

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

William Cloud,

Respondent.

DOCKET NUMBER:

AK1202525

F/V ARCTURUS

ORDER MODIFYING INITIAL DECISION

I. INTRODUCTION

This matter arises from a petition for discretionary review filed by the National Oceanic and Atmospheric Administration (NOAA or “the Agency”) in the above captioned case, appealing an Initial Decision issued by an Administrative Law Judge (ALJ) on October 31, 2016. In that decision, the ALJ found that the Agency failed to establish by a preponderance of the evidence that Respondent William Cloud harassed an observer in violation of the Magnuson-Stevens Fishery Conservation and Management Act (“Magnuson-Stevens Act” or “Act”) and its implementing regulations. The Agency filed a timely Petition for Administrative Review contending that the ALJ’s Initial Decision relied on invalid case law and an incorrect legal standard. On March 20, 2017, I issued an Order Granting Discretionary Review of this matter.

For the reasons outlined below, the ALJ’s Initial Decision is modified as described in this Order.

II. LEGAL BACKGROUND

Regulations promulgated under the Magnuson-Stevens Act implement a fishery management plan governing commercial fishing for groundfish in the Bering Sea and Aleutian Islands Management Area in the U.S. Exclusive Economic Zone off Alaska. *See* 50 C.F.R. § 679.1(b). In accordance with the Act, these regulations set forth the requirements for carrying observers aboard vessels engaged in fishing for species that are subject to the plan, for the purpose of collecting data necessary for the conservation and management of the fishery. *See* 50 C.F.R. Part 679; *see also* 16 U.S.C. § 1853(b)(8).

The Magnuson-Stevens Act specifically states that it is unlawful to harass an observer, making it illegal 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 regulations pertaining to commercial fishing for groundfish in the Bering Sea emphasize the point, establishing 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.” 50 C.F.R. § 679.7(g)(5). The Bering Sea regulations also clarify the scope of review in determining whether harassment has occurred:

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 Magnuson-Stevens regulations generally define the term “harass” as meaning “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. The Magnuson-Stevens Act authorizes the assessment of civil penalties where the Agency establishes observer harassment. 16 U.S.C. § 1858(a).

III. FACTUAL BACKGROUND

The facts in this matter are not in dispute and are set forth in the Findings of Fact in the ALJ’s Initial Decision. *Initial Decision* at 3-8:

Tracy Grimes, a fishery observer certified by NMFS and employed by Saltwater, Inc., received training as a groundfish observer in December 2011, including training on how to respond to incidents of harassment. *Initial Decision Finding of Fact (FF)* 1, 2. After serving as an observer on one other vessel, Ms. Grimes began working on the 132-foot fishing vessel (F/V) *Arcturus*, on June 7, 2012, and was assigned to provide observer services aboard the vessel until August 5, 2012. *FF* 2, 3; Exhibit 1, Attachment 1, Federal Fisheries Permit 533. While Ms. Grimes was aboard *Arcturus*, the vessel had five crewmembers in addition to her, including Respondent and the vessel captain, Glenn Sullivan. *FF* 4. Respondent was employed as an engineer and deckhand on *Arcturus* starting in 2011. Tr. at 133; *FF* 5.

On July 7, 2012, at approximately 11:00 p.m., after performing her observer duties, Ms. Grimes went to her private stateroom on the deck level of *Arcturus*, closed the door, changed into her pajamas, and then reopened the door to her room. *FF* 12, 13. She usually chose to keep her door open for safety reasons when she was in her room.¹ *FF* 14. Ms. Grimes then lay down in the lower bunk of her bed, underneath a blanket, and began watching a movie with her stateroom lights off. *FF* 15. At approximately 12:50 a.m., Respondent walked down the hallway past Ms. Grimes’ stateroom. When he walked back, he stopped and looked in Ms. Grimes’ room and saw the movie playing, then stepped into her room and spoke to her about the movie. *FF* 16.

Ms. Grimes neither invited Respondent into her stateroom, nor asked him to leave. *FF* 18. When Respondent stepped into Ms. Grimes’ room, she did not respond to him when he talked to her. Instead, she turned her head toward the wall and put her head under her pillow. *FF* 17.

¹ Ms. Grimes testified that based on her observer training, she preferred to keep the door to her room open in case of an emergency, if the boat were to sink and she had to abandon the ship in a survival suit. Tr. at 88-89.

