NO. 94846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals applied well-settled law to determine that Petitioner Dawn Cornwell cannot establish the required causation element of her retaliation claim under the Washington Law Against Discrimination ("WLAD"). Cornwell failed to present evidence that the decision-makers who gave Cornwell a low performance score in 2012 were aware of her alleged protected activity that occurred seven years earlier.

The Court of Appeals properly considered and rejected Cornwell's request that it adopt a new rule of law -- the "corporate knowledge" standard -- for establishing the causation element of a retaliation claim. In Washington, a retaliation claim requires evidence of three things: (1) protected activity; (2) adverse employment action; and (3) a causal connection between the protected activity and the adverse action. The corporate knowledge standard is only applied in some jurisdictions which require the plaintiff to prove an *additional* fourth element (knowledge). Even in those states, however, the knowledge requirement is separate and distinct from the causation element. Cornwell cites no authority holding that corporate knowledge is sufficient to establish causation, and the Court should decline to review this issue.

Cornwell also argues that this Court should accept review to adopt a "knew or suspected" standard in determining whether the decision-

maker had knowledge of protected activity sufficient to establish the causation element of a retaliation claim. The Court of Appeals in fact applied this standard, and explicitly considered and rejected Cornwell's argument that the decision-makers "knew or suspected" she engaged in protected activity, holding that Cornwell failed to provide any evidence – only speculation – to support her claim. Under settled Washington law, speculation is insufficient to survive summary judgment. The Court should deny the Petition for Review.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

Whether the Court of Appeals correctly held that neither "corporate knowledge" nor mere speculation is sufficient to establish a causal link between alleged protected activity and adverse action for purposes of a retaliation claim under the WLAD.

III. RESTATEMENT OF THE CASE

A. Cornwell's Employment with Microsoft and Prior Complaint.

Microsoft hired Cornwell in March 1997. CP 73-75, 79. In 2005, Cornwell complained that her then-supervisor, a female, had a conflict of interest in violation of Microsoft's policy because the supervisor was having a romantic relationship with one of Cornwell's male peers. CP 114-115. At the time, Cornwell obtained a lawyer, threatened litigation, and negotiated a settlement that included a strict confidentiality provision,

barring the parties from discussing the matters involved. CP 116, 111. Following the settlement, Cornwell transferred to a different department at Microsoft and continued working without incident. CP 215. She received promotions and satisfactory performance scores after making her complaint. *Id.* She worked in various roles until transitioning into the position of Release Program Manager, reporting to Mary Anne Blake, in December 2011. CP 84-85.

B. In Late 2011, Cornwell Told Blake That She Had an Unspecified Past Legal Issue Against Microsoft.

Cornwell told Blake that Cornwell had a "previous suit" against Microsoft arising from a "previous issue" with a manager. CP 119-120. Cornwell did not disclose the nature of the "previous issue" or tell her managers what the suit was about. *Id.*; CP 47-48, 54-55. She knew she was bound by the confidentiality clause in the release she signed in connection with the 2005 issue. CP 112, 119.

As a new manager, Blake was not sure how to proceed so she followed up with her assigned Human Resources Manager for guidance. CP 47-50. Blake was initially told there was no record of any lawsuit, and she shared this information with Cornwell. CP 49, 51, 52. That was the only time Blake mentioned the issue to Cornwell. CP 88-89.

In April, Blake and Cornwell had a meeting regarding Cornwell's performance, which left Blake feeling "threatened" by Cornwell's comments during the meeting because Cornwell was hostile and combative and said she "better not be surprised come review time." CP 156-160. Following the meeting, Cornwell sent Blake a lengthy email expressing her dissatisfaction with Blake as a manager, and, among other things, indicating she was surprised that Blake had followed up with Human Resources regarding her legal issue. *Id.* Blake reached out to Human Resources for guidance in working with Cornwell. *Id.*

Eventually, Blake was told that there was an unspecified legal issue in 2005, but that it was resolved and confidential. CP 52, 60. Blake never knew anything regarding the substance of Cornwell's 2005 legal issue during Cornwell's employment. CP 47-48, 54-55, 122. Other than hearing that an unspecified matter was resolved confidentially several years earlier, Blake had no further discussions with anyone at Microsoft concerning this matter and that was the end of her limited inquiry into the subject. CP 49-50, 52-55; CP 122.

