



**UNITED STATES DEPARTMENT OF COMMERCE**

**NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION**

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<b>IN THE MATTER OF:</b> )	<b>DOCKET NUMBER:</b>
)	)
<b>William Cloud,</b> )	<b>AK1202525</b>
)	<b>F/V ARCTURUS</b>
<b>Respondent.</b> )	)
_____ )	<b>Date Issued: October 31, 2016</b>

**INITIAL DECISION AND ORDER**

**Before:** M. Lisa Buschmann  
Administrative Law Judge,  
United States Environmental Protection Agency<sup>1</sup>

**Appearances:**

**For the National Oceanic and Atmospheric Administration:**

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**For the Respondent:**

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<sup>1</sup> The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. See 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

## **I. Statement of the Case**

On July 18, 2014, counsel for the National Oceanic and Atmospheric Administration (“NOAA” or “Agency”) issued a Notice of Violation and Assessment of Administrative Penalty (“NOVA”) to William Cloud (“Respondent”). The NOVA alleges that on July 8, 2012, the Respondent violated the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”), 16 U.S.C. § 1857(1)(A), and its implementing regulation at 50 C.F.R. § 679.7(g)(5), by harassing an observer with conduct that had sexual connotations, had the purpose or effect of interfering with the observer’s work performance, or that otherwise created an intimidating, hostile, or offensive environment. Specifically, the NOVA alleges that the Respondent, a crew member aboard the F/V Arcturus, entered the stateroom of a female groundfish observer, closed the door to the stateroom, sat on her bed uninvited, failed to leave when she said “no” when he asked if he could watch a movie with her, and climbed over her to lie next to her in her bunk uninvited. The Agency proposed a total penalty of \$17,500 for the alleged violation.

The Respondent, through counsel, denied the violation and requested a hearing by Response filed on July 23, 2014. Thereafter I was designated to preside over this matter. The Agency and the Respondent each submitted their Preliminary Position on Issues and Procedures (“PPIP”). In its PPIP, the Agency identified the observer alleged to be subject to harassment as Tracy Grimes (“Grimes”). Agency PPIP at 1–2.

A hearing in this matter was held at the William Kenzo Nakamura Federal Courthouse in Seattle, Washington on April 21, 2015. At the hearing, the parties submitted joint stipulations, which were made a part of the record as Court’s Exhibit 1 (“CX 1”). Additionally, the Agency submitted three exhibits, all of which were admitted into evidence (“GX 1–3”). The Agency called three witnesses at the hearing: Special Agent Jaclyn Smith, Aaron Baldwin, and Tracy Grimes. The Respondent appeared and testified on his behalf at the hearing. The Respondent also offered written declarations from Captains Wes Swimlar and Jeff Freese as written testimony at the hearing, which were objected to by the Agency. Transcript of Proceedings (“Tr.”) 159–62. These two declarations were not admitted into evidence because they were not made under oath and the witnesses were not subject to cross examination, as required by 15 C.F.R. § 904.251(c). See Tr. 162–63.

Following the hearing, the Agency moved to conform the transcript of the hearing to actual testimony, and this motion was granted. Thereafter, the parties timely filed their post-hearing briefs, and the Agency timely submitted a post-hearing reply brief.<sup>2</sup> Consistent with the Order Scheduling Post-Hearing Submissions, the record closed on July 17, 2015.

After a careful review of the entire record, I find that NOAA did not establish by a preponderance of the evidence that the Respondent harassed an observer in violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and the implementing regulations, 50 C.F.R. § 679.7(g)(5).

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<sup>2</sup> The Order Scheduling Post-Hearing Submissions directed the parties to file and serve any post-hearing reply briefs by July 17, 2015. The Respondent did not submit a post-hearing reply brief.

## **II. Applicable Statutory and Regulatory Provisions**

The Magnuson-Stevens Act, 16 U.S.C. §§ 1801–1891d, as amended, was enacted, *inter alia*, to “conserve and manage the fishery resources found off the coasts of the United States,” 16 U.S.C. § 1801(b)(1), and “to promote domestic commercial and recreational fishing under sound conservation and management principles.” 16 U.S.C. § 1801(b)(3). The Act makes it “unlawful . . . for any person . . . to violate any provision of this Act or any regulation or permit issued pursuant to this Act.” 16 U.S.C. § 1857(1)(A). Additionally, the Act makes it unlawful for any person “to forcibly assault, resist, oppose, impede, intimidate, sexually harass, bribe, or interfere with any observer on a vessel . . . .” 16 U.S.C. § 1857(1)(L). The assessment of civil penalties is authorized under Section 1858(a) of the Act for such prohibited conduct. 16 U.S.C. § 1858(a).

The Act authorizes the Secretary of Commerce, in conjunction with Regional Fisheries Management Councils, to approve fishery management plans and promulgate regulations to implement these plans. 16 U.S.C. § 1854(a)–(b). In accordance with the Act, any fishery management plan may require that one or more observers be carried on board a vessel engaged in fishing for species subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery. 16 U.S.C. § 1853(b)(8). Pursuant to this authority, the Secretary of Commerce promulgated regulations to implement a fishery management plan governing commercial fishing for groundfish in the Bering Sea and Aleutian Islands Management Area (“BSAI”) in the Exclusive Economic Zone off Alaska. *See* 50 C.F.R. § 679.1(b). These regulations establish that it is unlawful for any person to:

[h]arass an observer by conduct that has sexual connotations, has the purpose or effect of interfering with the observer’s work performance, or otherwise creates an intimidating, hostile, or offensive environment. In determining whether conduct constitutes harassment, the totality of the circumstances, including the nature of the conduct and the context in which it occurred, will be considered. The determination of the legality of a particular action will be made from the facts on a case-by-case basis.

50 C.F.R. § 679.7(g)(5).

The regulations under the Magnuson-Stevens Act define the term “harass” as “to unreasonably interfere with an individual’s work performance, or to engage in conduct that creates an intimidating, hostile, or offensive environment.” 50 C.F.R. § 600.10.

## **III. Findings of Fact**

The following findings are based on a thorough and careful review and analysis of the testimony of the witnesses, the exhibits entered into evidence, and the entire record as a whole.

1. At all times relevant to this proceeding, Grimes was an “observer” as defined by the Magnuson-Stevens Act and regulations thereunder. CX 1 ¶¶ 2, 3. She was certified by

NMFS and employed by Saltwater, Inc., as an observer to carry out observer responsibilities for the federally managed groundfish fishery within the exclusive economic zone off Alaska. CX 1 ¶¶ 4, 9; GX 1 at 81; Tr. 62.

