

69694-7

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KIRSTEN WILEY, an individual,

Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation,

Respondent.

BRIEF OF APPELLANTS

***SUBMITTED AS REDACTED FOR PUBLIC RECORD, PURSUANT
TO TRIAL COURT SEALING ORDER(S)***

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I. INTRODUCTION

Plaintiff-Appellant Kirsten Wiley respectfully submits that the Court must reverse the trial court's summary judgment in favor of Defendant-Respondent Microsoft Corporation. The trial court misapprehended and misapplied the law, and improperly weighed the factual evidence and substituted his fact-findings for those of the jury, as to both Ms. Wiley's WLAD claim(s) and her "*Thompson*" claim.

II. ASSIGNMENTS OF ERROR *(With Issues Pertaining to Assignments of Error)*

A. Trial court erred in dismissing plaintiff's WLAD (gender discrimination) claims. *Issues:*

1. Whether the evidence is sufficient to meet the plaintiff's prima facie case of discrimination?
2. Whether the evidence is sufficient to raise a genuine issue of material fact as to whether the reasons given by respondent for its adverse treatment or actions towards plaintiff are unworthy of belief or are mere pretext for what is in fact a discriminatory purpose?

B. Trial court erred in dismissing plaintiff's "*Thompson*" claim.

Issues:

1. Whether the evidence is sufficient to raise a genuine issue of material fact as to (a) whether respondent made a specific promise of

specific treatment (non-retaliation) applicable to plaintiff's situation; (b) which she reasonably relied upon; and (c) which respondent breached?

2. Whether the evidence is sufficient to raise a genuine issue of material fact as to whether respondent's self-serving disclaimer was negated through its inconsistent representations and practices?

III. STATEMENT OF THE CASE

A. WLAD Claim(s)

Before being forced out of her position and the company, Kirsten Wiley was employed at Microsoft for over 20 years. CP 1326 (Wiley Decl., ¶ 2). Her last position was a "Level 66," and her title was Director of Marketing and Communications, Microsoft Research Group. In this job, she was responsible for owning and driving the Microsoft Research, Marketing and Communications strategy worldwide. This included developing the Microsoft Research Group's global communications strategy, messaging, key themes and events, as well as managing strategic partnerships around the company. Since approximately 2003, Ms. Wiley reported directly to Kevin Schofield, who reported to Rick Rashid, who reported to Craig Mundie, who reports to CEO Steve Ballmer. See CP 1326-1327, 1335-1336 (Wiley Decl., ¶ 3 and Ex. 1).

During the relevant times, there were 16 executives reporting to Microsoft CEO Steve Ballmer, including Craig Mundie. All but the head

of Human Resources (“HR”) (Lisa Brummel) were male. That is, not a single one of the 15 business organizations at Microsoft was headed by a female. Moreover, in Craig Mundie’s organization, where Ms. Wiley worked, there was not a single female executive reporting to him. CP 1032-1033 (Mundie Dep. 12: 1-9, 13:3-8); CP 1331 (Wiley Decl., ¶ 21).

In addition, the evidence reflects that Microsoft’s senior male executives are oblivious to women in the workplace and wholly uninformed about gender discrimination issues. For example, Craig Mundie has had no training for the last 20 years to enhance the likelihood that he could be sensitive to gender discrimination issues. CP 1033-34 (Mundie Dep. 13:9-14:14). And the Women Employee Resource Group (“ERG”) is the largest group there is of women employees at Microsoft, with more than 12,000 members. CP 1331(Wiley Decl., ¶ 21). Yet Mr. Mundie had never even heard of it. CP 1035 (Mundie Dep., 16:22-24).

In fact, Frank Shaw’s corporate communications group (with whom Ms. Wiley interfaced) was known as a “good old boy’s club” or “old boy’s network.” Frank Shaw testified as follows:

Q: Did it ever come to your attention that any woman in your group regarded your group as an old boy’s network or old boy’s club?

A: When I joined the team, there was a set of people who had been there a long time, so it was before I joined the company, and I had heard that term.