Blake's manager at the time was Nicole McKinley. CP 39-40. McKinley also never had any knowledge of the nature of the legal issue. CP 144. McKinley was carbon copied on Blake's email to Human Resources asking about Cornwell's prior claims, but Cornwell never

mentioned the issue to McKinley. *Id*. And, like Blake, McKinley never learned the substance or nature of Cornwell's legal issue during Cornwell's employment, nor did she discuss it with others. *Id.*

Likewise, there is no evidence that any of the Human Resources professionals working with Blake or McKinley had knowledge of the substance of Cornwell's seven year old prior legal issue. CP 49, 51, 52. Emails also prove that the Human Resources representatives working with Blake at the time (Jan Dyer and Mary Stokes) had no knowledge of the legal issues. CP 150-154, 156.

Cornwell relies on a single email from Dyer to McKinley, in which Dyer indicated she would be meeting with LCA (Microsoft's legal team) about Cornwell and would have "LCA eyes on the review write up," CP 161, to argue that there is an inference of knowledge. But there is no evidence that Dyer ever learned the nature of the previous legal issue or that anyone from LCA had a role in deciding that Cornwell would receive a low performance score. Furthermore, there is no evidence that anyone involved in any decision regarding Cornwell in 2012 – not management, Human Resources, nor legal – was involved in resolving Cornwell's 2005 legal issue seven years earlier.

C. Microsoft Laid Cornwell Off as Part of a RIF in September 2012 After Completing her Evaluation.

In early 2012, Blake met with Cornwell and told her she was trending toward a performance score of "4," a low score. CP 65, 67; CP 110-111. Blake continued meeting with Cornwell to discuss performance issues throughout 2012. CP 65-66. Cornwell's final performance score (a "5") was locked into Microsoft's system in August, 2012. CP 129, CP 143.

The same month, McKinley approved the decision to include Cornwell in a larger RIF involving three other employees in McKinley's organization. CP 58-59; CP 144-145. The RIF occurred around the same time that Microsoft was communicating performance reviews to employees. CP 310.

Because the RIF was a group layoff, Microsoft's Human Resources team coordinated the communications to all employees regarding the process of terminating employment. CP 183-184. Blake followed the instructions of her Human Resources representative about notifying Cornwell of the layoff and uploading her evaluation into the system. *Id*. Microsoft informed Cornwell that it was eliminating her position on September 5, 2012. CP 72, 102-106. Cornwell's evaluation score – which was finalized the month prior – was uploaded into the

performance-management system, but not until after Cornwell received notice of the layoff. CP 68. Due to the timing of the RIF, which occurred right before performance meetings were typically held, Blake understood that Cornwell's annual performance review meeting would be replaced by the RIF meeting, and that Blake would not deliver Cornwell's "5" rating. CP 63-64; CP 310. [1]

D. Procedural History.

Microsoft moved for summary judgment on four separate grounds: (1) the decision-makers had no knowledge of any protected activity because they didn't know the basis of Cornwell's 2005 legal issue, and therefore Cornwell could not establish a causal link between any protected activity and any adverse action; (2) Cornwell signed a full release of all "known and unknown claims" against Microsoft, which waives all claims in her lawsuit; (3) Cornwell did not engage in any legally-cognizable "protected activity" that could have led to the retaliation she claims (i.e., the consensual relationship Cornwell complained of between her manager and a coworker does not implicate the WLAD); and (4) Cornwell could not show animus by the relevant decision-makers.

[1] Cornwell signed a Severance Agreement containing a complete release of known and unknown claims. CP 132-136. Her retaliation claim is thus premised upon her "5" performance score, not her termination.