Respondent then sat down on the door threshold eating pizza and watching the movie. *FF* 20. Without saying anything, Respondent unhooked and closed the door to Ms. Grimes' stateroom, sat on the floor for a few seconds, and then moved to sit at or near the foot of Ms. Grimes' bunk, very near her legs, below her knees. *FF* 21. Ms. Grimes was lying on her right side, with her head toward the forepeak and the door, facing the wall, and her feet toward the television. *Id.*

Respondent did not ask permission from Ms. Grimes to sit on her bed before sitting down. *FF* 22. Ms. Grimes turned over to lie curled up on her left side and asked Respondent what he was doing. *FF* 23. Respondent asked her if he could sit there and watch the movie and Ms. Grimes said "no." *Id.* Her voice was nervous and was not loud. *Id.* 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. *FF* 24. As he leaned his body over her legs, she immediately got out of the bunk with the blanket over her. *Id.*

After she jumped out of the bunk, she looked at Respondent on her bunk, and he was looking at her as if nothing was out of the ordinary. *FF* 25. Ms. Grimes opened her door, exited her stateroom and walked down the hallway into the galley. *FF* 26. This occurred at approximately 1:00 a.m. *Id.* Respondent then walked out of Ms. Grimes' stateroom. *FF* 27. As he passed Ms. Grimes in the galley, he said to her that he was sorry. *Id.*

Ms. Grimes returned to her stateroom and closed and locked the door, but could not sleep. *FF* 28. She tried to access the internet but it was not working. *Id.* At approximately 3:15 a.m., Ms. Grimes recorded her interaction with Respondent in her logbook, noting that she felt "really uncomfortable having to work around [Respondent] now," and that she would "hopefully have arrangements made to leave the boat." *Id.*

Early in the morning of July 8, 2012, Ms. Grimes performed her observer work by sampling the haul. *FF* 29. While Ms. Grimes was performing her sampling duties, Respondent approached her and apologized again. *FF* 30. On July 8, 2012, at approximately 9:00 a.m. when the satellites were working again, Ms. Grimes called Stacey Hansen, the coordinator at Saltwater, Inc., to report her interaction with Respondent. *FF* 31. Ms. Grimes also reported her interaction with Respondent to her NMFS in-season advisor through the Atlas computer database program once the internet was working again. *Id.*

Also on July 8, Captain Sullivan came to talk to Ms. Grimes, and she reported to him the incident with Respondent. *FF* 32. He offered to talk to Respondent to settle matters between Ms. Grimes and Respondent, but Ms. Grimes asked Captain Sullivan not to talk to Respondent until she was off the vessel. *Id.* When Julie Sullivan, the captain's wife, who was also aboard the *Arcturus*, heard about the incident and asked Ms. Grimes if she was okay, Ms. Grimes briefly mentioned what happened. *FF* 33. However, Ms. Grimes did not want to talk with her about the incident in detail and appeared very upset. *FF* 33. After reporting the incident to Captain Sullivan, Ms. Grimes did not sample the next haul, and stayed in her room. *FF* 34.

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. *FF* 35. The vessel stopped fishing and proceeded to Dutch Harbor, Alaska where, on July 8, 2012, Respondent was removed from the vessel. *Id.* Respondent was later fired by Trident due to the incident with Ms. Grimes. *Id.*

The *Arcturus* proceeded earlier than anticipated to the Trident processing plant in Akutan, Alaska to offload the fish onboard, arriving on July 9, 2012. *FF* 36. As the vessel observer, Ms. Grimes was required to monitor 50 percent of the offload. *FF* 37. However, Ms. 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. *Id.* She was crying when she talked about the incident to Baldwin. *Id.* He recorded the incident in his logbook, wherein he noted that Ms. Grimes "was extremely upset" and that "even knowing he is off the boat she is afraid to be on it." *Id.* Baldwin therefore agreed to monitor the entire offload, which was much smaller than usual, taking less than an hour. *Id.* The *Arcturus* then returned to Dutch Harbor for Ms. Grimes to disembark. *FF* 38. Ms. Grimes 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. *Id.*

IV. PROCEDURAL HISTORY

On July 18, 2014, the Agency issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) alleging that on or about July 8, 2012, Respondent harassed Ms. Grimes in violation of the Magnuson-Stevens Act, 16 U.S.C. § 1857(1)(L), and its implementing regulation, 50 C.F.R. § 679.7(g)(5). The Agency proposed a civil monetary penalty of \$17,500 for the alleged violation.

Respondent denied the violation and requested a hearing before an ALJ, which was held on April 21, 2015. On October 31, 2016, the ALJ issued an Initial Decision, finding that the Agency failed to establish by a preponderance of the evidence that Respondent harassed an observer in violation of the Magnuson-Stevens Act and its implementing regulations.