CP 1074 (Shaw Dep. 38:17-22). It is undisputed that the key men in this group were still there after Mr. Shaw joined the company, including Tom Pilla. CP 1074-75 (Shaw Dep. 38:17-39:15); CP 1331(Wiley Decl., ¶ 20). And Microsoft managers have admitted that there were no changes in how males treated females within this “old boy’s club” group after Frank Shaw arrived at the company and took over its leadership. *See* CP 1170-1171 (Pilla Dep. 21:18-22:2) (also admitting he did not observe any changes in how males in this group treated females in other groups after Mr. Shaw arrived).

Furthermore, the evidence reflects that males with whom Ms. Wiley worked in corporate communications, and who were directly involved in destroying her Microsoft career, view women (including those with whom they work) in sexist terms and as sex objects. *See* CP 1279-82 (at 2:11, 2:20, and 2:24) and CP 1287 (“IM” between Tom Pilla and Adam Sohn [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹ It is also uncontroverted that the men in Frank Shaw’s

¹ Mr. Pilla and Mr. Sohn were Microsoft marketing and communications managers at the time. This exchange took place on office computers and the Microsoft instant messaging

“good old boy’s” group with whom she worked commonly referred to Ms. Wiley as “Bitch” and “Mrs. No.” CP 1330 (Wiley Decl., ¶ 18); CP 1048 (Schofield Dep. 130:3-21) (admitting Tom Pilla told him people in Mr. Shaw’s group referred to Ms. Wiley as “Mrs. No”). *See also* CP 1292 (at MS0004768).²

Despite the evident “glass ceiling” for women at Microsoft, and this admitted “good old boy’s club” of males with whom she worked, Kirsten Wiley was – until Frank Shaw joined Microsoft – an undisputed “star.” Her last four performance reviews, before she was targeted for removal by Frank Shaw and his male collaborators, were as follows:

2006–Achieved,³ Strong;

2007–Exceeded, 20%⁴;

(“IM”) system. *See* CP 1119 (at line 51); CP 1175 (Pilla Dep. 129:23-24). The trial court has ordered the content of their exchange sealed and redacted. CP 807-12; 353-55.

² Mr. Pilla did not deny telling Ms. Wiley that people in his and Mr. Shaw’s organization referred to Ms. Wiley as “Mrs. No” and/or the “B or bitch woman.” CP 1174 (Pilla Dep. 116:14-19).

³ “Achieved” is defined by Microsoft as:

- Results relevant to one’s job and level consistently achieved and sometimes exceeded expectations.
- Achieved all commitments and expected results.
- Delivered the typical level of performance for the job.
- Demonstrated most competencies required for the job.

CP 1003 (McNaul Decl., Ex. A).

⁴ “Exceeded” was the highest rating possible at the time and is defined by Microsoft as:

- Results relevant to one’s job and level exceeded expectations.
- Achieved all commitments and exceptional results that surpassed expectations.
- Consistently delivered the highest level of performance.

2008–Achieved, 20%;

2009–Achieved, 20%.

She also received superlative after superlative in her performance reviews and always performed at a high level. The following is illustrative:

You are a huge asset to the organization and a fantastic contributor. Thanks for all of the hard work this year.

CP 1010 (2007 review, at MSFT404958).

You've been doing really solid work this year. Thank you: I really appreciate it.

CP 1017 (2008 year review, at MSFT404964).

Thanks for all the hard work. You're clearly delivering great results for MSR and for the company, in a tough and rapidly changing environment.

CP 1021 (2009 year review, at MSFT404967).

-
- Demonstrated all competencies required for the position.

CP 1003 (McNaul Decl., Ex. A.) Twenty percent (20%) was the highest contribution rating possible (reserved for the top 20% of employees) and is defined as:

- Demonstrates potential to advance faster than average as a leader – either as a People Manager and/or as an individual contributor – preferably multiple levels or 2 career stages.
- Past performance suggests capability of delivering exceptional results over the long-term.
- Competencies typically are at or above expected levels.