2. She received training as a groundfish observer in December 2011, including training in how to respond to incidents of harassment. Tr. 64-65. After her training, she served as an observer, usually for two 60-day to 90-day contracts per year, until May 2014. Tr. 64. She had worked on one other vessel as an observer prior to working on the F/V Arcturus. Tr. 66.
3. On June 7, 2012, Grimes boarded the F/V Arcturus and began work as an observer on the vessel, which was required by federal fishery regulations to have an observer aboard while operating as a catcher vessel engaged in directed fishing for pollock in the Bering Sea. Tr. 65-66, 67-68; CX 1 ¶ 8. Grimes was assigned to provide observer services aboard the vessel until August 5, 2012. CX 1 ¶ 9; Tr. 115. The Arcturus was engaged in fishing for Pollock while Grimes worked as an observer on the vessel. Tr. 68-69.
4. While Grimes was on board the Arcturus serving as an observer, the vessel had five crew members, including Respondent and Glenn Sullivan, the vessel captain ("Captain Sullivan"). Tr. 16, 75-76, 119.
5. Respondent was employed as an engineer and deckhand on the Arcturus starting in 2011. CX 1 ¶ 10; Tr. 135.
6. While on the Arcturus, Grimes communicated with her NMFS in-season advisor through the Atlas computer database program. Tr. 73-74; GX 1 at 35-38. She also communicated with family and friends by satellite telephone and the Internet. Tr. 73.
7. In the course of their duties aboard a fishing vessel, observers must work, eat, and sleep in close quarters with the vessel captain and crew during extended deployments at sea. CX 1 ¶ 6.
8. The crew of the Arcturus, including Respondent, was generally helpful to Grimes in her work as an observer. Tr. 77.
9. Grimes socialized, ate meals, watched movies in the galley with the crew members aboard the Arcturus during non-working hours, and Grimes and Respondent occasionally played board games alone in the galley or also with others who were on board. Tr. 18, 75, 77, 119, 136-137, 141.
10. While the Arcturus was at sea, there was a constant rumbling sound of the vessel's engines, so the environment was noisy. Tr. 72, 139, 157-158.
11. From about July 5 through approximately 9:00 on the morning of July 8, 2012, the vessel's ship-to-shore communication systems -- internet and phones -- were not working due to satellite maintenance. Tr. 85, 86, 103; GX 1 at 37, 53.

12. Grimes had a private stateroom on the deck level of the Arcturus. Tr. 79, 83. The room was approximately 8 feet long and 8 feet wide. Tr. 80. It contained an upper bunk, a lower bunk, a closet that protruded from the wall next to the doorway and across from the bunk, and a television mounted to the wall at the foot of the bunk, between the bunk and the closet. Tr. 80; GX 3. There was no chair in the room. Tr. 143; GX 3.
13. On July 7, 2012, at approximately 11:00 p.m., after performing her observer duties, Grimes went to her stateroom, closed the door, changed into her pajamas, and then re-opened the door to her room. Tr. 86–88, 119–20. She secured the door to the wall of her room by a hook and eye mechanism that kept the door open without swinging around. Tr. 89–90.
14. She usually chose to keep her door open when she was in her room. Tr. 88-89, 120-121, 124.
15. Grimes then laid down in her stateroom on the lower bunk underneath a blanket and began watching the movie *Gone with the Wind* on the television. Tr. 13, 88, 91, 94, 125, 142. The lights were off in her room. Tr. 94.
16. On July 8, 2012, at approximately 12:50 a.m., Respondent walked down the hallway past Grimes' stateroom to get some pizza, and when he walked back, he stopped and looked in Grimes' room and saw the movie playing, and then stepped into her room and spoke with her about the movie. Tr. 19, 24, 93–95, 122, 142; GX 1 at 32, 35, 53, 56. He had to step into her room to see the television screen. Tr. 125, 142. He stood between the door and the bunk beds, eating pizza. Tr. 93-94, 122, 142.
17. When Respondent stepped into her room she did not respond to him when he talked to her. Tr. 19, 95; GX 1 at 26, 32, 53. She turned her head toward the wall and put her head under her pillow. Tr. 13, 95; GX 1 at 26.
18. Grimes neither invited Respondent into her stateroom, nor asked him to leave. Tr. 95.
19. Although Grimes had never invited Respondent into her stateroom before, he had entered her room before to inform her of a haulback. Tr. 13-14, 20-21, 70, 96, 136; GX 1 at 32.
20. Respondent then sat down on the door threshold eating pizza and watching the movie. Tr. 143, 151-152, 156.
21. Without saying anything, Respondent unhooked and closed the door to Grimes' stateroom, sat on the floor for a few seconds, and then sat down at or near the foot of her bunk, very near her legs, below her knees. Tr. 14, 19-20, 96–97, 126-127, 143–145, 152, 155-156; GX 1 at 26, 32, 37, 53, 57. She was laying on her right side, with her head toward the forepeak and the door, facing the wall, and her feet toward the television. Tr. 94, 127, 144; GX 3.

22. He did not ask permission from Grimes to sit on her bed before sitting down. Tr. 97; GX 1 at 27, 32, 37, 53.
23. Grimes turned over to lay curled up on her left side and asked Respondent what he was doing. Tr. 98. Respondent asked her if he could sit there and watch the movie. Tr. 24, 30, 98, 142-143; GX 27, 37. Grimes said “no.” Tr. 98; GX 1 at 27, 37, 53. Her voice was nervous and was not loud. Tr. 98.
24. Respondent suddenly leaned his body over her legs, about an inch away from her, and placed his whole back against the wall behind her bunk, reclining on the bed. Tr. 98-99, 126-128, 144, 153-155; GX 1 at 27, 53, 57. As he leaned his body over her legs, “kind of like one moment,” she immediately got out of the bunk with the blanket over her. Tr. 99, 127-128, 144.
25. After she jumped out of the bunk, she looked at Respondent on her bunk, and he was looking at her like nothing was out of the ordinary. Tr. 98-99, 128.
26. Grimes opened her door, exited her stateroom and walked down the hallway into the galley. Tr. 14, 99-100, 107, 144; GX 1 at 27, 37, 38, 57. This occurred at approximately 1:00 a.m. on July 8, 2012. Tr. 100.
27. Respondent then walked out of Grimes’ stateroom. Tr. 100, 144, 153. As he passed Grimes in the galley, he said to her that he was sorry. Tr. 14, 101, 104, 107, 144, 153; GX 1 at 27, 33, 38, 57.
28. Grimes returned to her stateroom and closed and locked the door, but could not sleep. Tr. 101. She tried to access the Internet but it was not working. Tr. 101. At approximately 3:15 a.m., Grimes recorded her interaction with the Respondent in her logbook. Tr. 106-107; GX 1 at 53. She noted in her logbook that she felt “really uncomfortable having to work around [Respondent] now” and that she would “hopefully have arrangements made to leave the boat.” GX 1 at 53.
29. Early in the morning of July 8, 2012, Grimes performed her observer work by sampling the haulback. Tr. 102, 104, 109-110; GX 1 at 37.
30. While Grimes was performing her sampling duties, Respondent approached Grimes and apologized again. Tr. 102, 104; GX 1 at 37.
31. On July 8, 2012, at approximately 9:00 a.m. when the satellites were working again, Grimes called Stacey Hansen, the coordinator at Saltwater, Inc., to report her interaction with the Respondent. Tr. 103. Grimes also reported her interaction with Respondent to her NMFS in-season advisor through the Atlas computer database program. Tr. 23-24, 103-104; GX 1 at 37-38.
32. Also on July 8, Captain Sullivan came to talk to Grimes, and she reported to him the incident with Respondent. GX 1 at 37, 54. He offered to talk to Respondent to settle

matters between Grimes and Respondent, but Grimes asked Captain Sullivan not to talk to Respondent until she is off the vessel. Tr. 108-109; GX 1 at 54.