On November 30, 2016, the Agency requested discretionary review of the ALJ's Initial Decision by the NOAA Administrator, pursuant to 15 C.F.R. § 904.273. As grounds for review, the Agency alleged that the ALJ relied on an incorrect legal standard in determining whether harassment occurred. Specifically, the Agency argued that the ALJ should have made a determination of harassment from the perspective of a reasonable person similarly situated to Ms. Grimes.

On March 20, 2017, I issued an Order Granting Discretionary Review of the Initial Decision after determining that the ALJ failed to apply the correct legal standard for analyzing whether Respondent harassed Ms. Grimes in violation of 50 C.F.R. § 679.7(g)(5). I specifically requested the parties brief two issues:

1. Whether, when applying the "reasonable person similarly situated" standard, Respondent's conduct had sexual connotations, had the effect of interfering with the observer's work performance and/or created an intimidating or offensive environment in violation of 50 C.F.R. § 679.7(g)(5); and

2. Whether, in accordance with Section 308 of the Magnuson-Stevens Act, 16 U.S.C. §1858, and the Agency's July 1, 2014, "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions," \$17,500 is an appropriate civil penalty amount to assess if it is determined that Respondent violated 50 C.F.R. § 679.7(g)(5).

V. DISCUSSION

To establish civil liability under the Magnuson-Stevens Act, the burden is on the Agency to prove an alleged violation by a 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, 277-78 (1994); *Steadman v. Securities and Exchange Comm'n*, 450 U.S. 91, 100-03 (1981). Having issued an Order Granting Discretionary Review, I now consider the totality of the circumstances to determine whether, by a preponderance of the evidence, the Agency has demonstrated that Respondent harassed Ms. Grimes in violation of 50 C.F.R. § 679.7(g)(5), warranting the assessment of a civil penalty.

- A. Whether, when applying the "reasonable person similarly situated" standard, Respondent's conduct had sexual connotations, had the effect of interfering with the observer's work performance, or created an intimidating or offensive environment in violation of 50 C.F.R. § 679.7(g)(5).

- i. *Standard applied by the ALJ*

In the Initial Decision, the ALJ appropriately looked to federal case law addressing sexual harassment in the context of hostile work environment claims under Title VII of the Civil Rights Act of 1964 to determine whether sexual harassment occurred in this case. *Initial Decision* at 15; *see also* *In re James Chan Song Kim*, 2003 NOAA LEXIS 4, **18-19 (NOAA, Jan. 7, 2003).² The "hostile work environment" line of cases arises from allegations of sexual harassment that unreasonably interfere with an individual's job performance, or create an intimidating, hostile, or offensive work environment. *See* 29 C.F.R. § 1604.11(a).³ When assessing the severity of the offensive conditions resulting in a hostile work environment under Title VII, the Supreme Court has held that the circumstances under review "must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in

² This case was subsequently modified and vacated in part. *See* *James Chan Song Kim*, 2003 NOAA LEXIS 20 (NOAA ALJ, Nov. 6, 2003). However, the line of Title VII precedent cited in the original decision is consistent with subsequent administrative decisions in which ALJs look to Title VII precedent to guide their analysis of harassment allegations under the Magnuson-Stevens Act. *See* *In the Matter of: Hai Van Nguyen*, 2016 WL 5747067 at *26 (NOAA ALJ, Aug. 22, 2016).

³ The U.S. Equal Employment Opportunity Commission's Title VII implementing regulations define harassment on the basis of sex to include "unwelcome sexual advances . . . and other verbal or physical conduct of a sexual nature . . . when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment." 29 C.F.R. § 1604.11(a).

fact did perceive to be so.” See *Faragher v. City of Boca Raton*, 524 U.S. 775, 786-87 (1998); see also *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

In applying this standard in the present case, the ALJ first looked at the Respondent’s conduct in terms of Grimes’ subjective state of mind, finding that it was “clear that Grimes subjectively felt Respondent’s actions constituted harassment.” *Initial Decision* at 17. For the “objective” analysis, the ALJ focused on Respondent’s perspective and whether, objectively, he could have viewed his conduct as inoffensive. *Initial Decision* at 17-20. The ALJ concluded that “it was reasonable under the circumstances for Respondent to assume that he was not offending [Grimes]” and that “[i]f 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.” *Id.* at 17, 20. In arriving at this conclusion, the ALJ noted that:

[i]f Grimes had been a male crewmember, 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.

Initial Decision at 19.