Id. at 1004.

In addition, she was designated a “high-potential” (“HiPo”) employee in 2008 and 2009.⁵ Craig Mundie, the Chief Research and Strategy Officer at Microsoft who reports directly to CEO Steve Ballmer, has testified that there are approximately 1,800 people in his organization (which includes Ms. Wiley, several times removed), and he has a budget as to the number of HiPos in his group and is ordinarily limited to twenty or thirty (out of the 1,800). In other words, less than 2% receive this distinction. CP 1036-1039 (Mundie Dep. 18:6-21:9).

Ms. Wiley was also selected for Microsoft’s prestigious “Bench” program in 2008, and it ran for two years: 2008 and 2009. The Bench program is designed to identify and groom future leaders of the company. CP 1327-28 (Wiley Decl., ¶¶ 6-7). In 2010, she was awarded the coveted (and highly-competitive) “Gold Star,” accompanied by a bonus of \$80,000 worth of stock. Ms. Wiley also received high praise from her direct reports, her peers, and those she worked with and those she assisted in events, including Bill Gates and Craig Mundie. *Id.* (at ¶7).

The evidence reflects, however, that there were two men (in addition to Frank Shaw) who interfaced with Ms. Wiley who did not like

⁵ Microsoft defines a “HiPo” as superior to and even more select than a high-performer, and as having these characteristics: “Demonstrates exceptional ability (behavior, skills, and competencies), Proven Capability, and ACA to advance to and succeed in more senior, critical roles in an accelerated timeframe.... [And as] an employee who is highly reliable and for whom we have the greatest expectation.” CP 1023.

working with her. They were David Pritchard, a Senior Director and Craig Mundie's Chief of Staff; and Peter Haynes, who reported to Mr. Pritchard. There is no documentation that suggests that any "concerns" they had about Ms. Wiley's performance or work-style were serious. In fact, her direct supervisor, Kevin Schofield, testified that he does not recall any serious concerns being expressed to him about her prior to the Spring of 2010.⁶ CP 1045-1047 (Schofield Dep. 77:14-79:11). In any event, initially at least, David Pritchard and Peter Haynes were not in a position to cause the removal of Ms. Wiley from her position.

The "game changer" was the arrival of Frank Shaw at Microsoft in late August 2009 as the new Vice President of Corporate Communications. For three or more years before joining Microsoft, he had managed the Microsoft account for its primary public relations consulting firm, Waggener Edstrom. He also knew very well the people at Waggener Edstrom with whom Ms. Wiley interfaced on a daily basis in her role at Microsoft (as they had directly or indirectly reported to Frank Shaw when he was at that firm). CP 1328 (Wiley Decl., ¶ 8).

Frank Shaw fit right into the "good old boy's club" culture of the organization he joined at Microsoft. He was in the Marines for 11-12

⁶ Mr. Schofield testified that Mr. Haynes may have expressed some concern about Ms. Wiley before the Spring of 2010, but he was not sure. CP 1047 (Schofield Dep. 79:1-15).

years in a non-combat role (public relations and engineering support) – four years in active duty and seven to eight years in the reserves. CP 1066 (Shaw Dep. 18:8-23). He always had at least one woman subordinate to him in the Marines and never had a female refuse to carry out his orders or directives. CP 1068 (*id.*, 20:3-12, 19-24). But during the early part of 2010 that is what Ms. Wiley felt compelled to do, and did.

In particular, Ms. Wiley believed that at least some of what Frank Shaw had asked her to do or he was doing violated Microsoft policy, or was otherwise ill-advised. For instance, she pointed out to him that she and the company could not comment to the media on technology underlying a pending patent application as he apparently wanted her to do.⁷ On another occasion, she reminded him that communications with the public relations firm Waggener Edstrom were supposed to go through her, rather than him communicating with his old firm directly.