33. When Julie Sullivan, the captain's wife, who was also aboard the Arcturus, heard about the incident and asked Grimes if she was okay, Grimes briefly mentioned what happened, but did not want to talk to her about it in detail and appeared very upset. Tr. 18, 109; GX 1 at 29-30.
34. After reporting the incident to Captain Sullivan, Grimes did not sample the next haul, and stayed in her room. Tr. 109-110.
35. When this incident was reported by Saltwater, Inc. to Christian Asay, a catcher vessel fleet manager of Trident Seafoods Corporation ("Trident"), which owned the Arcturus, Asay told Captain Sullivan to fire Respondent. Tr. 16, 146, 148. The vessel stopped fishing and proceeded to Dutch Harbor. Tr. 108, 110. At Dutch Harbor, on July 8, 2012, Respondent was removed from the vessel. Tr. 16, 110, 146; GX 1 at 27, 54. Respondent was fired later by Asay due to the incident with Grimes. Tr. 146-148.
36. The Arcturus proceeded earlier than anticipated to the Trident processing plant in Akutan, Alaska to offload the fish onboard, arriving on July 9, 2012. Tr. 50-51, 110-111; GX 1 at 43.
37. Grimes was required, as the vessel observer, to monitor 50 percent of the offload. Tr. 52, 111. However, Grimes asked Aaron Baldwin, an observer stationed at the Trident processing plant, if she could skip watching the offload, and told him about the incident with Respondent. Tr. 52, 54. She was crying when she talked about the incident to Baldwin. Tr. 54. He recorded the incident in his logbook, wherein he noted that Grimes was "was extremely upset" and that "even knowing he is off the boat she is afraid to be on it." Tr. 49-50; GX 1 at 40-43. Baldwin therefore agreed to monitor the entire offload, which was much smaller than usual, taking less than an hour. Tr. 54-55, 111.
38. The Arcturus then returned to Dutch Harbor for Grimes to disembark. Tr. 110; GX 1 at 54. She terminated her work as an observer on the Arcturus before the end of her assignment, exiting the vessel in Dutch Harbor on July 9, 2012, due to the incident with Respondent. Tr. 10, 110, 115; GX 1 at 6.
39. Special Agent Jaclyn Smith of the NOAA Fisheries Office of Law Enforcement interviewed Grimes on July 9, and summarized the interview in her investigation report. Tr. 12-13, 112; GX 1 at 26. Grimes suddenly started crying several times during the interview. Tr. 15; GX 1 at 27.
40. In her required observer debriefing on July 13, 2012, Grimes reported the incident with Respondent as sexual harassment. Tr. 112-114; GX 1 at 46.
41. Grimes took some time off visiting family and friends and then returned to work as an observer in September 2012. Tr. 27, 114-116.

42. Grimes contacted Special Agent Smith again in September 2012 and in October 2012 Grimes was interviewed again by Special Agent Smith. Tr. 27, 114; GX 1 at 56.
43. Another observer named Heidi had warned Grimes to “watch out for Cloud while he was drinking.” based on what the observer heard from other observers. Tr. 14, 33-34, 79, 129; GX 1 at 27, 57.
44. Respondent had been employed on fishing vessels for over 20 years and had worked with 30 to 40 observers on the vessels, over half of whom were female. Tr. 133-135, 150. No complaints had been submitted to NOAA about Respondent at the time of the investigation. Tr. 31. He has had no prior violations of the Magnuson-Stevens Act. CX 1 ¶ 11.

#### **IV. Analysis**

##### **A. Burden of Proof**

In an action to establish civil liability under the Magnuson-Stevens Act, the Agency has the burden of proving the alleged violation by the preponderance of “reliable, probative and substantial evidence.” 5 U.S.C. § 556(d); *see also Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. Securities and Exchange Comm’n*, 450 U.S. 91, 100–03 (1981). “The burden of showing something by a preponderance of the evidence . . . requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [judge] of the fact’s existence.” *Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993)(inner quotations omitted, brackets in original). Facts constituting violations of law may be established either by direct or circumstantial evidence. *Watson*, 2010 NOAA LEXIS 8, at \*10 (NOAA, July 17, 2010); *Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at 17 (ALJ, Aug. 17, 2001)(violations may be established by direct or circumstantial evidence).

##### **B. Elements of Violation**

To establish a violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(A) and the implementing regulation at 50 C.F.R. § 679.7(g)(5), the Agency must prove that the Respondent is a person who harassed an observer by conduct that had sexual connotations, had the purpose or effect of interfering with the observer’s work performance, or otherwise created an intimidating, hostile, or offensive environment. 16 U.S.C. § 1857(1)(A); 50 C.F.R. § 679.7(g)(5).

In their joint stipulations, the parties acknowledge that the Respondent is a “person” and that at the time of the alleged violation, Tracy Grimes was an “observer” within the definition of those terms in the Magnuson-Stevens Act, 16 U.S.C. § 1802(36). CX 1 ¶¶ 1, 2. The remaining

issues in dispute are whether Respondent's conduct towards Grimes constitutes harassment by conduct that had sexual connotations, had the purpose or effect of interfering with her work performance, or otherwise created an intimidating, hostile, or offensive environment.

### **C. Parties' Arguments**

The Agency's position is that Respondent's actions had sexual connotations and created an intimidating, hostile and offensive environment, and had the purpose or effect of interfering with Grimes' work performance. NOAA argues that it need not show intent or knowledge on the part of Respondent, because the Magnuson- Stevens Act and implementing regulations do not set forth a scienter requirement. Agency's Post Hearing Brief at 14. The Agency asserts that Respondent's actions had obvious and threatening sexual connotations, and that the evidence establishes that they engendered fear and intimidation in Grimes. *Id.* at 16-17. Noting that there were only two eyewitnesses, the Respondent and Grimes, to the events comprising the alleged violation, the Agency argues that its case should be given considerable weight, given Grimes' sworn testimony at the hearing, supported by the contemporaneous records she made of her encounter with Respondent immediately following the incident in her observer logbook, and in communications with NMFS, and with her employer, Saltwater, Inc. *Id.* at 15-16. Moreover, the Agency highlights that Grimes' account of the events was consistent with statements she later made during two interviews with Special Agent Smith, while Respondent's description of the events was less consistent. *Id.* The Agency points out that as a result of the Respondent's actions, Grimes left the F/V Arcturus almost a month earlier than originally scheduled, and was still too upset the following day to assist with the offload of fish from the vessel. *Id.* at 19. NOAA urges that a "reasonable person" standard should be applied, looking to the totality of the circumstances surrounding the events, and that any reasonable person in her circumstances would have felt upset and fearful for her safety, and harassed and intimidated, as a consequence of Respondent's "physically threatening behavior" toward Grimes. *Id.* at 16, 18, 19.

The Respondent contends that the Agency failed to meet its burden of proof because the Agency's testimony as to the sequence of events deviated from the initial claims that Grimes reported to Baldwin and Captain Sullivan, that he walked into her cabin and climbed into her bunk. Respondent's Post Trial Brief at 2-4. Respondent additionally contends that Grimes and the Respondent's relationship differed from what the Agency claimed, as they "had spent substantial time together in close quarters on a ship as crew members." *Id.* at 5. Moreover, Respondent maintains that Grimes' actions during the incident contradict her stated desire for sleep and privacy because she never specifically asked Respondent to leave her stateroom. *Id.* Finally, Respondent argues that the Agency's evidence failed to establish any sexual motivation or intent. *Id.* at 6.

