

11 v.

12 TOTE SERVICES,

13 Defendant.

Case No. C14-1685RSL

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT AND  
DENYING PLAINTIFF'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT

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15  
16 This matter comes before the Court on the parties' cross-motions for summary judgment.  
17 Dkt. ## 40, 48. Plaintiff Boualem Habib claims that his employer, defendant Tote Services, Inc.,  
18 discriminated against him based on his race, national origin, and religion in violation of Title VII  
19 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and the Washington Law Against  
20 Discrimination, RCW 49.60.010, *et seq.* Having reviewed the parties' briefs, declarations,  
21 exhibits, and the remainder of the record, the Court finds as follows.

22 **BACKGROUND**

23 Defendant operates a maritime staffing service that provides operational crews to public  
24 and private ship owners. Dkt. # 41, ¶ 2. The United States Maritime Administration contracts  
25 with defendant to staff some of its missile-tracking vessels. Dkt. # 41, ¶ 2. In addition to the

26 ORDER GRANTING DEFENDANT'S  
27 MOTION FOR SUMMARY JUDGMENT AND  
28 DENYING PLAINTIFF'S CROSS-MOTION  
FOR SUMMARY JUDGMENT - 1

1 operational crew provided by defendant, these vessels are staffed with a mission crew managed  
2 by the Missile Defense Agency. Dkt. # 41, ¶ 2.

3 Missile-tracking vessels alternate between Full Operating Status and Reduced Operating  
4 Status. Dkt. # 41, ¶ 3. Full Operating Status occurs when a ship is preparing for or engaged in  
5 active Missile Defense Agency operations and requires a full operational and mission crew. At  
6 all other times, the ships transition to Reduced Operating Status. Dkt. # 41, ¶ 3. In Reduced  
7 Operating Status, a reduced crew of ten or more operational staff is responsible for maintaining  
8 the inactive ship while it undergoes maintenance or waits in standby. Dkt. # 42, Ex. B at 86.

9 In May 2012, defendant hired plaintiff, an Algerian-born Arab-American who is a  
10 practicing Muslim, to work as a 45-day relief steward aboard a missile-tracking vessel, the SS  
11 Pacific Tracker (“Tracker”). Dkt. # 16, ¶ 2.1; Dkt. # 42, Ex. A at 29–30; Dkt. # 42, Ex. D. In  
12 June 2012, when the Tracker’s permanent steward resigned, defendant hired plaintiff as a  
13 permanent steward aboard the Tracker. Dkt. # 42, Ex. A at 31–33; Dkt. # 42, Ex. E. As  
14 steward, plaintiff was responsible for preparing and serving the crew’s meals and for  
15 maintaining the ship’s supplies through inventorying and requisitioning. Dkt. # 42, Ex. F at  
16 123–25. In Full Operating Status, plaintiff oversaw as many as eight steward assistants and  
17 shared his food preparation responsibilities with the Tracker’s chief cook, whereas in Reduced  
18 Operating Status, plaintiff was the sole member of the steward’s department and was directly  
19 responsible for all meal service. Dkt. # 42, Ex. F at 123–25; Dkt. # 42, Ex. G at 139; Dkt. # 41,  
20 ¶ 7.

21 Sometimes, when the Tracker was in Reduced Operating Status, it would berth together  
22 with its sister ship, the SS Pacific Collector (“Collector”). Dkt. # 42, Ex. G at 139. When the  
23 Tracker and the Collector berthed together in Reduced Operating Status, plaintiff was  
24 responsible for coordinating with the Collector’s steward to prepare meals for the crews of the  
25 two ships. Dkt. # 42, Ex. A at 55. The Tracker and the Collector monthly alternated hosting the

1 combined crews for meals, and the steward of the visiting crew would assist the steward of the  
2 hosting crew in preparing the meals. Dkt. # 42, Ex. G. at 139; Dkt. # 43, Ex. P.