The evidence reflects that Mr. Shaw was angry with Ms. Wiley for questioning him about these things, and he immediately mounted a campaign to discredit her and destroy her Microsoft career. While he now

⁷ Contrary to Microsoft's argument that there is no policy prohibiting this, its senior executive, Craig Mundie, has admitted there is. He testified as follows: "when patents have been filed, and in prosecution, in order not to disrupt the legal process of prosecuting an application, we ... don't talk about these applications in any detailed way." CP 1040 (Mundie Dep. 32:10-17) (further stating this has been true for the entire time he has been there).

tries to claim he was not really upset with her for standing up to him, his own emails indicate otherwise. For example, he accused her of “wildly over-complicat[ing]” the matter of policy that prohibits making comments to the media about the technology underlying a pending patent application. CP 1097-1100 (at 1097). Within minutes, he privately shared this exchange with Peter Haynes and David Pritchard. Mr. Haynes then wrote back to Mr. Shaw: “I believe it was you who said: shoot me now.” *Id.* Mr. Pritchard has testified that Mr. Shaw would use the term “shoot me now” when “he’s frustrated beyond belief.” CP 1106 (Pritchard Dep. 44:7-14). *See also* CP 1159 (private email from Mr. Shaw to Mr. Haynes regarding the patent issue, in which Shaw states “I’m getting hot now”).

In short, the evidence reflects that Frank Shaw began a concerted effort to sabotage Ms. Wiley for having deigned to question him; and that David Pritchard and Peter Haynes, along with Tom Pilla (Mr. Shaw’s right-hand man [REDACTED], *see supra* at 4), were willing participants in that effort. The first step in this orchestrated campaign was for these men to keep each other posted, confidentially, whenever one of them learned something they could use to criticize Ms. Wiley about. *See* CP 1104, 1107-08 (Pritchard Dep. 20:18-21, 67:20-68:6). *See also* CP 1150 (Frank Shaw forwarding email exchange between him and Ms. Wiley to Peter Haynes, in which he writes privately

to Mr. Haynes: “another one on the list”); CP 1157 (private email from Lou Gellos to Tom Pilla (both subordinates to Frank Shaw in his group) forwarding Ms. Wiley’s email to Mr. Gellos and others that “Microsoft doesn’t comment on patents,” in which Mr. Gellos comments privately to Mr. Pilla that this is the “3rd in a series,” i.e., referring to her telling Mr. Shaw “no” on this issue); CP 1159 and 1160-62 (private email exchange between Peter Haynes and Frank Shaw regarding “new patent” and containing expletives directed at Ms. Wiley from Mr. Haynes to Mr. Shaw (“\$#@%ing patents”), in which Mr. Shaw states to Mr. Haynes “I’m getting hot now,” and in which the two of them are plainly criticizing Ms. Wiley to each other for having expressed her understanding of Microsoft policy about not commenting to the media about technology underlying a pending patent application).

The evidence reflects that the second step in the concerted campaign by this group of men to cause the removal of Ms. Wiley was to put pressure on those who controlled her destiny to do so. They launched a series of Kirsten-attacks on her direct supervisor, Kevin Schofield. For example, Frank Shaw forwarded an email exchange between him and Mr. Schofield concerning Ms. Wiley to his (Mr. Shaw’s) direct report, Tom Pilla, asking him to “reinforce” his (anti-Kirsten) message. Mr. Pilla responds “will do.” CP 1164. Mr. Pilla understood this message included

the removal of Ms. Wiley as the main partner between her team and the teams of Frank Shaw and Peter Haynes. See CP 1172 (Pilla Dep. 56:8-23). At one point, Frank Shaw even yelled at Ms. Wiley's direct supervisor, Mr. Schofield, to get him to remove the word "Senior" from her title. CP 1177.⁸

The evidence reflects that these concerted and relentless attacks on Ms. Wiley by Frank Shaw and his three male collaborators were unwarranted and/or otherwise unworthy of belief. In fact, her direct supervisor, Kevin Schofield, noted in his April 9, 2010 email (replying to Mr. Shaw's criticisms of Ms. Wiley):

I understand the point you're making but I respectfully disagree.