### **D. Discussion of Facts and Credibility of the Witnesses**

The accounts of Grimes and Respondent differ regarding their interaction in her stateroom. As to the outset of the incident, Grimes testified that Respondent stood in her room, against the wall between the door and the edge of the bunk beds, eating his pizza, and mentioned

something about the movie, and that she did not respond to him but turned her head toward the wall and put it under her pillow. Tr. 93-95. She testified that after she turned away from him, she heard the door unlatch and close, and “almost immediately” she felt him sit on her bed partially on her legs, just below the knee area, and that she then turned over facing away from the wall, and asked Respondent what he was doing, and he asked her if he could sit and watch the movie from there. Tr. 95-98, 122, 126-127. Grimes testified that she said “no,” and then very suddenly he climbed over her and laid next to her. Tr. 98-99, 127-128.

Respondent testified that when he stepped into her room, he asked her what she was watching and she told him the name of the movie and said that she had a couple other old movies too, and he stood in her room for awhile, eating pizza and watching the movie, and asked her if he could sit there and watch the movie. Tr. 142-143, 158-159. He testified that she did not answer and he sat down on the threshold of the door eating his pizza, but from there he “had to look around” to see the television, so he closed the door and sat on the floor with his back against the forepeak wall facing the television, while he ate three pieces of pizza and drank a bottle of water while watching the movie. Tr. 142-143, 151, 156; see, GX 3. He explained that if he sat on the floor with his back against the open door latched to the forepeak wall he would be “kind of bending the door.” Tr. 151. He testified that he said to her that his butt was hurting and that he needed to sit on something soft, and then sat on the end of her bunk, at the end of her feet, with his feet hanging over the bunk and his whole back leaning against the wall, looking at the television to his right. Tr. 143-145, 152-156. He denied that her legs were touching him or that he crawled over her and laid next to her, stating that he was at the end of her bunk. Tr. 144, 152. The only words that he recalled she spoke during the time he was in her room were while he was standing in her room. Tr. 158-159.

The first significant point on which the two accounts differ is whether Grimes spoke in response to Respondent when he first stepped into her room. The second point is the amount of time between Respondent closing the door and sitting on her bunk. The third point is whether he sat on the floor prior to sitting on her bed. The fourth point is whether he told Grimes that he needed to sit on something soft before he sat on her bed. The fifth is whether he sat partially on her lower legs. The final point is what happened between the time he sat down on her bunk and when she got off the bed.

These points may bear on whether Respondent’s conduct had “sexual connotations, ha[d] the purpose or effect of interfering with the observer’s work performance, or otherwise create[d] an intimidating, hostile, or offensive environment” or they may contribute to determining “the totality of the circumstances, including the nature of the conduct and the context in which it occurred.” 50 C.F.R. § 679.7(g)(5). Therefore, an assessment of credibility of the testimony is necessary.

When evaluating a witness’ credibility, there are various factors that may be considered. Facts as to the witness’ opportunity to observe the event or act at issue are essential in determining the witness’ credibility. 3A Wigmore on Evidence § 1005(f) (Chadbourne rev. 1970). Inconsistency of a witness’ statements raises doubts as to the truthfulness of such statements. 3 Weinstein’s Evidence, ¶ 607[06] (1985), quoting McCormick on Evidence §34 (1954). Bias, including the fact that testimony is self-serving, is a factor to consider in assessing

probative weight of the evidence. *Cigna Fire Underwriters Co. v. MacDonald and Johnson*, 86 F.3d 1260, 1269 (1<sup>st</sup> Cir. 1996). Improbability is also a factor to consider in assessing credibility. *Yan Liu v. Holder*, 640 F.3d 918, 926 (9<sup>th</sup> Cir. 2011). Assessment of the witness' demeanor, based on the judge's observation of the "carriage, behavior, manner, bearing and appearance of a witness" during testimony, is evidence to be taken into account in assessing credibility. *Dyer v. MacDougal*, 201 F.2d 265, 268-69 (2d Cir. 1952).

Grimes' account of her interaction with the Respondent in her stateroom generally is consistent with the statements she wrote soon after the incident; her two interviews with Special Agent Smith; her statements to Aaron Baldwin, her statements to Stacey Hansen, and her testimony at the hearing. See GX 1 at 26-27, 37, 53, 56-57. Special Agent Smith testified that Grimes's account of the incident was generally consistent between the two interviews, which were conducted three months apart. Tr. 30. Grimes' testimony and records regarding her interaction with the Respondent reflect substantial and consistent detail. See generally Tr. 62-124; see also GX 1 at 26-27, 37, 53, 56-57. These factors support a finding that her testimony generally was credible.

As to the first point, whether Grimes spoke in response to Respondent when he first stepped into her room, there were discrepancies between Respondent's account of the incident at the hearing and in his interview with Special Agent Smith on July 11, 2012, a few days after the alleged violation of the incident. According to Special Agent Smith's notes of the interview, Respondent said that when "he stepped in [her room] and started talking to her," Grimes "didn't say anything to him so he stayed in her room." GX 1 at 32. This is consistent with Grimes' testimony that she shoved her head in her pillow and did not respond to him. Tr. 93-95; GX 1 at 37, 53. Yet at the hearing, he testified that she told him what movie she was watching and that she had other old movies too. Tr. 19, 142-143, 156. There is no reason to doubt the accuracy of Agent Smith's notes or Grimes' testimony on this point, but there is some reason to doubt Respondent's testimony at the hearing. Saying that Grimes responded to him would suggest more receptivity to his presence than silence, so Respondent may have slanted his testimony to justify his entering her room. Even if she did speak initially, the evidence consistently shows that when he stepped into her room she did not respond to him when he talked to her.

As to the second point, the amount of time between closing the door and sitting on her bunk, Respondent stated in the interview with Special Agent Smith that he closed the door and "sat watching the movie for about 10 minutes" before he sat on her bunk, and at the hearing he estimated that "it's probably 15, 20 minutes when I sat on the floor." GX 1 at 32; Tr. 145, 151. Grimes, in interviews with Special Agent Smith and in the report to her in-season advisor, did not specify that he sat on her bed immediately, but her statements suggest that he sat on her bunk within a very short period of time after closing the door. GX 1 at 27, 37 ("I heard my door shut and then he was sitting on my bed."), 57 ("After he closed her door he sat on her bed."). In her logbook she wrote "I heard my door shut and next thing I knew, he was sitting on my bed." GX 1 at 53. She testified at the hearing as follows:

Q: Do you recall what you were thinking when you heard the door close?

A: I remember thinking he had left the room.

Q: And what happened next?

A: Almost immediately after I heard the room door shut, I felt someone sit on my – on my bed and partially on my legs.

Q: So it was the respondent sitting on your legs at that point?

A: Yes.

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Q: Do you recall your state of mind at that moment?

A: I was pretty panicked and afraid of what he might do.

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Q: Were you concerned for your safety?

A: Yes.

Q: Did you say anything to the respondent?