The ALJ’s line of reasoning is inconsistent with controlling law and past NOAA administrative decisions. By looking to Respondent’s testimony and subjective beliefs to discern whether his actions were sexually motivated, the ALJ appears to have relied upon Respondent’s intent in determining whether harassment occurred, instead of whether the complainant’s subjective state was reasonable.⁴ *Initial Decision* at 17-20. While the ALJ acknowledged that, “the Agency need not demonstrate that the alleged violator intended to harass or knew he was harassing the observer,” the Initial Decision suggests that the ALJ put undue focus on Respondent’s state of mind. *Id.* at 20. For example, in concluding that Respondent did not create an intimidating or offensive environment by closing the door to Ms. Grimes’ cabin, sitting on her bed and reclining over her legs, the ALJ noted that Respondent’s “intention to view the television is a logical explanation for leaning over [the observer’s] legs and reclining on the bunk.” *Id.* at 18. The ALJ concluded that “[i]f 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.” *Id.* at 20.

⁴ The Magnuson-Stevens Act and its implementing regulations do not set forth a scienter requirement. As such, civil penalties under the Act are considered strict liability offenses. See *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not required to impose civil penalties under the Magnuson-Stevens Act); see also *Tart v. Massachusetts*, 949 F.2d 490, 502 (1st Cir. 1991) (noting that, “[a]s a general matter, scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind.”); but cf. *United States v. Cusick*, 2012 U.S. Dist. LEXIS 15907, **6-7 (D. Mass. Feb. 9, 2012) (holding that in order to find defendant guilty of a criminal offense for violating 16 U.S.C. § 1857(1)(L), defendant must have either (1) known his conduct unreasonably interfered with a person’s work performance, or (2) known his conduct was creating an intimidating, hostile, or offensive environment).

ii. *Appropriate Legal standard*

Given that the events at issue all occurred offshore of Alaska, the legal standard applied in this matter should be consistent with the prevailing law of the Ninth Circuit,⁵ which has explicitly rejected a general “reasonable person” standard, and instead focused on the perspective of a reasonable victim. *See, e.g., Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991).

In *Ellison*, the Ninth Circuit found that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.” *Ellison*, at 879. The *Ellison* Court noted that the sexual experiences of men and women are different, with women disproportionately subject to rape and sexual assault and therefore more likely to view milder forms of harassment as “merely a prelude to a violent sexual assault.” *Id.* Accordingly, the *Ellison* court applied a reasonable victim standard, focusing specifically on a reasonable victim of the same sex as the plaintiff. *Ellison*, at 879. The Supreme Court and other circuits have held similarly. *See, e.g., Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (Mar. 4, 1998) (“the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances”); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990) (holding that discrimination would detrimentally affect a reasonable person of the same sex in that position); *Yates v. Avco Corp.*, 819 F.2d 630, 636-37 (6th Cir. 1987) (adopting the reasonable woman standard in constructive discharge actions involving sexual harassment by a male supervisor); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1115 (9th Cir. 2004) (affirming that allegations of a racially hostile workplace must be assessed from the perspective of a reasonable person belonging to the racial or ethnic group of the plaintiff).

Recent NOAA administrative decisions involving observer harassment originating within the Ninth Circuit’s jurisdiction similarly have applied the “reasonable person similarly situated” standard. *See In the Matter of: Hai Van Nguyen*, 2016 WL 5747067, *27 (NOAA ALJ, Aug. 22, 2016) (noting that a reasonable person similarly situated to the alleged victim would not necessarily have construed Respondent’s gesture as hostile or offensive); *In the Matter of: Kenneth Lee House*, 2011 WL 7030843, *6, *7 (NOAA ALJ, July 12, 2011) (applying a “reasonable person” standard to determine whether an observer was intimidated by a respondent’s behavior, and concluding that “[a] reasonable person similarly situated to [the observer] would be expected to feel anxiety, intimidation, and fear”); *In the Matter of: Sang Yeol Kim and Kim Fishing Company, Inc.*, 2011 WL 7030845, *2 (NOAA ALJ, July 26, 2011) (determining that the “reasonable person standard is a flexible standard” that contemplates a reasonable person in the situation the observer finds herself in, including consideration of the sex of the observer).

⁵ *See, generally*, 16 U.S.C. § 1858(b) (under the Magnuson-Stevens Act, any person against whom a civil penalty is assessed may obtain review thereof “in the United States district court for the appropriate district”); *see also* 28 U.S.C. § 1391(e) (a civil action in which the defendant is an agency of the United States, or the United States, may be brought in any judicial district in which, *inter alia*, “a substantial part of the events . . . giving rise to the claim occurred”).