On January 29, 2016, the King County Superior Court granted Microsoft's Motion for Summary Judgment on the first ground. CP 341-342. Cornwell timely appealed and on June 5, 2017, the Court of Appeals affirmed, concluding:

> There is no evidence Blake or McKinley knew that Cornwell's seven-year-old legal action involved protected activities. Cornwell's speculative argument is insufficient to defeat a motion for summary judgment. Cornwell failed to make the prima facie showing that Blake or McKinley had knowledge that she had engaged in a protected activity, or that the exercise of a protected activity was "a significant or substantial factor" in her termination. Summary judgment was appropriate.
>
> Opinion at 14.

Cornwell timely petitioned for review in this Court.

IV. REASONS WHY REVIEW SHOULD BE DENIED

Cornwell argues the Court should accept review under RAP 13.4(b)(1) and RAP 13.4(b)(4), claiming that the Court of Appeals' decision involves an issue of substantial public interest and conflicts with this Court's mandate to liberally construe the WLAD. In reality, the Court of Appeals merely applied established case law and held that Cornwell's speculation and conjecture was insufficient to survive summary judgment.

Cornwell raises two arguments in the Petition for Review. First, Cornwell argues that the Court of Appeals should have adopted the Second Circuit's "corporate knowledge" standard; but Cornwell fails to

recognize that this standard does not apply to the element at issue in this case: causation.

Second, Cornwell argues that the Court of Appeals should have adopted the "knew or suspected" standard from a single Ninth Circuit case, which holds that causation can be established if the decision-maker "knew or suspected" that the employee engaged in protected activity. Even assuming that "knew or suspected" is the appropriate standard in the Ninth Circuit, the Court of Appeals decision did explicitly consider (and reject) Cornwell's argument under this standard. Evaluating the record evidence, the Court of Appeals determined that Cornwell had presented only speculation (not evidence, as required) regarding what the decision-maker "knew or suspected" in this case. The Court of Appeals applied established Washington state precedent in holding that "Cornwell's speculative argument is insufficient to defeat a motion for summary judgment." The Court of Appeal's decision is consistent with established Washington law *and* with the Ninth Circuit case she would have this Court adopt, and this Court should deny the Petition for Review.

A. The Court of Appeals Correctly Rejected the "Corporate Knowledge" Standard.

Cornwell argues that the Court should accept review in order to adopt the Second Circuit's "general corporate knowledge" standard, but

fails to identify any split in authority or ambiguity in Washington law that would merit changing the standard. Even if the different standard were adopted, Cornwell's claim would still fail because "corporate knowledge" is not sufficient to establish causation, which was and is missing in Cornwell's case and was the basis for dismissal. The cases Cornwell cites discuss a *different* element of a prima facie case of retaliation, "knowledge," not "causation." Although Cornwell claims that the court in *Gordon* "used the same prima facie as this Court did in *Wilmot*," Petition for Review at 16, the plain language in *Gordon* demonstrates that this is untrue.

In *Gordon*, the court explained that a plaintiff claiming retaliation must prove **four** elements: "(1) participation in a protected activity; (2) ***that the defendant knew of the protected activity***; (3) adverse employment action; and (4) a causal connection between plaintiff's protected activity and the adverse employment action." *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111, 113 (2d Cir. 2000) (emphasis added). In contrast, in *Wilmot*, this Court held that a *prima facie* case for retaliatory discharge requires proof of **three** elements: (1) that the plaintiff engaged in statutorily protected activity; (2) that an adverse employment action was taken; and (3) that there is a causal link between the employee's activity and the employer's adverse action. *Wilmot v. Kaiser Aluminum & Chem.*

Corp., 118 Wn.2d 46, 68, 821 P.2d 18, 28 (1991); *see also Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 1182 (2000) (same elements for retaliation claim under the WLAD). Knowledge is not a separate element of a *prima facie* case under Washington law and thus the "corporate knowledge" standard from *Gordon* is not applicable.