A: I turned over and asked him what he was doing.

Tr. 97. She consistently stated that she thought he had left the room after he closed the door. GX 1 at 27, 57. Respondent's testimony of sitting for 10 to 20 minutes in her room after he closed the door and before sitting on her bed is not consistent with her testimony and statements. Moreover, if he sat in her room for such a long time after she thought he had left, it is improbable that she would not have screamed or otherwise expressed extreme alarm when she felt someone suddenly sit on her bed, or that she would not have reported that he hid in her room before sitting on her bed. Additionally, Respondent's estimate as to the amount of time that elapsed while sitting on the floor grew between the interview and the hearing from 10 minutes to 15 or 20 minutes. He admitted he didn't have a watch, and his estimate appears to be based on eating the three pieces of pizza and drinking the bottle of water. He also indicated an estimate of the total time he spent in her room based on the events he saw in the movie. Tr, 145. His estimate as to the length of time he sat on the floor is not reliable, because he watched some movie events and ate some of the pizza before he closed the door. He testified that he got three pieces of pizza and "stood there for awhile and I was eating my pizza, watching the . . . movie . . ." and then sat down on the threshold of the door watching the movie and eating his pizza. Tr. 142-143. Grimes' testimony is more consistent and credible than that of Respondent on this point, and a preponderance of the reliable evidence shows that he sat on her bunk seconds after closing her door.

Given this finding, there would not have been much time for Respondent to sit on the floor after he closed the door. The question of whether or not he sat on the floor is significant with respect to whether closing the door and sitting on her bunk had sexual connotations. He consistently claims that he sat on her bed due to discomfort. Tr. 143-144, 156; GX 1 at 32. He explained that the floor was steel with quarter-inch-thick carpeting. Tr. 143-144. His testimony that he sat on the threshold of the door also could explain some discomfort from sitting on a hard surface. Tr. 143, 152. There is no testimony from Grimes as to whether or not he sat on the floor or door threshold, but she would not have seen him do so because she had her head in her pillow turned toward the wall and away from the door. Tr. 95-98, 158; GX 1 at 26, 53. The only other reasonable explanation for Respondent closing the door is that he intended to approach Grimes for sexual reasons and therefore wanted privacy. As discussed below in the analysis of Respondent's liability, I find that explanation not supported by the evidence. I find that Respondent sat on the floor for a few seconds after closing the door.

The next issue is whether to credit Respondent's testimony as to what he said to Grimes before he sat on her bed. In his interview with Special Agent Smith, he stated that the door was in his way, so he told Grimes that the door was bothering him before he closed the door. GX 1 at 32; Tr. 19. At the hearing, however, he testified that he did not tell Grimes anything but that he "just got up and closed the door." Tr. 142-143, 156. I credit his testimony that he did not say anything to Grimes before he closed the door, as it is not self-serving and is consistent with Grimes' testimony. After he closed the door, he testified, he was sitting on the ground and said "Tracy, my butt's hurting. I need to sit on something soft." Tr. 143-144. He later testified that he said "it was killing my rear." Tr. 156. Special Agent Smith noted that he told her he "sat on her bed because his butt hurt," but her memorandum of the interview does not indicate that he said this aloud to Grimes. GX 1 at 32. These discrepancies, as well as Grimes' testimony, cast some doubt on his testimony that he directed a comment aloud to Grimes about needing to sit on something soft. Yet with the television on and the sound of the vessel engines, and with Grimes facing away from him, Respondent may have said something about his rear hurting that Grimes did not hear. Tr. 72, 139, 156-158. Nevertheless, even if he had said something to that effect, I find that he did not ask permission from Grimes before he sat on her bed.

As to where Respondent sat on the bunk, Grimes' testimony was not unwaveringly consistent with her previous statements. In all of the statements that Grimes made soon after the incident, Grimes only alleged that the Respondent sat on her bed after he entered her stateroom to watch the movie. GX 1 at 27, 37, 53, 57. At the hearing, Grimes testified for the first time that Respondent did not just sit on her bed, but rather sat "partially on [her] legs" as well. Tr. 97. When questioned further about it, Grimes admitted she could not remember that part of the incident that much, and she remembered feeling his body weight on her leg but not a lot of weight on it. Tr. 126. However, if Respondent actually sat on her legs, it should have stood out in her memory and she would have reported it to others and written about it. It would have been particularly memorable because if his weight was on her, she would have had some difficulty when she turned over from laying on her right side to laying on her left side. Tr. 13, 94-95, 127, 144; GX 1 at 26. Respondent denied that he sat on her legs, and testified that he sat down "at the end of her bunk" about two or three inches from her feet, and Special Agent Smith noted that he said he sat "by her legs" in her notes of the interview with him. Tr. 144, 152, 155; GX 1 at 32. I find by a preponderance of the evidence that he sat on the bunk very near her legs, below her knees.

Grimes and Respondent disagree on the point in time when he asked whether he could sit and watch the movie and on what happened after he sat on her bed. Grimes testified that after he sat on her bunk, she asked him what he was doing, he asked her "if he could sit there and watch the movie from there," and she then replied "no." Tr. 98; GX 1 at 27, 37, 53. The statements and testimony of Grimes on this point are very consistent, with the exception that the interview notes of Special Agent Smith do not indicate that Grimes asked him what he was doing. GX 1 at 27. She admitted that she was nervous and that her voice was not loud. Tr. 98. Grimes testified that "[m]aybe one or two seconds later" he very suddenly "climbed over" her, and was laying on his side facing her, with his whole weight reclining on the bed between her and the wall. Tr. 98-99, 127-128. When asked what part of her body he crawled over, she testified, "I don't exactly recall, but I - I feel like it was closer to the legs, because if it was over my body, I feel like I would remember that a lot better." Tr. 126. When asked how close his body was to hers, she

testified, "It was basically touching, like maybe an inch apart," and when asked whether he touched any part of her body when he climbed over her, she responded, "Not that I could remember." Tr. 126-127. She stated that when he laid down, she was "facing away [from him], getting out of the bunk already." Tr. 128. She explained that "it was kind of like one moment where he was crawling over and I realized what was happening and I started getting out." Tr. 127.

She answered questions on the witness stand in a forthright and clear manner, and was honest in admitting aspects of the incident that she could not remember well and facts that tended to be exculpatory to Respondent. Tr. 99, 126, 128. She became emotional during the hearing when she read aloud her message about the incident to her in-season advisor. Tr. 104. She testified that after the incident, in chronological order she was feeling panicked, afraid, "really confused," unable to sleep, unable to look at Respondent's face, "feeling a little bit of anger," and shaken up. Tr. 97, 100-102, 107. Aaron Baldwin observed that when the F/V Arcturus came to port in Akutan, Grimes was crying when she told him about the incident, and he noted that Grimes was "was extremely upset" and that "even knowing he is off the boat she is afraid to be on it." Tr. 54; GX 1 at 40-43. Special Agent Smith observed that Grimes started crying several times during her interview. Tr. 15; GX 1 at 27. According to Special Agent Smith's memoranda of interviews of Julie and Captain Sullivan, Grimes appeared very upset and really shaken up shortly after the incident. Tr. 18; GX 1 at 29-30. These emotions are consistent with an encounter which was genuinely traumatic to her. Furthermore, Grimes has nothing to gain personally by her testimony or by the outcome of this proceeding.