3 Plaintiff testified that, while working on the ship, he encountered bigoted comments from  
4 other crew members. For example, some used a racist slur to refer to African-Americans,  
5 including President Barack Obama, Dkt. # 49-1 at 3–7; see also Dkt. # 49-2 at 9, and some  
6 referred to plaintiff as “the Arab” and “a terrorist hijacker,” Dkt. # 49-1 at 15–21, 37; see also  
7 Dkt. # 49-2 at 1–11. Plaintiff testified that one day, the Collector’s chief engineer, Reuben  
8 Grendahl, called plaintiff into the engine room, where other crew members were gathered, and  
9 showed plaintiff a video of two missiles striking each other in the air, telling plaintiff, “this is  
10 how we deal with terrorists.” Dkt. # 49-1 at 19–21.

11 In plaintiff’s November 2012 crewmember evaluation, the Tracker’s chief mate, Jeffrey  
12 Royer, reported that plaintiff’s performance was either “excellent” or “very good” in every  
13 category. Dkt. # 43, Ex. H. Mr. Royer remarked that plaintiff was “an excellent chef and the  
14 meals are superb. He runs a tight ship in the galley and the house is very well maintained.” As  
15 to areas for improvement, Mr. Royer suggested that plaintiff “[r]eview provision consumption  
16 from last mission for future reference” and submit paperwork earlier. Dkt. # 43, Ex. H.

17 Plaintiff’s crewmember evaluation on February 10, 2013 was similarly positive. Dkt.  
18 # 43, Ex. I. Mr. Royer noted that plaintiff could improve by “[reviewing] actions that could be  
19 taken to improve steward department morale without affecting supervision or performance.”  
20 Dkt. # 43, Ex. I. In response to this suggestion, on February 12, 2013, plaintiff wrote that

21  
22 The morale of the -entire ship- is of the utmost importance to the Chief  
23 Steward. On any given voyage one will always find a ship’s crew  
24 member who would never be content no matter the circumstance. In  
25 my humble opinion, [t]he morale of the many trumps the satisfaction of  
the lone -sea-lawyer- anytime. I would appreciate it in the future if the

1 Ship's Master confronts me with the demoralized crewmember to  
2 assess the facts of the complaint and afford me the opportunity to  
3 apologize if the complaint is fact based. It is always the least  
4 competent who complain the most.

5 Dkt. # 43, Ex. J.

6 On February 12, 2013, the Tracker and the Collector returned to Reduced Operating  
7 Status and berthed together in Portland, Oregon. Combined meal service began aboard the  
8 Tracker. Dkt. # 41, ¶ 10. Also on February 12, 2013, the Collector's permanent steward took  
9 leave, and Keesha Holloway, an African-American woman, was hired as a 60-day relief steward  
10 for the Collector. Dkt. # 41, ¶ 10; Dkt. # 43, Ex. K. Ms. Holloway met with plaintiff to become  
11 oriented to their respective steward roles on the two ships. Dkt. # 43, Ex. L; Dkt. # 43, Ex. M.  
12 Ms. Holloway left that meeting unsure of her responsibilities, understanding that plaintiff  
13 intended to do the bulk of the steward work for both ships and intended her merely to clean up.  
14 Dkt. # 43, Ex. M.

15 On February 14, 2013, Ms. Holloway suggested that she join plaintiff on his shopping trip  
16 to purchase supplies, as she was unfamiliar with the area, plaintiff had the funds to purchase  
17 supplies for both ships, and plaintiff was preparing to leave for a week-long vacation. Dkt. # 43,  
18 Ex. M. Plaintiff refused, and Ms. Holloway, concerned that she would be unprepared for her  
19 first week as the lone steward for both the Tracker and the Collector, explained the situation to  
20 her supervisor, the Collector's chief mate Douglas Voss. Dkt. # 43, Ex. L; Dkt. # 43, Ex. M.

21 That same day, Mr. Voss, Mr. Royer, and Mr. Grendahl approached plaintiff and asked  
22 him to bring Ms. Holloway on his shopping trip. Dkt. # 43, Ex. L; Dkt. # 43, Ex. M; Dkt. # 43,  
23 Ex. N; Dkt. # 43, Ex. Q. Plaintiff claims that during this conversation, Mr. Voss accused  
24 plaintiff of harassing Ms. Holloway. Dkt. # 43, Ex. L. Ms. Holloway denies accusing plaintiff  
25 of harassment. Dkt. # 43, Ex. M. Mr. Voyer and Mr. Grendahl deny that anyone accused

1 plaintiff of harassment; rather, they claim that Mr. Grendahl suggested that the conflict between  
2 plaintiff and Ms. Holloway might develop into harassment. Dkt. # 43, Ex. N; Dkt. # 43, Ex. P;  
3 Dkt. # 43, Ex. Q.