Craig and Rick have asked a lot of Kirsten over the last two years. She's not perfect by any stretch, but she's got great talent, she's loyal and she works hard to deliver. She deserves our loyalty in return, and the opportunity to fix this.

⁸ By way of further example, Frank Shaw reported privately to David Pritchard about his April 5, 2010 meeting with Kevin Schofield as follows:

Sharing w/ you in confidence please.

I had a come to jesus meeting with Kevin yesterday re: the way he, his team and Kirsten were perceived, and the *awful consequence that was heading his way* if this did not change. I gave specific examples. I told him that I had discussed with Rick [Rashid] as well, and that things needed to happen fast improvement-wise.

He was relatively open to this, and subsequently had what looks like a pretty direct convo w/ Kirsten. That's a step.

CP 1179 (emph. added).

So yes, I will be more visible, but I'm not going to undermine Kirsten in the process. She deserves better than that.

CP 1182. Similarly, on July 13, 2010, Mr. Schofield told Tom Pilla and Peter Haynes:

It is not appropriate or accurate to blame [Ms. Wiley] for apparent disconnects. She is working super hard at making this partnership work. ***

Also keep in mind that our agency team lost two people in June, and we've been short staffed and scrambling since. That's certainly not Kirsten's fault. ***

On Peter Lee, it was my call in consultation with HR and Rick [Mr. Schofield's boss], not Kirsten's. So if you want to be mad at someone, I'm your guy.

CP 1186. Frank Shaw then wrote this to Mr. Pilla on July 21, 2010:

"David [Pritchard] exchanged mail w/Kevin – who says that he has not gotten sustained feedback [critical of Ms. Wiley]. It is time to be super direct w/ him . . . *put the hammer down.*" CP 1190 (emph. added). A reasonable inference from this evidence is that since individual pressure on Ms. Wiley's direct supervisor was not working, Frank Shaw and his buddies decided they needed to "put the hammer down" on him collectively, in order to cause him to replace her.

They tried to meet in August or September of 2010, but because of scheduling difficulties finally met on October 14. David Pritchard, Peter Haynes, and Frank Shaw's surrogate and report, Tom Pilla, met with Mr.

Schofield and told him he had to “mov[e]” Ms. Wiley “out of her role quickly.” CP 1115-16 (Pritchard Dep. 110:18-111:7). Consistent with “put[ting] the hammer down” on Mr. Schofield, rather than just blasting Ms. Wiley they now threatened Mr. Schofield – *e.g.*, emphasizing to him as a group that if he did not replace her immediately *his* “credibility” was going to be on the line. CP 1111-12 (at 99:5-16, 101:1-12). *See also* CP 1179 (re: Shaw’s “come to jesus”/“awful consequence” meeting with Schofield). The evidence supports the inference and finding that under the sustained pressure of such threats from Frank Shaw and his three male collaborators, Mr. Schofield capitulated and threw Ms. Wiley to the wolves. In fact, Mr. Pritchard emailed Sheryl Peterson of HR on October 17 stating there was “consensus” amongst those attending the October 14 meeting that Ms. Wiley was to be removed from her role. CP 1192.

In order to “justify” the decision that had already been made (to “quickly” remove Ms. Wiley from her position), Kevin Schofield and Sheryl Peterson of HR began soliciting negative “feedback” about her. The evidence reflects that this process was rigged from the start. Mr. Schofield had already agreed that Ms. Wiley would not get another marketing or communications (MarComm) role at Microsoft. And Frank Shaw and his buddies encouraged people subordinate to them or otherwise

subject to their influence to go to Ms. Peterson and/or Mr. Schofield and malign Kirsten Wiley.⁹