According to Respondent's testimony, he asked her whether he could sit and watch the movie while he was standing near the door, and that when he sat on her bunk she didn't say anything. Tr. 142-144. He testified:

And I went down to the end of her bunk, there, and I sat down -- and I told her this on the phone -- and I sat down at the end of the bunk and my feet were hanging over and my back was leaning against the wall, and she got up, out of the bunk, like that, and walked out the door . . . .

Tr. 144. The person on the phone he was referring to was Special Agent Smith. Tr. 145. This interpolation of a memory of speaking to Special Agent Smith, and his tense appearance during this testimony, indicate that attempting to recall exactly what happened from the time he first sat on her bunk until the moment she got up caused him stress, which suggests either that he was unsure or that he was not telling the whole truth of what happened. When asked more specifically about the position of his body on the bed, he testified that he leaned his head at a "slight angle" to the wall, looking at the television to his right, with his whole back against the bulkhead wall. Tr. 153. He did not indicate that he shifted his position from the time he first sat on the bunk until the time she got up. He denied that his body leaned over her feet or any part of her body, and he stated that she was "curled up in her blanket," and that her feet were to his left, two to three inches away. Tr. 144, 154-155. He guessed that she may have fallen asleep and that he startled her by sitting on the bunk. *Id.*

Considering the testimony of Grimes and Respondent, as well as their demeanor on the witness stand, and the testimony of Special Agent Smith and Aaron Baldwin as to Grimes' appearance when she reported the incident to them, I credit Grimes' description of the events that occurred from the time Respondent sat on her bunk until she left her room, and I credit Respondent's description of events in that time period only to the extent not inconsistent with Grimes' testimony. Therefore, I find that when he sat on her bunk, Grimes turned over to lay curled up on her left side, and asked Respondent what he was doing, and Respondent asked her if he could sit there and watch the movie, and Grimes responded "no," but her voice was nervous and was not loud. Tr. 24, 30, 98, 142-143, 154; GX 1 at 27, 37, 53. He then suddenly leaned his body over her legs, about an inch away from her, and placed his whole back against the wall behind her bunk, reclining on the bed on his side. Tr. 98-99, 126-128, 144, 153-155; GX 1 at 27, 53, 57. As he leaned his body over her legs, she immediately got out of the bunk with the blanket over her. Tr. 99, 127-128, 144.

### **E. Discussion and Conclusions as to Liability**

The question presented is whether, in considering the totality of the circumstances, Respondent harassed Grimes by conduct that had sexual connotations, had the purpose or effect of interfering with her work performance, or otherwise created an intimidating, hostile, or offensive environment. 50 C.F.R. § 679.7(g)(5). There is no evidence that Respondent's conduct was for the purpose of interfering with her work performance, or that it created a hostile environment. Under the regulatory definition of "harass," the remaining questions are whether Respondent engaged in conduct, with or without sexual connotations, that created an intimidating or offensive environment, or that unreasonably interfered with Grimes' work performance. 50 C.F.R. § 600.10.

#### **1. Relevant Case Law**

In making determinations of sexual harassment against observers on fishing vessels, administrative law judges have referred to federal court case law regarding sexual harassment in the context of hostile work environment claims under Title VII of the Civil Rights Act of 1964. *In re James Chan Song Kim*, 2003 NOAA LEXIS 4, at \*\*22-23 (NOAA Jan. 7, 2003). The Supreme Court has held that for harassment to rise to the level of a violation "it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (internal quotations and citations omitted). "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, . . . there is no need for it also to be psychologically injurious." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993) (citing *Meritor*, 477 U.S. at 67). "[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances," including "the frequency of the . . . conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, 510 U.S. at 23 (citing *Meritor*, 477 U.S. at 65-67). To determine whether a sexually objectionable environment has been created, the circumstances "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in

fact did perceive to be so.” *Faragher v. City of Boca Raton*, 524 U.S. 775, 786–87 (1998); see also *Harris*, 510 U.S. at 21–22.

Neither the Act nor the applicable regulations define the term “intimidating,” but a court has defined “intimidate” within the context of a criminal case of a crew member’s sexual harassment of an observer under 16 U.S.C. § 1857(1)(L) as “the use of any words or actions intended or designed to make another person timid or to make that person refrain from doing something that person would otherwise do, or do something that person would not otherwise do.” *United States v. Cusick*, 2012 U.S. Dist. LEXIS 15907, at \*6 (D. Mass. Feb. 9, 2012). The common legal definition of intimidation is “[u]nlawful coercion; extortion; duress; putting in fear.” Black’s Law Dictionary 422 (abridged 5th ed. 1983).

It has been held that “one sexual advance is sufficient to constitute interference with an observer.” *In re Ken Cronce*, 1994 NOAA LEXIS 6 (NOAA Sept. 12, 1994). In *Cronce*, the respondent was held to have caused interference with an observer’s official duties and sexually harassed her where he laid his arm on the observer’s thigh, and later, in the cabin they shared, he stood next to her bunk, wearing only boxer shorts, put his hands on her shoulders and began to move as if he were going to kiss her. She thought he was attempting to climb into her bunk against her wishes. She had difficulty sleeping for the next three nights, due to fear of being attacked, as she continued to share the cabin with him, and she testified that the incident disrupted her state of mind and that she was unable to gather as much data as required. 1994 NOAA LEXIS 6 \* 23-24.

Sexual harassment has been found where there was no physical touch, but where there were repeated gestures, comments or acts that were clearly sexual in nature. *In re Chris Evans*, 1996 NOAA LEXIS 7 (NOAA, April 10, 1996)(crew member harassed observer where he made repetitive advances and lewd comments and physically cornered her, and she then became physically ill and quit her position as an observer); *In re Robert Palmer*, 1996 NOAA LEXIS 8, \*20 (Apr. 10, 1996)(crew member held to have created an extremely abusive work environment constituting harassment where he used excessively foul language in reference to and in discussion with observer, made lewd gestures, called her names, sang crude lyrics to her, and failed to call out safety warnings to her); *United States v. Cusick*, 2012 U.S. Dist. LEXIS 15907, at \*11–12 (D. Mass. Feb. 9, 2012) (defendant sexually harassed an observer, creating an intimidating, hostile or offensive environment, where he repeatedly made sexual comments and stated his vulgar intentions to the observer, and repeatedly ask her for sex).

Where a crew member put his head under a towel surrounding the observer’s bunk in the night and requested to sleep with her, and she told him “no,” to go away and stop bothering her, his conduct was held not to rise to the level of sexual harassment. *In re James Chan Song Kim*, 2003 NOAA LEXIS 4 \* 13, 22-23 (NOAA Jan. 7, 2003). In that case, while the observer felt uncomfortable seeing him afterward, and terminated her position as an observer after completion of the trip, she did not feel in danger from him, did not want to interfere with the captain’s fishing activities, and completed her contract on the vessel. 2003 NOAA LEXIS 4 at \* 23-25. The judge held that it was a single verbal request unaccompanied by a physical threat or assault, and did not intimidate the observer or unreasonably interfere with her work performance in the circumstances of the case. *Id.*

## 2. Whether Respondent's conduct created an intimidating or offensive environment

The actions of Respondent that raise the question of whether his conduct created an intimidating or offensive environment are his entering Grimes' room while she was in her bed, closing the door, and sitting and then reclining in her bunk. Finding of Fact ("FF") 16, 21, 24. To resolve the question, the facts and circumstances surrounding these incidents must be examined. While it is clear that Grimes subjectively felt that the Respondent's actions constituted harassment, but Respondent's actions must be *objectively* analyzed.