4 On February 20, 2013, plaintiff wrote a letter explaining his side of the story. In this  
5 letter, plaintiff states that he refused Mr. Grendahl's request to drive Ms. Holloway to the  
6 grocery store to show her how to order supplies, because he was not comfortable driving Ms.  
7 Holloway in his personal car and because "teaching a woman how to shop is a fool's errand. I  
8 have enough problem[s] with my own wife['s] shopping habits." Dkt. # 43, Ex. L. Plaintiff  
9 claimed that Mr. Grendahl accused him of harassing Ms. Holloway and requested that the  
10 harassment allegations be submitted in writing so that he could contest them. Plaintiff's letter  
11 also asked for a written apology from Mr. Grendahl "for falsely accusing me of harassment in  
12 the workplace of a female coworker and also for accusing me of hurting the morale of my  
13 departmental crewmembers during our last mission – 01/10/2013 to 02/10/2013." Dkt. # 43, Ex.  
14 L. The letter does not attribute this alleged false accusation to discrimination based on plaintiff's  
15 sex, religion, or national origin, nor does it mention any other instances in which plaintiff  
16 himself was harassed. Dkt. # 43, Ex. L.

17 On February 22, 2013, Mr. Voss wrote to defendant Tote Services, Inc.'s human  
18 resources department to report plaintiff's refusal to cooperate with Ms. Holloway. Dkt. # 43, Ex.  
19 O. In this letter, Mr. Voss mentioned that plaintiff had "a history of being very hard to work  
20 with" and expressed "great concerns" about the upcoming meal service changeover from the  
21 Tracker to the Collector, "when the roles are reversed and [plaintiff] will be working for [Ms.  
22 Holloway]." Dkt. # 43, Ex. O.

23 On February 28, 2013, the port engineer for the Tracker and the Collector, Dan Wyman,  
24 hosted a meeting with plaintiff, Ms. Holloway, and other senior crew members from the Tracker  
25 and the Collector. Dkt. # 43, Ex. S. At this meeting, Mr. Wyman characterized plaintiff as "a

1 true chef” with “great pride in his work” who “has a hard time of letting go of control.” Dkt.  
2 # 43, Ex. S. The meeting did not solve the conflict between plaintiff and Ms. Holloway. Dkt.  
3 # 43, Ex. S. The next day, Mr. Wyman hosted a second meeting between plaintiff, Ms.  
4 Holloway, and senior crew members of the Tracker and the Collector. Dkt. # 43, Ex. U.  
5 Plaintiff was issued a verbal warning over his failure to cooperate. Dkt. # 42, Ex. C.

6 Following this second meeting, Robert Rogers, defendant’s vice president of human  
7 resources, emailed the port agent of the Seafarers International Union, of which plaintiff is a  
8 member, to request that a representative from the union speak with plaintiff. Mr. Rogers wrote  
9 that “Mr. Habib is extremely competent as far as food preparation, but also appears to be very  
10 stubborn and set in his ways – much of which may or may not be cultural. Candidly, while Ms.  
11 Holloway seems to be a ‘team player,’ Mr. Habib appears to be the issue going forward.” Dkt.  
12 # 49-2 at 51.

13 On March 2, 2013, the ships’ joint meal service changed over to the Collector. Dkt. # 43,  
14 Ex. V. Plaintiff took scheduled leave from March 2 to March 5, 2013. Dkt. # 41, ¶ 16. On  
15 March 6, 2013, plaintiff failed to report to work aboard the Collector. Later that morning, he  
16 was found working aboard the Tracker. Dkt. # 43, Ex. V. Plaintiff was explicitly directed to  
17 report to the Collector the following day to assist Ms. Holloway in preparing the morning and  
18 noon meals for the crews of the Tracker and the Collector. Dkt. # 41, ¶ 16; Dkt. # 42, Ex. A at  
19 43–44. After this conversation, plaintiff assisted Ms. Holloway in preparing the noon meal  
20 aboard the Collector. Dkt. # 41, ¶ 17; Dkt. # 42, Ex. A at 43–44.