Based on this case law, I find that “the reasonable person similarly situated” standard is the appropriate standard to apply in the instant case to determine whether Respondent’s conduct created an intimidating or offensive environment or unreasonably interfered with the observer’s work performance.

- iii. *When applying the “reasonable person similarly situated” standard, Respondent’s conduct constituted harassment under 50 C.F.R. § 679.7(g)(5)*

I now consider whether a reasonable person similarly situated to Ms. Grimes would view Respondent’s conduct as constituting harassment, examining each component of the prohibition against harassing observers in light of this standard.

a) Conduct that has sexual connotations

The preponderance of the evidence supports a finding that a reasonable person similarly situated to Ms. Grimes would have believed that Respondent’s conduct had sexual connotations. The Agency’s Opening and Reply Briefs cite to substantial evidence from the Initial Decision and Transcript that supports this finding:

Respondent entered Ms. Grimes’ private stateroom at approximately 12:50 a.m. on July 8, 2012, when she was in her bunk wearing pajamas underneath a blanket, watching a movie with the lights off in her room. Initial Decision Findings of Fact (FF) 12, 13, 15, 16. Ms. Grimes usually chose to keep her door open when she was in her room for safety reasons. FF 14; Hearing Transcript (“Tr.”), attached as Exhibit 3 to the Agency’s Petition, at 88-89. Initially, Respondent sat on the door threshold. FF 20. Without saying anything, Respondent then unhooked and closed the door to Ms. Grimes’ stateroom. FF 21. Ms. Grimes had previously been warned about Respondent Cloud based on reports of his inappropriate conduct towards female observers on other trips. Tr. 33-34. Respondent 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. FF 21. He did not ask permission from Ms. Grimes to sit on the bed before sitting down. FF 22. [After sitting on Grimes’ bed] Respondent asked her if he could sit there and watch the movie. FF 23. In a nervous but not loud voice, Ms. Grimes said “no.” *Id.* Then 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. FF 24. As he leaned his body over her legs, “kind of like one moment,” Ms. Grimes immediately got out of the bunk with the blanket over her. *Id.* She then opened her door, exited her stateroom and walked down the hallway into the galley. FF 26.

Respondent does not dispute these facts. *See generally, Respondent’s Reply Brief.* Instead, Respondent cites to the Initial Decision, noting that the ALJ concluded, “[t]here 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 . . . [t]here is no evidence that he looked at her when he reclined on the bed.” *Respondent’s Reply Brief* at 3, citing *Initial Decision* at 18. The ALJ also concluded

that Respondent's "intention to view the television is a logical explanation for leaning over her legs and reclining on the bunk." *Id.*

Despite the ALJ's analysis, when viewed through the lens of a reasonable female observer, lying in her bed watching TV, late at night on a vessel at sea, the preponderance of the evidence supports a finding that Respondent's overly familiar conduct had sexual connotations regardless of his intent. Uninvited, Respondent closed the door to Ms. Grimes' private room when the lights were off, sat on her 2.5-foot-wide bunk, and then reclined next to her after she said "no" to his request to sit there. Even the ALJ found that, "it is understandable that [Ms. Grimes] would be shocked and assume that [Respondent] had a sexual motive," and that, "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." *Initial Decision* at 18-19.

Based on these facts, I find that the preponderance of the evidence supports a finding that a reasonable person similarly situated to Ms. Grimes would have believed that Respondent's conduct had sexual connotations.

b) Conduct that creates an intimidating or offensive environment

Neither the Magnuson-Stevens Act, nor its implementing regulations define the terms "intimidating" or "offensive." The common legal definition of "intimidation" is "[u]nlawful coercion; extortion, duress, putting in fear." *Initial Decision* at 16, citing Black's Law Dictionary 422 (abridged 5th ed. 1983). The common legal definition of "offensive" is "[c]ausing displeasure, anger, or resentment; esp., repugnant to the prevailing sense of what is decent or moral." *Initial Decision* at 16, citing Black's Law Dictionary (10th ed. 2014). As noted by the ALJ, hostile work environment sexual harassment may arise from "purely psychological aspects of the workplace environment" that serve to substantially affect the terms and conditions of a victim's employment. *See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

In a similar NOAA case involving observer harassment, a crew member put his head under a towel surrounding a fishery observer's bunk late at night and asked her to engage in sexual intercourse. *In the Matter of: James Chan Song Kim, Askar Ehmes, Ulheelani Corp.*, 2003 NOAA LEXIS 20, *8 (NOAA ALJ, Nov. 6, 2003). On remand, the ALJ found that the respondent's actions created an intimidating and offensive environment constituting harassment. *Id.* at 9-11. The observer stated feeling "very, very uncomfortable" and, while she stayed on the vessel for the remaining 14 days of the trip, she ultimately decided to resign from the Observer Program due in part to the incident. *Id.* at 10.