The actions occurred within a span of approximately 10 to 20 minutes. Tr. 93, 100, 122, 145, 151. He entered her room at night when her room door was wide open, latched to the wall, and she was watching television with the lights off. Tr. 87-90, 94. He stood between the door and her bunk, about three or four feet away from her, ate pizza, and talked to her about the movie. Tr. 93-94. He had to step into her room to see the television, which he could not see from the doorway because the closet protruded from the wall next to the door between the door and the television, as admitted by Grimes and as evident from the room diagram she drew at the hearing. Tr. 125, 142; GX 3. There were only four other crew members on board, and that evening, no one was in the common area, and the door was closed to the crew member's room across the hall. FF 4; Tr. 123. Grimes had been on board with the crew for a month, and she socialized, ate meals, and watched movies in the galley with the crew members, and she occasionally played board games alone with Respondent in the galley. FF 3, 9. He had entered her room on a prior occasion to inform her of a haulback. FF 19. Respondent was aware that on other vessels female observers share the same cabin as male crew members. Tr. 138-139. In these circumstances, where Respondent had some familiarity with Grimes in a social context on the vessel, the evidence shows that he entered her room to socialize and view the movie while he ate pizza. Grimes apparently assumed this was his purpose, in her testimony that she "wasn't interested in socializing." Tr. 95. She did not ask him to leave, and her explanation, "I think I was a little afraid and I'm just not a very confrontational person" does not show that she was significantly intimidated or offended at this point. Tr. 95. By Grimes keeping her room door open and by her silence and apparent acquiescence, merely turning her head toward the wall and putting her head under the pillow, it was reasonable under the circumstances for Respondent to assume that he was not offending her by standing in her room watching the movie. FF 17.

The next question is whether he created an intimidating or offensive environment when he closed her door, and seconds later, sat on her bunk very near her legs, and then reclined on her bunk. FF 21-24. Grimes testified that when he sat on her bed, she was "pretty panicked and afraid of what he might do," and asked him what he was doing. Tr. 97-98; FF 23. Her reaction indicates that at this point she felt intimidated. However, the Agency has the burden to show that his conduct created an intimidating or offensive environment. Her testimony as to her feelings is only one piece of evidence to consider in determining whether the Agency has met its burden. The circumstances are as follows. He was watching the movie and eating, but was not comfortable sitting on the door threshold. He testified that while he sat on the threshold leaning against the edge of the door, he had to "look around," referring to looking around the closet, which from the doorway was blocking the view of the television. Tr. 125, 142-143, 151-152;

GX 3. He explained that he closed the door because if he sat on the floor against the door while it was latched to the wall, it was “sticking out, so, if you’re leaning against the door you can -- it’s kind of bending the door,” and that with the door closed, he sat on the floor leaning against the forepeak wall directly facing the television. Tr. 142-143, 151-152, 156. Grimes did not voice any objection. At this point Grimes and Respondent apparently had differing assumptions. Grimes assumed that he had left the room. Tr. 97. Respondent appears to have assumed either that Grimes had fallen asleep or that she knew he still was in her room and by her silence, did not object to his closing the door and remaining in her room. Tr. 143. According to Respondent, he then sat on her bunk because his rear end was uncomfortable on the hard floor. Tr. 143-144, 156; GX 1 at 32. Grimes did not give Respondent reason to believe that his actions were making her uncomfortable he was already sitting on her bunk. Tr. 95, 144-145. By asking Grimes whether he could sit there and watch the movie from there, he asked her permission, albeit after the fact, and indicated an intention to watch the movie. Tr. 98.

Grimes’ response, saying “no,” should have been an obvious signal to Respondent that he should immediately get off her bed, and naturally that was Grimes’ expectation. However, she admitted that when she told him “no,” her voice was nervous and was not loud. Tr. 98. Given the noise from the television and the vessel engines, it is possible that he did not hear her. FF 10. There is no evidence as to whether he was looking at her at that moment. Immediately after she said it, he suddenly leaned his body over her legs, about an inch away from her, and placed his whole back against the wall behind her bunk, reclining on the bed with his body facing her. FF 24; Tr. 98-99, 126-128, 144, 153-155; GX 1 at 27, 53, 57. As he moved suddenly toward her, it is understandable that she would be shocked and assume that he had a sexual motive.

However, the evidence shows that there was another motive for his sudden move. He testified that when he was leaning against the wall on her bunk, he was looking at the television. Tr. 153. Grimes did not deny this, stating that at the time he reclined on the bed, she did not see his face, as she was “facing away, getting out of the bunk already.” Tr. 128. The television was to his right, attached to the wall to which the foot of the bunk extended, and located between the bunk and the closet, according to Grimes’ drawing of the room layout. FF 12; Tr. 153; GX 3. Therefore, from where he sat, at or near the foot of the bed, he would not have been able to view the television because it would be parallel to his line of vision. FF 21; GX 3. In order to view the television, he would either have had to sit further up on the bed closer to Grimes’ body, or else lean or recline his body toward her, with his back against the wall behind the bunk for support. See GX 3. His intention to view the television is a logical explanation for leaning over her legs and reclining on the bunk.

The other explanation is that Respondent did hear her say “no” but ignored it, and acted as if he wanted to watch the movie as a pretext to get close to her for sexual reasons. However, the weight of the evidence does not support this explanation. There is no evidence that he touched her, reached for her, spoke or acted in a flirtatious or seductive way, or moved in an attempt to hug or kiss her. There is no evidence that he looked at her when he reclined on the bed. She testified as follows:

Q: Okay. The question’s a little sensitive, but what about Mr. Cloud or what he did or what he said or any movement or anything about him at all was the most upsetting thing

about the whole encounter? Is there any one particular thing that was just the most upsetting thing to you?

A: It was just so out of the blue, really. Out of all the crew members, I've probably talked to him more than anyone, and, so, when this happened, it was just very unexpected, despite, you know, the warning I had from Heidi, yeah.

Tr. 129. It was the unexpected proximity of him on her bed, and his sudden move after she said "no" that shocked her. She testified that when she got out of the bed and looked at him, he looked back at her "like nothing was out of the ordinary," which is consistent with an innocent intent rather than a romantic or sexual intent. FF 25; Tr. 99. His subsequent apologies, saying he was sorry and that he "didn't mean to freak [her] out," do not suggest that he had a sexual motivation. FF 27, 30. Nor does the mere possibility that he could have sat on the top bunk in her room instead of her bottom bunk. Special Agent Smith noted that in her interview, Julie Sullivan stated that in the evening of July 7, 2012 she played a game with Respondent and Grimes and did not see any flirtatious behavior between them. GX 1 at 30.