21 On the morning of March 7, 2013, plaintiff hand-delivered a letter to Mr. Wyman,  
22 explaining that the previous morning he had reported to work on the Tracker rather than on the  
23 Collector because he understood that he had been “expressly directed” to do so. Dkt. # 43, Ex.  
24 AA; Dkt. # 41, ¶ 18. In this letter, plaintiff wrote that he could no longer work on the Collector,  
25 but that he would be willing to perform his duties aboard the Tracker. Plaintiff attributed his

1 “low morale” to “the patronizing behavior of [Mr. Royer]” and “the obvious double standard  
2 that has been occurring since [Ms. Holloway] started her unfounded complaints against me.”  
3 Dkt. # 43, Ex. AA.

4 That same morning, plaintiff failed to report to work on the Collector to assist Ms.  
5 Holloway with breakfast preparation as requested. Dkt. # 42, Ex. A at 41–42, 45, 48; Dkt. # 42,  
6 Ex. C. Mr. Wyman issued a warning letter to plaintiff, citing his failure to report and to assist  
7 Ms. Holloway, and warning plaintiff that “repetition of this offense, or any other act of  
8 misconduct will be grounds for your immediate dismissal.” Dkt. # 43, Ex. V. Plaintiff declined  
9 to sign the warning letter and again refused to assist Ms. Holloway with preparation of the noon  
10 meal. Dkt. # 43, Ex. V; Dkt. # 42, Ex. A at 49–50; Dkt. # 42, Ex. C. Later that day, defendant  
11 fired plaintiff, citing his “refus[al] to follow direct orders” to work in collaboration with Ms.  
12 Holloway. Dkt. # 42, Ex. C; Dkt. # 43, Ex. AA.

13 On March 11, 2013, plaintiff filed a grievance report with the Seafarers International  
14 Union. Dkt. # 43, Ex. BB. In his report, plaintiff stated that he had been “expressly told” to  
15 work exclusively aboard the Tracker, and that the decision to reprimand him but not Ms.  
16 Holloway revealed a “blatant [d]ouble standard.” Dkt. # 43, Ex. BB. After investigation, the  
17 Union declined to pursue the grievance, explaining that “[b]ased upon the evidence offered by  
18 the Company, it is unlikely that the Union could persuade an arbitrator that the Company did not  
19 have adequate reason for their decision” and “[i]n this case the employer appears to have  
20 sufficiently supported its reason for the action taken.” Dkt. # 43, Ex. X. In October 2013,  
21 Plaintiff filed a charge with the Regional Director of the National Labor Relations Board,  
22 claiming that the Union had violated its duty to represent him. Upon concluding that there was  
23 insufficient evidence demonstrating that the Union had acted unreasonably, the Regional  
24 Director declined to issue a complaint. Dkt. # 43, Ex. Z; Dkt. # 43, Ex. Y.

25 In November 2013, plaintiff filed a charge of discrimination with the Washington State

1 Human Rights Commission and the federal Equal Employment Opportunity Commission  
2 (EEOC), alleging that on February 14, 2013, he had been falsely accused of harassment, and that  
3 on March 7, 2013, he had been discharged due to discrimination based on his sex, religion,  
4 national origin, and in retaliation for his protests. Dkt. # 43, Ex. CC. In this charge, plaintiff  
5 stated that the date of both the earliest and the latest acts of discrimination was March 7, 2013.  
6 Dkt. # 43, Ex. CC. Plaintiff also appealed the Regional Director's decision to the NLRB's  
7 Office of the General Counsel, but in January 2014 that office denied the appeal. Dkt. # 43, Ex.  
8 Z. In August 2014, the EEOC recommended dismissing plaintiff's charge of discrimination.  
9 Dkt. # 43, Ex. DD.

10 In November 2014, plaintiff filed this lawsuit, alleging discriminatory termination,  
11 harassment, and retaliation in violation of Title VII. Dkt. # 1. Plaintiff filed an amended  
12 complaint in September 2015, adding discrimination claims under the Washington Law Against  
13 Discrimination. Dkt. # 16. Defendant moved for summary judgment, Dkt. # 40, and plaintiff  
14 cross-moved for summary judgment, Dkt. # 48.