In fact, individually and at various times, Frank Shaw, Tom Pilla, David Pritchard, and Peter Haynes went above and around Ms. Wiley's own direct supervisor, Kevin Schofield, and approached his boss, Rick Rashid, to tell him how terrible Kirsten Wiley was. CP 1109 (Pritchard Dep. 89:8-24). And on approximately October 27, 2010, before the solicitation of negative feedback really got started, Mr. Rashid had his annual "People Meeting" with Craig Mundie (to whom David Pritchard reported as a Senior Director and Mr. Mundie's chief of staff). Ms. Wiley had become an "action item" out of that meeting. Craig Mundie instructed Mr. Rashid that he had to "aggressively manage" what to do with Ms. Wiley, and bring the situation to closure. CP 1243-44.¹⁰ A reasonable inference from this and the other evidence is that Mr. Rashid's "handling" of the Kirsten Wiley situation was put on hold until his subordinate, Kevin Schofield and the HR representative assigned to assist him (Ms. Peterson)

⁹ See, e.g., CP 1114 (Pritchard Dep. 105:2-4) (admitting efforts by him and his direct report Mr. Haynes to encourage a person to provide negative comments about Ms. Wiley to Ms. Peterson); CP 1173 (Pilla Dep. 108:3-20) (admitting he encouraged someone to provide negative comments about Ms. Wiley to Mr. Schofield); CP 1196-97 (email from Mr. Haynes to Ms. Peterson asking her to "proactively" talk to someone he says has something negative to say about Ms. Wiley and who had not contacted HR, and stating that her doing so "would be really helpful to David [Pritchard] and me.").

¹⁰ The "action item" regarding her was the first item on the list and written as follows: "Kirsten Wiley – should we make a move with her? Determine after following up with Tom Pilla and others." CP 1245, 1249. Mr. Pilla was Mr. Shaw's right-hand man.

were able to solicit negative feedback on her, so they could say they had some sort of truly “actionable” comments supposedly supporting the decision that had already been made to remove her from her position.¹¹

Further illustrating the contrived nature of the “feedback” solicitation process, it is undisputed that much of what was purportedly complained about concerning Ms. Wiley in this process was not even within the complainant’s own observations, but rather “reports” of what other (often entirely unidentified) people had supposedly said. *See* CP 1202 (Peterson Dep. 50:19-25); CP 1052 (Schofield Dep. 211:9-15).¹² Moreover, Microsoft argues that 17 people were interviewed about Ms. Wiley in this “feedback” gathering process, and they all just happened to make the same or similar negative statements about her. However, the evidence reflects that the complainants were collaborating.¹³ In addition, there were very positive statements about Ms. Wiley, which were ignored. *See, e.g.*, CP 1208-12.

Moreover, the evidence reflects that most of the really negative statements in the “feedback” process that were used against Ms. Wiley can

¹¹ Frank Shaw’s team also had a consolidation proposal worked up for Mr. Schofield’s group specifically targeting Ms. Wiley to be “RIF’d.” CP 1308-09.

¹² In some instances, it was even what someone had told the complainant that someone else had told him or her. *Id.*

¹³ For example, Jim Pinkelman told Mr. Schofield that Ms. Wiley spent “two much time in the weeds.” CP 1204 (hand-written interview notes of Kevin Schofield). Then Heather Mitchell used the very same term (“in the weeds”). CP 1206 (same).

be traced back to just two people – Heather Mitchell and Ann Paradiso – and had this process not been rigged from the start their criticisms of Ms. Wiley would not have been credited. Ms. Wiley had little or no interaction with Ms. Paradiso for the last 4 years. CP 1329 (Wiley Decl., ¶ 15). And while Ms. Mitchell was one of Ms. Wiley’s direct reports, the evidence reflects she was notoriously volatile, inconsistent, disgruntled, and generally mad at the world. For example, Ms. Mitchell described Ms. Wiley as having a “[s]uper micro-managing nature,” being “hostil” [*sic*] and “aggressive,” claimed that “90%” of her behavior is “bullying,” and she was a “raving bitch.” CP 1216-18 (typed interview notes of Kevin Schofield). But just a couple of months before she was interviewed for “feedback” and made such damaging comments about Ms. Wiley, she had written to a colleague, Kelly Berschauer, saying that she (Ms. Mitchell) was “totally in her [Kirsten’s] camp defending her again.” CP 1229.