Respondent's conduct was overly familiar toward Grimes and therefore inappropriate and inconsiderate of her status as an observer and a vulnerable female on board a vessel out at sea. He clearly should have respected Grimes' personal space given that status. However, the weight of the evidence does not show that his conduct was of a sexual nature, or that that it was an attempt to engage in any sexual behavior, creating an intimidating or offensive environment. If Grimes had been a male crew member, Respondent's conduct would not have been, or would barely have been, inappropriate, much less intimidating or offensive, particularly given the small spaces on the vessel. It was because she was a female that his actions, considered alone or in different circumstances, could have been interpreted as having sexual connotations and thus could have been considered intimidating or offensive. Considering the totality of the circumstances, including the nature of his conduct and the facts and circumstances surrounding it, I conclude that the Agency has not shown by a preponderance of the evidence that his conduct created an intimidating or offensive environment.

### 3. Whether Respondent unreasonably interfered with Grimes' work performance

After she exited her room she considered locking herself in the bathroom because she was "very afraid," and she locked her door when she reentered her room and did not sleep that day. Tr. 100-102. She testified that she was afraid of interacting with him again. Tr. 102. In the morning just after the incident, Grimes performed her observer work by sampling the haulback, but later, after reporting the incident to Captain Sullivan, she did not sample the next haul, and stayed in her room. FF 29, 34. She felt "really uncomfortable" having to work around Respondent after the incident, and "couldn't even look at his face." FF 28; Tr. 102. She did not monitor half of the offload as she was required to do when the vessel arrived at the Trident processing plant. FF 37. However, she likely was aware that the amount of offload was much smaller than usual, and indeed it took only an hour, so her request to Aaron Baldwin to skip monitoring the offload does not demonstrate that she chose to impose a significant

inconvenience on Aaron Baldwin due to an inability to work. FF 37. She left her observer duties on the Arcturus before the end of her assignment, exiting the vessel the next day. FF 38. This testimony and evidence show that Respondent's conduct had an adverse effect on Grimes' work performance.

To rise to the level of harassment, however, the conduct must "unreasonably interfere" with her performance, considering "the totality of the circumstances, including the nature of the conduct and the context in which it occurred." 50 C.F.R. §§ 600.10, 679.7(g)(5). While the Agency need not demonstrate that the alleged violator intended to harass or knew he was harassing the observer, harassment cannot be premised merely on the fact that the conduct had the effect of interfering with the observer's work performance based on the subjective view and reactions of the observer. For example, it would be unjust to penalize a crew member on the basis of an observer's mistaken belief that the crew member tried to harm the observer, resulting in interference with her work performance, where he in fact was trying to help the observer with her duties. The effect of a crew member's particular conduct on an observer's work performance may depend on her perception of his conduct, her knowledge of his reputation, the likelihood of being alone with the crew member, reactions of other crew members, her past experience with other crew members, her past experience with sexual misconduct, and her sensitivity, resilience, expectations, and other factors.

Here, Grimes alleged that Respondent sexually harassed her. GX 1 at 46; Tr. 114. This perception was based on his actions being sudden and unexpected, and indeed, she testified she felt confused afterward. Tr. 101, 107, 129. She assumed that his conduct had a sexual motive apparently at least in part due to her perception that he violated her denial of permission to sit on her bed. These perceptions would account for her reactions of fear and avoidance of Respondent, and of her feeling shaken and upset. There were other circumstances that to some extent could have contributed to her reactions to the incident, as follows. She had been warned by another observer to "watch out for Cloud while he was drinking." Tr. 79, 129; FF 43. This was only the second vessel on which she served as an observer. FF 2. She felt homesick while on the vessel, and after the first three weeks she could no longer visit her boyfriend in port. Tr. 123. She was particularly vulnerable due to the vessel being out at sea without the protection of law enforcement, the satellites not working for the two days prior and morning of the incident so she could not contact anyone off the vessel until the next day, and not being "exactly on the friendliest of terms" with the captain when she reported the incident to him. FF 11; Tr. 109; GX 1 at 37. In *James Chan Song Kim*, 2003 NOAA LEXIS 4 \* 13, 23-25, the judge ruled that there was no unreasonable interference with the observer's work performance where she felt uncomfortable seeing the perpetrator after he invaded her personal space with a clearly expressed sexual motive, and she later terminated her position as an observer, but she did not feel in danger from him, did not want to interfere with the captain's fishing activities, the captain made all efforts to prevent crew from interfering with the observer, and she completed her contract on the vessel. 2003 NOAA LEXIS 4 at \* 23-25.

In the present case, a preponderance of the evidence shows that Respondent's conduct was not of a sexual nature. If Grimes had realized that Respondent was not attempting to engage in sexual behavior, then she should not have felt in danger from Respondent or felt the need to leave the vessel. Additionally, his apologies suggest that he was unlikely to engage in any

further questionable behavior. Moreover, on July 8, after being informed of the incident, Captain Sullivan asked Grimes what he could do for her, and Respondent was quickly removed from the vessel the same day, eliminating any possibility of her encountering him again on the vessel. GX 1 at 37, 54; Tr. 146; FF 35. I conclude that the Agency has not shown by a preponderance of the evidence that the conduct of Respondent unreasonably interfered with Grimes' work performance.

#### **V. Ultimate Conclusion**

Based on the evidence of record, taking into consideration the nature and the totality of the circumstances surrounding this event, I find that NOAA failed to establish by a preponderance of the evidence that the Respondent harassed an observer in violation of the Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. § 1857(1)(A), and the implementing regulation, 50 C.F.R. § 679.7(g)(5).

#### **ORDER**

**IT IS HEREBY ORDERED THAT** the Notice of Violation and Assessment of Penalty against Respondent William Cloud is **DISMISSED**.

**PLEASE TAKE NOTICE**, that this Initial Decision becomes effective as the final Agency action, sixty (60) days after the date this Initial Decision is served, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

**PLEASE TAKE FURTHER NOTICE**, that any petition for reconsideration of this Initial Decision must be filed within twenty (20) days after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within fifteen (15) days after a petition is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

**PLEASE TAKE FURTHER NOTICE**, that any petition for review of this decision by the Administrator of NOAA must be filed within thirty (30) days after the date this Initial Decision is served and in accordance with the requirements of 15 C.F.R. § 904.273. If neither party seeks administrative review within thirty (30) days after issuance of this order, this initial decision shall become the final administrative decision of the Agency. A copy of 15 C.F.R. §§ 904.271–904.273 is attached.

*M. Lisa Buschmann*

**M. Lisa Buschmann**  
**Administrative Law Judge**  
**U.S. Environmental Protection Agency**

TITLE 15 -- COMMERCE AND FOREIGN TRADE  
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN  
TRADE  
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION,  
DEPARTMENT OF COMMERCE  
SUBCHAPTER A -- GENERAL REGULATIONS  
PART 904 -- CIVIL PROCEDURES  
SUBPART C -- HEARING AND APPEAL PROCEDURES  
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

- (1) Otherwise provided by statute or regulations;
- (2) The Judge grants a petition for reconsideration under § 904.272; or
- (3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

#### § 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

#### § 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse,

modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

(1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;

(2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;

(3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;

(4) A copy of the Judge's initial decision must be attached to the petition;

(5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

(f) No oral argument on petitions for discretionary review will be allowed.

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(1) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section.

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.