## 15 DISCUSSION

### 16 A. Summary Judgment Standard

17 Summary judgment is appropriate when there is no genuine dispute as to any material fact  
18 which would preclude the entry of judgment as a matter of law. Fed. R. Civ. P. 56(a). The  
19 moving party bears the initial burden of identifying those portions of the pleadings, depositions,  
20 answers to interrogatories, admissions, and affidavits, if any, that demonstrate the absence of a  
21 genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the  
22 moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving party  
23 fails to designate specific facts showing that there is a genuine issue of material fact for trial. Id.  
24 at 324. An issue is genuine only if there is a sufficient evidentiary basis on which a reasonable  
25 fact finder could find for the nonmoving party. In re Barboza, 545 F.3d 702, 707 (9th Cir.



1 2008). “The mere existence of a scintilla of evidence in support of the non-moving party’s  
2 position is not sufficient,” and factual disputes whose resolution would not affect the outcome of  
3 the suit are irrelevant to the consideration of a motion for summary judgment. Arpin v. Santa  
4 Clara Valley Transp. Agency, 261 F.3d 912, 919 (9th Cir. 2001); Anderson v. Liberty Lobby,  
5 Inc., 477 U.S. 242, 248 (1986). The Court will view the evidence in the light most favorable to  
6 the nonmoving party and draw all reasonable inferences in that party’s favor. Mueller v. Auker,  
7 576 F.3d 979, 991 (9th Cir. 2009).

## 8 **B. Claims Under Title VII of the Civil Rights Act of 1964**

9 Plaintiff asserts claims under Title VII of the Civil Rights Act of 1964 (“Title VII”), 42  
10 U.S.C. § 2000e-2(a), for wrongful termination, disparate treatment, and hostile work  
11 environment. Dkt. # 16, ¶¶ 4.1–4.3. Defendant argues that plaintiff has failed to exhaust his  
12 administrative remedies for all but his wrongful termination claim, Dkt. # 40 at 9–14, and that  
13 the wrongful termination claim fails as a matter of law, Dkt. # 40 at 14–20.

### 14 **1. Exhaustion Through EEOC Charge of Discrimination**

15 Title VII requires claimants to exhaust administrative remedies through the EEOC before  
16 filing in federal court. 42 U.S.C. § 2000e-5(e). Filing an EEOC charge of discrimination  
17 satisfies the exhaustion requirement for all allegations of discrimination that either “fell within  
18 the scope of the EEOC’s *actual* investigation or an EEOC investigation which *can reasonably be*  
19 *expected* to grow out of the charge of discrimination.” B.K.B. v. Maui Police Dep’t, 276 F.3d  
20 1091, 1100 (9th Cir. 2002). The language of the EEOC charge is to be construed “with utmost  
21 liberality”; claims that are “like or reasonably related to the allegations contained in the EEOC  
22 charge” are considered exhausted. Id. In determining whether allegations not specified in the  
23 EEOC charge are exhausted, a court may consider

24 such factors as the alleged basis of the discrimination, dates of the  
25 discriminatory acts specified within the charge, perpetrators of

1 discrimination named in the charge, and any locations at which  
2 discrimination is alleged to have occurred. In addition, the court should  
3 consider plaintiff's civil claims to be reasonably related to allegations  
4 in the charge to the extent that those claims are consistent with the  
5 plaintiff's original theory of the case.

5 Id.

6 Plaintiff's EEOC charge of discrimination, Dkt. # 43, Ex. CC, satisfies Title VII's  
7 exhaustion requirement as to plaintiff's claims for wrongful termination and disparate treatment,  
8 but not as to plaintiff's claim for hostile work environment. The charge alleges that plaintiff was  
9 falsely accused of harassment, and that this accusation was the result of discrimination based on  
10 plaintiff's sex (male), religion (Muslim), and national origin ("Arab"). The charge further  
11 alleges that plaintiff's discharge was the result of the same discrimination, and also retaliation  
12 for plaintiff's protests against the allegedly discriminatory harassment accusation. Dkt. # 43, Ex.  
13 CC. Accordingly, plaintiff has satisfied Title VII's exhaustion requirement for his claims of  
14 disparate treatment and wrongful termination.