Mr. Schofield ignored that it had previously been brought to his attention that Ms. Mitchell was a well-known back-biter and complainer, who liked to talk behind people’s backs. CP 1055 (Schofield Dep. 234:5-21). Indeed, Ms. Mitchell wrote to a colleague that *Mr. Schofield* is a “lost cause,” who is “comfortable chit chatting with his admins (Amy, Jan, Mel) but has no ability to discuss business at a strategic level, as far as I can tell. If I talk about being a mommy he’ll chat with me, but if I discuss

work he seems to clam up and the well runs dry.” CP 1234, 1298. When presented at his deposition with the back-biting sorts of comments that Heather Mitchell leveled at *him*, Mr. Schofield acknowledged that her observations were inaccurate. CP 1058-1061 (Schofield Dep. 249:19-252:14).

Sheryl Peterson (the HR person assigned to assist in the “feedback” process) interviewed Ms. Mitchell about Ms. Wiley, as did her subordinate in the HR department, Jason Scovil. Kevin Schofield also solicited Ms. Mitchell’s criticisms of Ms. Wiley. *See* CP 1216-18; CP1053-54 (Schofield Dep. 228:25-229:3); CP 1201 (Peterson Dep. 46:10-11); CP 1226 (Scovil Dep. 24:9-25:20). Her comments were then used as the centerpiece of the “feedback” that was used to “justify” the destruction of Ms. Wiley’s career. CP 1329 (Wiley Decl., ¶ 15). These “feedback” criticisms were purportedly summarized into a slide deck labeled “KW Feedback Themes,” which Kevin Schofield and Sheryl Peterson of HR presented to Ms. Wiley on December 6, 2010. *See id.*; CP 1239-41. It was clear that Ms. Wiley’s days were numbered.

Following this December 6, 2010 presentation, Ms. Wiley wrote to Mr. Schofield and Ms. Peterson, noting it was apparent that “these slides and the behind-the-scenes work that led to their creation were constructed with the sole intention of creating a case to justify terminating me from

Microsoft;” they followed on the heels of her standing up to Frank Shaw and refusing “to discuss specific patent applications with the media, since that would clearly violate corporate policy” (and his anger at her for doing so); and further noting that in the feedback provided with in these slides

[t]here is no consideration for context or the business environment, ... my over 19 years of exemplary performance including my recent gold star paid sabbatical rewarded for consistent high performance, election to the ... Bench program, and history of strong positive contributions to the company and other recognitions; [but rather it] is presented and viewed through a single lens focused on the last two months and is glaringly inaccurate as well.

CP 1252. Microsoft immediately involved its legal department upon receiving this email from Ms. Wiley. A veil of secrecy enshrouds its tactical decisions from that point on. Microsoft counsel has instructed company witnesses not to answer questions about its purported internal “investigation” of Ms. Wiley’s concerns after this point in time. CP 996 (McNaul Decl., ¶ 3).

The McNaul Ebel firm sent a demand letter to Microsoft on Ms. Wiley’s behalf on December 16, 2010; and served her complaint on or about February 16, 2011. She stayed on with the company after filing suit, but was excluded from emails and meetings, and generally shunned. *See* CP 1330 (Wiley Decl., ¶ 17).

On November 7, 2011, Ms. Wiley went on medical leave (per doctors' instructions) due to the emotional distress caused by Microsoft's treatment of her. At the direction of her doctors she has remained on leave since then. She has been diagnosed by her doctors as suffering from major depression, as a result of her treatment by Microsoft. *See* 1330, 1430 (*id.* at ¶ 17, Ex. 5). While she was on this medical leave caused by Microsoft, the company replaced her with a [REDACTED] male from the organization Frank Shaw belongs to.¹⁴ Moreover, the evidence reflects that this man was hired to replace her even though the recognized "successor" to Ms. Wiley and her position was a female (Kelly Berschauer). CP 1331-1332, 1432 (Wiley Decl., ¶ 24, and Ex. 6).