In *Gordon*, the trial court instructed the jury that to prove the second element (knowledge), the plaintiff was required to show that the defendant's agents knew of the plaintiff's protected activity. *Gordon*, 232 F.3d at 116. The Second Circuit reversed, holding that general corporate knowledge was sufficient "to satisfy the **knowledge** requirement." *Id.* at 116 (emphasis added). The court did not hold that corporate knowledge was sufficient to satisfy the **causation** element. Cornwell attempts to mislead the Court by conflating the knowledge element with the causation element. *Gordon* and the authorities cited by Cornwell are inapposite and do not support Cornwell's request that the Court stretch the general corporate knowledge principle to establish not only knowledge (which is not separately required under Washington law) but also the required causation element of her claim.

The other cases cited by Cornwell similarly held that corporate or constructive knowledge is sufficient **for the knowledge element**. *See, e.g., Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) (one

element of prima facie retaliation case is that "the employer had actual or constructive knowledge of the protected conduct"). Cornwell's citation to *Taylor v. City of Los Angeles* is likewise inapposite, as it dealt with the level of specificity required in pleading causation to survive a motion to dismiss. *Taylor v. City of Los Angeles Dep't of Water & Power*, 144 Cal. App. 4th 1216, 1236, 51 Cal. Rptr. 3d 206, 219 (2006). Cornwell's case was not decided on a motion to dismiss. To survive summary judgment, Cornwell was required to do more than plead a causal link; she must **submit evidence** in support of her allegations. She did not do so.

As the Court of Appeals recognized in rejecting Cornwell's argument: "**the Second Circuit's approach in *Gordon* still requires that someone participating in the adverse action knows about the protected activity when determining if a "causal connection" exists."** Opinion at 12 (emphasis added). Washington law requires Cornwell to show evidence of causation, which logically requires evidence that the decision-makers or someone involved in the action at issue were aware of her protected activity. If Cornwell can survive summary judgment here by merely alleging that Microsoft as a corporation knew of her alleged protected activity – even if no individual involved knew – then any employer with a human resources or legal department can be held strictly liable for a retaliation claim as long as an employee raised a complaint at

some point in the past. The Court should decline to accept review to adopt the "corporate knowledge" standard.

B. The Court of Appeals Considered What the Decision-Makers "Knew or Suspected" and Held that Evidence – Not Speculation – is Required to Survive Summary Judgment.

Cornwell alternatively argues that this Court should accept review to adopt the "knew or suspected" standard articulated in one Ninth Circuit case, *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003). As an initial matter, it is not established that "knew or suspected" is the appropriate standard in the Ninth Circuit for determining whether the decision-maker had sufficient knowledge of the protected activity to support a causal link. Although the one case cited by Cornwell, *Hernandez*, does articulate the test as "knew or suspected," the *Cohen* case cited by the Court of Appeals requires that the employer be "aware" of the protected activity. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). Numerous cases since *Cohen* continue to use the "aware of" standard in determining whether a causal link has been established. *See, e.g., Hurst v. Falcon Air Express Inc.*, 650 Fed. Appx. 299, 300 (9th Cir. 2016) ("there is no evidence that the managers responsible for firing Hurst were aware of his protected activity at the time they made their decision. Therefore, Hurst failed to raise a triable issue of fact as to whether his

termination was retaliatory."). In contrast, not a single Ninth Circuit opinion has cited *Hernandez's* "knew or suspected" language as the appropriate standard.[2]

Regardless, even if "knew or suspected" is the appropriate legal standard in the Ninth Circuit, the Court of Appeals explicitly considered Cornwell's argument that a jury could reasonably infer that "Blake knew or suspected that Cornwell had engaged in protected activity." Order at 11; *see also* Order at 13-14. The Court of Appeals correctly concluded that Cornwell failed to present sufficient evidence to survive summary judgment. Essentially, **Cornwell asks the Court to speculate that Blake may have speculated about Cornwell's protected activity, which is an insufficient basis to survive summary judgment.** A comparison between Cornwell's case and the *Hernandez* case upon which Cornwell relies demonstrates the speculative nature of her claim.