15 The charge does not allege, however, that plaintiff experienced discriminatory treatment  
16 beyond these two incidents, and thus does not allege that plaintiff was subject to harassment so  
17 pervasive that it created an abusive working environment. See Meritor Sav. Bank, FSB v.  
18 Vinson, 477 U.S. 57, 66 (1986) (recognizing claim for hostile work environment under 42  
19 U.S.C. § 2000e-2(a)(1)); Swinnie v. Geren, 379 F. App'x 665, 667 (9th Cir. 2010) (finding  
20 hostile work environment claim not exhausted where EEOC charge alleged "discrete acts of  
21 discrimination" that "would not have put the EEOC investigator on notice of a pattern of  
22 conduct 'sufficiently severe or pervasive' so as to create an 'abusive work environment'"  
23 (quoting Manatt v. Bank of Am., 339 F.3d 792, 798 (9th Cir. 2003))). Accordingly, plaintiff has  
24 failed to exhaust his administrative remedies for his hostile work environment claim, and the  
25 Court lacks subject-matter jurisdiction to hear it. See B.K.B., 276 F.3d at 1100.

1 Defendant's motion for summary judgment is granted as to plaintiff's Title VII claim for  
2 hostile work environment.

3 **2. Merits of Remaining Title VII Claims**

4 A plaintiff alleging employment discrimination can survive a motion for summary  
5 judgment on a Title VII claim by establishing a prima facie case of discrimination and then, if  
6 the defendant proffers a non-discriminatory explanation for the adverse action, by identifying a  
7 genuine issue of material fact as to whether the defendant's explanation is pretextual. See  
8 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). At the summary judgment stage,  
9 the "requisite degree of proof necessary to establish a prima facie case for Title VII . . . is  
10 minimal and does not even need to rise to the level of a preponderance of the evidence."  
11 Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1062 (9th Cir. 2002).

12 To establish a prima facie case of disparate treatment, plaintiff must show that (1) he  
13 belongs to a protected class; (2) he was qualified for his position as steward; (3) he experienced  
14 an adverse employment action; and (4) someone similarly situated was treated more favorably.  
15 Villiarimo, 281 F.3d at 1062. Similarly, to establish a prima facie case of wrongful termination,  
16 plaintiff must show that (1) he belongs to a protected class; (2) he was performing his job in a  
17 satisfactory manner; (3) he was discharged; and (4) the employer sought a replacement with  
18 qualifications similar to those of plaintiff. See Rose v. Wells Fargo & Co., 902 F.2d 1417, 1421  
19 (9th Cir. 1990).

20 Plaintiff has failed to state a prima facie case of either claim. Plaintiff has successfully  
21 met the first element of both claims by showing that he is a Muslim male of Algerian national  
22 origin, and the third element of both claims by showing that he was fired. Plaintiff's case,  
23 however, falls short on the second element of both claims.

24 Plaintiff has not identified sufficient evidence showing that he was performing his job  
25 satisfactorily. It is uncontested that plaintiff's performance evaluations were broadly positive,

1 and that he received glowing feedback on the quality of his cooking. But it is also uncontested  
2 that plaintiff disobeyed direct orders to work cooperatively with Ms. Holloway, though plaintiff  
3 argues that he was justified in disobeying those orders. See Pejic v. Hughes Helicopters, Inc.,  
4 840 F.2d 667, 674 (9th Cir. 1988) (holding that plaintiff had failed to show satisfactory  
5 performance where plaintiff failed to pay union dues, a condition of employment); see also  
6 Villiarimo, 281 F.3d at 1062 & n.8 (noting that it was not clear plaintiff had shown she was  
7 qualified for her position where plaintiff did not dispute that she had failed to perform important  
8 tasks and was told that she was terminated due to her failure to perform her job satisfactorily).  
9 Accordingly, plaintiff has failed to state a prima facie claim for either disparate treatment or  
10 wrongful termination.<sup>1</sup>