Like the crew member in *James Chan Song Kim*, I find that Respondent's conduct created an intimidating and offensive environment, putting Ms. Grimes in fear and making her feel uncomfortable around Respondent. As noted in the Agency's Opening Brief, "Ms. Grimes testified that in the minutes just after Respondent climbed into her bunk she was 'very afraid' and considered locking herself in the bathroom, but decided to remain in the galley, 'since it was kind of a public area and if something happened, there were other people downstairs that would hear.'" *Agency's Opening Brief* at 4-5, citing *Initial Decision* at 19 and Tr. 100. After the

incident, Ms. Grimes returned to her stateroom, locked her door, and was unable to sleep. *Agency's Opening Brief* at 5, citing Tr. 87. Ms. Grimes logged the incident into her logbook, writing that she felt "really uncomfortable having to work around [Respondent] now" and that she would "hopefully have arrangements made to leave the boat." *Agency's Opening Brief* at 5, citing *FF* 28.

Ms. Grimes' actions in the days after the incident further establish that she was intimidated and scared. At the first opportune moment, Ms. Grimes called her fishery observer coordinator to report her interaction with Respondent. *FF* 31. Ms. Grimes also reported the incident to the Captain of the ship and her NMFS in-season advisor through their computer database program. *Id.* The captain's wife reported that Ms. Grimes "appeared very upset" and did not want to talk in detail about what had happened. *FF* 33. When the vessel docked in Akutan, Alaska, an observer stationed at the processing plant who agreed to monitor the offload for Ms. Grimes noted in his logbook that "[s]he was crying when she talked about the incident," "was extremely upset," and that "even knowing he is off the boat she is afraid to be on it." *FF* 37. When the NMFS Special Agent interviewed Ms. Grimes the following day, she reported that Ms. Grimes suddenly started crying several times during the interview. *FF* 39. At the hearing, Ms. Grimes testified that the incident involving Respondent was the only reason she left the fishing vessel nearly a month earlier than scheduled. Tr. 115.

When considering the totality of the circumstances, the preponderance of the evidence supports a finding that a reasonable person similarly situated to Ms. Grimes would have felt Respondent's conduct was intimidating and offensive. Respondent's behavior put Ms. Grimes in fear and made it so uncomfortable for her to be on the boat that she arranged to leave the boat as soon as she was able. It is likely that any reasonable person in Ms. Grimes' situation would have likewise been placed in fear if subjected to Respondent's conduct, particularly considering that she was aboard a confined vessel at sea with limited ability to communicate with the outside world.

c) Conduct that has the effect of interfering with an observer's work performance

Regulations under the Magnuson-Stevens Act make it unlawful for any person to "[h]arass an observer by conduct that . . . has the purpose or effect of interfering with the observer's work performance." 50 C.F.R. § 679.7(g)(5).⁶ Past NOAA administrative decisions have concluded that, "'interference' entails behavior by respondents that has the effect of delaying, impeding, or preventing an observer from completing his or her duties." *Hai Van Nguyen*, 2016 WL 5747067, *22; *see also Initial Decision* at 16, citing *In the Matters of Ken Cronce, Brenda Cronce*, 1994 WL 1246358, *9 (NOAA ALJ, Sept. 12, 1994) ("one sexual advance is sufficient to show interference with an observer"). In *Cronce*, a male respondent's sexual advances toward a female

⁶ General regulations under the Magnuson Stevens Act have a more restrictive definition of harass, stating that "harass" means "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 (emphasis added). However, in the present case, the appropriate definition of "harass" is found in the more specific commercial fishing regulations for groundfish in the Bering Sea and Aleutian Islands Management Area in the Exclusive Economic Zone off Alaska, as quoted in the text. *See* 50 C.F.R. §§ 600.10 and 679.7(g)(5).

observer while she was in her bunk at night were found to have interfered with the performance of her duties “because it disrupted her state of mind,” resulting in her inability to collect as much data as required. *Agency’s Opening Brief* at 6-7, citing *Cronce*, 1994 WL 1246358, *9.