In *Hernandez*, the plaintiff filed an internal complaint alleging that his manager was sexually harassing a female employee. Evidence that the

[2] Cornwell's citation to *Heffernan v. City of Paterson* is inapposite. There, the employer reasonably (but mistakenly) believed that the employee engaged in certain political speech after seeing him holding a sign and speaking with a political candidate's campaign manager. The employer took action against him as a result. The Court held that when "an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment." *Heffernan v. City of Paterson, N.J.*, 136 S. Ct. 1412, 1418, 194 L. Ed. 2d 508 (2016). The decision does not lessen Cornwell's burden of producing evidence to support her claims.

manager knew plaintiff was the one who made a complaint about him included: (1) the manager saw plaintiff speaking with the female employee and discouraged him from talking to her; (2) plaintiff filed a complaint with the Human Resources manager, who began an immediate investigation; (3) plaintiff told one of his supervisors he had reported to HR and the supervisor responded that plaintiff was "now in trouble"; (4) plaintiff told other co-workers about his report to HR, including a co-worker with a close relationship to the manager; (5) the manager was aware that a sexual harassment complaint had been filed against him; and (6) plaintiff was terminated three weeks later. Thus, at a minimum, at least three individuals had direct knowledge that the plaintiff had reported his manager's alleged sexual harassment to HR, and there was evidence that the manager himself had reason to be aware (or "suspect") that it was plaintiff who filed the report.

In contrast, Cornwell's argument consists of the fact that (1) she had a prior legal action that involved a review score; (2) against a male manager; (3) which resulted in a confidential settlement; (4) precluding Cornwell from working for the manager again; and that (5) when Blake inquired with Human Resources about it; (6) HR promised to tell Blake what was learned. See Petition at 18-19. This argument is entirely speculative, and Cornwell omits several critical facts. First, when Blake

followed up with Human Resources about Cornwell's legal action, she was told there was nothing on file. Second, there is no evidence that Blake ever learned the nature of the legal action. Third, there is no evidence that any individual involved in Cornwell's employment had knowledge of her alleged protected activity seven years earlier.

Unlike the case in *Hernandez,* where multiple individuals knew about the plaintiff's protected activity and could have told the manager, in this case there is no evidence that any person was aware of Cornwell's alleged protective activity. Nevertheless, Cornwell asks the Court to speculate as to what Blake may have speculated – which is insufficient to survive summary judgment under well-established and settled Washington law. *See, e.g., Meyer v. Univ. of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98, 102 (1986) ("A nonmoving party in a summary judgment may not rely on speculation, argumentative assertions that unresolved factual issues remain, or on affidavits considered at face value."); *see also Michkowski v. Snohomish Cty.*, 185 Wn. App. 1057 at *5 (2015), *review denied*, 184 Wn.2d 1004, 357 P.3d 665 (2015) (unpublished opinion) ("While [plaintiff] is correct that he may rely upon circumstantial evidence and reasonable inferences, **he cannot rely on mere speculation or a hunch that the decision makers knew of his exercise of protected conduct**. It is pure speculation to infer that a person having knowledge of

an employee's protected activity actually told the decision maker about the protected activity.") (emphasis added); *see also Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999) ("because "could have told" is not the same as "did tell," **it would be pure speculation"** to infer that manager with knowledge of the protected activity had shared that information with the decision-maker) (emphasis added).

The Court of Appeals decision does not conflict with established precedent or this Court's mandate to liberally construe claims under the WLAD. Rather, the Court of Appeals properly applied established Washington and federal law in concluding that mere speculation is insufficient to survive summary judgment. The petition for review should be denied.

V. CONCLUSION

The Court of Appeals' decision followed well-established law, rejected Cornwell's argument to adopt an irrelevant standard, and produced no inconsistency with existing precedent. Microsoft respectfully requests that the Supreme Court deny Cornwell's Petition for Review.

RESPECTFULLY SUBMITTED this 11th day of September, 2017.

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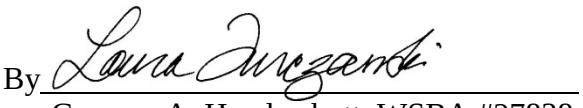
By 

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