11 A plaintiff can also defeat a motion for summary judgment by producing direct or  
12 circumstantial evidence creating a genuine issue of fact as to whether a discriminatory reason  
13 motivated the defendant’s adverse employment action. Pacific Shores Props., LLC v. City of  
14 Newport Beach, 730 F.3d 1142, 1158–59 (9th Cir. 2013). Plaintiff has introduced evidence that  
15 Mr. Royer and other members of the Tracker’s crew held racist and Islamophobic views:  
16 specifically, testimony that crew members regularly referred to African-Americans using racist  
17 slurs and referred to plaintiff as “the Arab” and a “terrorist hijacker,” and evidence that one of  
18 defendant’s human resources administrators believed that stubbornness was a “cultural”  
19 characteristic. Dkt. # 49-1 at 3–7, 15–21, 37–41, 57; Dkt. # 49-2 at 1–11, 51. This evidence  
20 primarily supports plaintiff’s exhaustion-barred hostile work environment claim, but to the  
21 extent it constitutes circumstantial evidence of discrimination motivating plaintiff’s termination,

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22  
23 <sup>1</sup> Plaintiff also fails to identify a similarly situated employee who was treated more favorably.  
24 Though plaintiff sees an “obvious double-standard” in defendant’s failure to discipline Ms. Holloway  
25 for their conflict, Dkt. # 43, Ex. AA, plaintiff has not offered any evidence suggesting that Ms.  
Holloway was unwilling to work with him. Thus, plaintiff and Ms. Holloway are not similarly situated  
because he disobeyed orders to cooperate and she did not.

1 the Court concludes that the evidence, even when viewed in the light most favorable to plaintiff,  
2 does not create a genuine issue of fact as to whether that bigotry – rather than plaintiff’s failure  
3 to cooperate with Ms. Holloway – motivated the firing.

4 Specifically, plaintiff does not offer any evidence of bigotry on the part of Mr. Wyman,  
5 the port engineer with authority over the crews of both ships who oversaw two meetings  
6 attempting to resolve plaintiff’s dispute with Ms. Holloway and who eventually made the  
7 decision to fire plaintiff. See Dkt. # 41. Mr. Wyman personally instructed plaintiff on multiple  
8 occasions to cooperate with Ms. Holloway, and when plaintiff did not comply, Mr. Wyman  
9 delivered a warning letter to plaintiff informing him that repeated noncompliance would result in  
10 dismissal. When plaintiff failed to report on March 7, 2013, Mr. Wyman prepared and  
11 personally delivered plaintiff’s discharge letter. Dkt. # 41, ¶ 20. In light of this evidence and the  
12 rest of the record, the Court concludes that plaintiff has failed to identify a genuine issue of fact  
13 regarding the motivation for plaintiff’s termination. See DeHorney v. Bank of Am. Nat. Trust &  
14 Sav. Ass’n, 879 F.2d 459, 468 (9th Cir. 1989) (per curiam) (affirming summary judgment for  
15 lack of evidence of discriminatory motivation where plaintiff presented no evidence that  
16 “ultimate decision maker” was tainted by racial bias, and thus there was no “nexus between the  
17 alleged racially biased statements and the decision to terminate”).

18 Defendant’s motion for summary judgment is granted as to plaintiff’s Title VII claims for  
19 disparate treatment and wrongful termination.

## 20 **C. Claims Under Washington’s Law Against Discrimination**

21 Plaintiff also asserts claims under Washington’s Law Against Discrimination (WLAD),  
22 RCW 49.60, *et seq.*, for wrongful termination, disparate treatment, and hostile work  
23 environment.

### 24 **1. Wrongful Termination**

25 WLAD makes it an unfair practice for any employer to discharge a person from

1 employment because of “race, creed, color, [or] national origin.” RCW 49.60.180(2). To  
2 establish a prima facie case of wrongful termination, “an employee must demonstrate that he or  
3 she (1) belongs in a protected class; (2) was discharged; (3) was doing satisfactory work; and (4)  
4 was replaced by someone not in the protected class.” Plemmons v. U.S. Bancorp, 2006 WL  
5 290557, at \*3 (W.D. Wash. Feb. 7, 2006). Washington courts often look to federal case law on  
6 Title VII when interpreting the WLAD. Blackburn v. State, 186 Wn.2d 250, 257–58 (2016).  
7 For all the reasons set forth above, see supra Part B.2, plaintiff has failed to show that he was  
8 doing satisfactory work and accordingly fails to state a prima facie claim of wrongful  
9 termination under WLAD. Defendant’s motion for summary judgment as to this claim is  
10 granted.