In the present case, after the respondent’s actions Ms. Grimes reported feeling “very afraid” and “really uncomfortable,” causing her to lock her bedroom door, lose sleep, avoid interactions with Respondent, skip sampling duties, not monitor fifty percent of the offload as required when the vessel returned to dock, and leave the vessel a month earlier than scheduled. *Initial Decision* at 19-20. Even the ALJ acknowledged that, “Respondent’s conduct had an adverse effect on Grimes’ work performance.” *Agency’s Opening Brief* at 6, citing *Initial Decision* at 20. Accordingly, the preponderance of the evidence shows that Respondent’s actions had the effect of interfering with Ms. Grimes’ work performance, in violation of 50 C.F.R. § 679.7(g)(5).

d) Conclusion

In summary, when viewed through the lens of a “reasonable person similarly situated,” the preponderance of the evidence supports a finding that Respondent’s conduct constituted harassment under 50 C.F.R. § 679.7(g)(5). This harassment is based on any one (or more) of the three alternative grounds described above: (1) the conduct had sexual connotations; (2) the conduct created an intimidating or offensive environment; and (3) the conduct had the effect of interfering with Ms. Grimes’ work performance.

B. Assessment of Civil Penalties

Having determined that Respondent unlawfully harassed Ms. Grimes, I must next determine the appropriate civil penalty to assess in this case. The Magnuson-Stevens Act provides for the assessment of civil penalties up to \$181,071 per violation.⁷ 16 U.S.C. § 1858(a). In assessing a penalty, I must consider several factors including the nature, circumstances, extent, and gravity of the violation, and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require.⁸ 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108(a).

When assessing civil penalties under the Act, the Agency follows its “Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions” (“Penalty Policy”) to ensure that statutory factors are consistently applied, are enforced in a fair and consistent manner, are

⁷ The Magnuson-Stevens Act provides for civil penalties up to \$100,000 per violation. 16 U.S.C. § 1858(a). This amount has been adjusted upward for inflation, pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990. *See* 15 C.F.R. § 6.4; 81 Fed. Reg. 95432, 95435 (Dec. 28, 2016).

⁸ A respondent’s ability to pay is another factor which may be considered, but only if it is raised by the respondent in a timely fashion. In this case, Respondent did not raise the ability to pay as an issue and, as such, it is deemed that Respondent has the ability to pay any civil penalty assessed. 16 U.S.C. § 1858(a); 15 C.F.R. § 904.108.

appropriate for the gravity of the violation, and promote consistency, predictability, and transparency.⁹ As such, I will follow the Penalty Policy in assessing a penalty in this case.

The Penalty Policy provides a base penalty range commensurate with the appropriate gravity-of-offense level¹⁰ and the alleged violator's degree of culpability.¹¹ Once an initial base penalty is established, the Agency may make adjustments within the base penalty range based on a number of factors, including an alleged violator's history of prior offenses, and "other matters as justice may require," such as the alleged violator's conduct after a violation occurs or his/her long history of compliance. Penalty Policy at 9-12; *see also* 16 U.S.C. § 1858(a). The Agency may further adjust the penalty if the alleged violator benefits economically from the violation or cannot afford to pay the penalty. Penalty Policy at 13-15. In the present case, the Agency proposed a civil penalty of \$17,500, classifying the violation as offense level III¹² with a culpability level of "recklessness." *Agency's Opening Brief* at 9.

i. Gravity of Offense

Under the Agency's Penalty Policy, harassing an observer is either a level II or level III offense:

It is a level II offense where the harassment . . . causes minimal interference with the observer's work, and there is no economic gain from the violation. It is a level III offense where the harassment . . . causes significant interference with the observer's work, or there is some economic gain from the violation.

Penalty Policy at 33, note 10.

The Agency classified Respondent's violation as an offense level III, contending that the offense caused "significant interference" with Ms. Grimes' observer work. *Agency's Opening Brief* at 8. Specifically, the Agency asserted that Respondent's conduct caused Ms. Grimes "to discontinue her observer duties and leave the vessel," resulting in Ms. Grimes not sampling a second haul, not monitoring fifty percent of the offload when the vessel returned to the dock, and leaving the vessel almost a month early. The Agency further emphasized the importance of protecting

⁹ See http://www.gc.noaa.gov/documents/Penalty%20Policy_FINAL_07012014_combo.pdf (last visited on Aug. 4, 2017).

¹⁰ The offense levels take into consideration the nature, circumstances, and extent of a violation. Penalty Policy at 7-8.

¹¹ Mental culpability is determined by the following factors: 1) whether the alleged violator took reasonable precautions against the events constituting the violation; 2) How much control the alleged violator had over the events constituting the violation; 3) whether the alleged violator knew or should have known of the potential harm associated with the conduct; and 4) other similar factors as appropriate. Penalty Policy at 9.