## 11 **2. Disparate Treatment**

12 WLAD forbids any employer to discriminate against any person in the conditions of their  
13 employment because of “race, creed, color, [or] national origin.” RCW 49.60.180(3). To  
14 establish a prima facie case of disparate treatment, plaintiff must show that the employer “treats  
15 some people less favorably than others because of their race, color, religion, sex, or national  
16 origin.” Blackburn, 186 Wn.2d at 258. In a disparate treatment case, the plaintiff has the burden  
17 of proving that a discriminatory animus more likely than not motivated the employer’s practices.  
18 Shannon v. Pay ‘N Save Corp., 104 Wn.2d 722, 727 (1985), abrogated on other grounds by Blair  
19 v. Wash. State University, 108 Wn.2d 558, 573 (1987). As set forth above, see supra Part B.2,  
20 plaintiff has failed to identify a genuine issue of fact as to whether his termination was motivated  
21 by discrimination. Defendant’s motion for summary judgment on this claim is granted.

## 22 **3. Hostile Work Environment**

23 WLAD prohibits harassment based on a protected characteristic that rises to the level of a  
24 hostile work environment. See RCW 49.60.180(3). “An employee must demonstrate four  
25 elements for a hostile work environment claim: that the harassment (1) was unwelcome, (2) was

1 because of a protected characteristic, (3) affected the terms or conditions of employment, and (4)  
2 is imputable to the employer.” Blackburn, 375 P.3d at 1081. Unlike Title VII, WLAD does not  
3 require a claimant to pursue his hostile work environment claim through administrative remedies  
4 before filing in federal court. Gonzalez v. Nat’l R.R. Passenger Corp., 376 F. App’x 744, 746  
5 (9th Cir. 2010).

6 As described above, plaintiff has identified evidence of bigoted harassment by plaintiff’s  
7 coworkers, including by Mr. Royer, plaintiff’s supervisor. Defendant argues that it cannot be  
8 held vicariously liable for any hostile work environment that plaintiff may have experienced  
9 because (1) it exercised reasonable care to prevent and correct any harassing behavior by  
10 plaintiff’s supervisor, and (2) plaintiff unreasonably failed to take advantage of the preventive or  
11 corrective opportunities that defendant provided. See Vance v. Ball State Univ., 570 U.S. 2434,  
12 2439 (2013). This affirmative defense is available only where the plaintiff suffered no tangible  
13 job consequences as a result of the supervisor’s actions. Burlington Indus., Inc. v. Ellerth, 524  
14 U.S. 742, 765 (1998). As explained above, the tangible job consequence in this case – plaintiff’s  
15 termination – resulted from plaintiff’s explicit disobedience rather than from discrimination.  
16 Accordingly, defendant can escape vicarious liability for any hostile work environment created  
17 by plaintiff’s supervisor if it can show both (1) defendant’s reasonable care and (2) plaintiff’s  
18 unreasonable failure to avail himself of preventive opportunities.

19 Defendant has met that burden here by introducing evidence of its anti-harassment policy,  
20 Dkt. # 43, Ex. GG, HH, evidence of plaintiff’s awareness of that policy, Dkt. # 43, Ex. HH, and  
21 evidence of plaintiff’s failure to mention a pattern of harassment at any time before filing this  
22 lawsuit in November 2014, including during Mr. Wyman’s two meetings with plaintiff and Ms.  
23 Holloway in which he asked both of them directly whether they felt as though they were  
24 experiencing harassment, Dkt. # 41, ¶¶ 13–15. In light of this evidence, defendant cannot be  
25 held vicariously liable for the alleged hostile actions of defendant’s other employees. See

1 Ellerth, 524 U.S. at 765.

2 For all the foregoing reasons, defendant's motion for summary judgment (Dkt. # 40) is  
3 GRANTED. Plaintiff's cross-motion for summary judgment (Dkt. # 48) is DENIED.  
4 Defendant's motions in limine (Dkt. # 69) are DENIED as moot. The Clerk of Court is directed  
5 to enter judgment against plaintiff and in favor of defendant.  
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8 SO ORDERED this 11th day of January, 2017.

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11 Robert S. Lasnik  
12 United States District Judge  
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26 ORDER GRANTING DEFENDANT'S  
27 MOTION FOR SUMMARY JUDGMENT AND  
28 DENYING PLAINTIFF'S CROSS-MOTION  
FOR SUMMARY JUDGMENT - 16