¹² The offense level was determined using the offense level guidance for "Violations Regarding the Facilitation of Enforcement, Scientific Monitors, Or Observers" under the "Magnuson-Stevens Act Schedule" in Appendix 3 of the Penalty Policy. *Exhibit #2*; Penalty Policy at 33.

observers from harassment by a vessel operator or crew so that they can safely fulfill their duties without interference. *Id.*

For the reasons described above, there is substantial evidence to support a finding that Respondent's actions significantly interfered with Ms. Grimes' ability to do her job, and thus constituted a level III offense. Due to the fear and discomfort Ms. Grimes experienced because of Respondent's actions, her job performance suffered beyond a minimal amount, and the impacts to Ms. Grimes' duties were significant.

ii. Degree of culpability

The Penalty Policy sets forth four degrees of culpability to determine where a violation falls within the penalty matrix: intentional,¹³ recklessness,¹⁴ negligence,¹⁵ and unintentional.¹⁶ In the present case, there is no evidence to support a finding that Respondent's actions were unintentional since they were not the result of an accident or mistake. On the other hand, there is a lack of evidence to support a finding that Respondent intentionally harassed Ms. Grimes. The Agency applied the culpability level of "recklessness," asserting that "[i]t was entirely foreseeable that Respondent's conduct would result in interference with Ms. Grimes" and that he "acted with conscious disregard of his advances being unwelcome." *Agency's Opening Brief* at 8. The Agency contends that Respondent acted "beyond mere negligent failure to exercise due care." *Id.*

I disagree, and believe that a preponderance of the evidence supports a finding that Respondent's behavior amounted to "negligence" and not "recklessness." Ms. Grimes testified that when she got out of the bed and looked at Respondent, he looked at her "like nothing was out of the ordinary" and apologized, saying he was sorry and that he "didn't mean to freak [her] out." *FF* 27, 30; *Tr.* 99. Respondent appears to have failed to "exercise the degree of care that a reasonably prudent person would exercise in like circumstances," by not clearly seeking permission from Ms. Grimes before entering her stateroom and sitting on her bed. That said, the facts do not establish that Respondent did not care about the consequences of his actions. After Ms. Grimes exited her stateroom and walked down the hallway into the galley, Respondent passed her and told her he was sorry. *FF* 26-27. The following morning when Ms. Grimes was performing her sampling duties, Respondent approached her and apologized again. *FF* 30.

¹³ An "intentional" act is "when a violation is committed deliberately, voluntarily, or willfully, i.e., the alleged violator intends to commit the act that constitutes the violation. A person intends a result when he or she both foresees the results that will arise if certain actions are taken and desires the result to occur." Penalty Policy at 8.

¹⁴ "Recklessness" occurs when a person does not intend a certain result, but can foresee the possibility of their actions having that result and consciously takes that risk. Recklessness also occurs when a person does not care about the consequences of their actions. *Id.* at 9.

¹⁵ "Negligence" is "the failure to exercise the degree of care that a reasonably prudent person would exercise in like circumstances. Negligence denotes a lack of diligence, a disregard of the consequences likely to result from one's actions, or carelessness." *Id.*

¹⁶ An "unintentional" act "is one that is inadvertent, unplanned, and the result of an accident or mistake." *Id.*

Looking at the facts as a whole, I find that the appropriate level of Respondent's culpability is "negligence."

iii. Appropriate Penalty

Based on the Penalty Policy, a level III, negligence violation has a penalty range of \$10,000 to \$15,000, with a midpoint of \$12,500. Penalty Policy at 23. The facts of this case do not support an adjustment to the penalty based on other factors that might apply -- Respondent has no history of prior offenses, did not gain economically from his violation, and did not assert an inability to pay the assessed penalty.

Having carefully considered the evidence presented in this case and the factors set forth in the Magnuson-Stevens Act, implementing regulations, and Agency Penalty Policy, I conclude that the appropriate civil penalty to impose in this case is \$12,500.

VI. CONCLUSION

For the reasons set forth above, I find that Respondent negligently harassed Ms. Grimes in violation of 50 C.F.R. § 679.7(g)(5), causing significant interference with her duties. Accordingly, it is hereby ordered that a civil penalty of twelve thousand five hundred dollars (\$12,500) be assessed against Respondent William Cloud.

This Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

10/16/17

Dated

Ben R

Benjamin Friedman
Deputy Under Secretary for Operations
Performing the duties of Under Secretary
of Commerce for Oceans and Atmosphere
and NOAA Administrator