Microsoft has argued that Ms. Wiley is still a "Microsoft employee." However, the evidence and/or reasonable inferences from it is that no one can plausibly deny that her 20-plus year career at the company has been destroyed. In fact, Peter Haynes has boasted as much in an email reminding his boss, Peter Haynes, relative to his performance review: "I have been instrumental in getting Kirsten Wiley removed from Microsoft (if that in fact ever happens)". CP 1254. The evidence

¹⁴ The man who has replaced Ms. Wiley, [REDACTED]

[REDACTED] *See* CP 1118-48 (at 1130) (Designated "Highly Confidential-Attorney's Eyes Only" ("AEO") by Microsoft, and ordered sealed or redacted by the trial court). CP 807-12.

indicates that Microsoft obviously knew it would appear transparently retaliatory if it fired her after she wrote her demand letter and had a lawsuit pending; so it did not and bided its time. But it is undisputed that if Kirsten Wiley were to interview for another position at Microsoft, before making her an offer, the hiring manager would look at her last performance review and talk to her last manager(s). *See* CP 1105 (Pritchard Dep. 27:10-23). Her 2011 performance review is now a job killer. CP 1259-71. And her last manager, Kevin Schofield, has already thrown her under the bus (after being threatened by Mr. Shaw and his buddies about the “awful consequence that was heading his way” if he did not). *Supra* at 12-14, n. 8. Indeed, Senior Director (and Craig Mundie’s Chief of Staff) David Pritchard has admitted that Microsoft had gone beyond the point of no return with Ms. Wiley such that the “situation was beyond repair,” with which assessment Mr. Schofield “agreed.” CP 1110-12 (Pritchard Dep. 94:6-20; 99:14-16; 101:7-9, 23-25).

In addition, Ms. Wiley has submitted evidence of adverse treatment based on gender in pay and promotion decisions. She has submitted detailed male comparator evidence as to pay and promotions (grade levels). She has also presented detailed evidence about the

significance of different performance review ratings and other accolades and achievements relative to Microsoft's pay and promotion decisions.¹⁵

The evidence shows these male comparators and Ms. Wiley interfaced regularly as substantial parts of their job duties. For example, her job and theirs all consisted of research projects that were highly technical, and required a deep understanding of the technology (so as to be able to communicate value). She and they all had to position research

¹⁵ Some of this comparison evidence (designated "AEO" by Microsoft) is as follows: Behrooz Chitsaz reports to Mr. Schofield as did Ms. Wiley. His relevant performance review scores are as follows –

[REDACTED]
[REDACTED] CP 995-996 (McNaul Decl., ¶ 2) ("AEO").

Daron Green started with the company in December of 2007, as a [REDACTED]. His relevant performance review scores are as follows – [REDACTED]
[REDACTED] CP 996 ("AEO").

Jim Oker also reports to Mr. Schofield. He started with the company in April of 1994, about three years after Ms. Wiley. His relevant performance review scores are as follows [REDACTED]
[REDACTED] CP 996 ("AEO").

Sailesh Chutani started with the company in August of 1999, while Ms. Wiley started with Microsoft in 1991. [REDACTED]
[REDACTED] He no longer is with Microsoft. But when he was, he reported directly to Mr. Schofield as well, from January 2004 to September 2006 (and later to Tony Hey and then to Scott Horn). [REDACTED] CP 996 ("AEO").

The foregoing are to be contrasted with Ms. Wiley, whose performance review scores are as follows – 2007 (Exceeded/20%); 2008 (Achieved/20%); 2009 (Achieved/20%); 2010 (Achieved/70%). Her start date with Microsoft was 1991. She was promoted to a Level 66 in 2007 and stagnated there, despite her "HiPo" designation and numerous other awards and accolades. Her last salary was \$168,412. See *supra* at 2, 5-7 and nn. 3-5; CP 1326-27 (Wiley Decl., ¶¶ 3-4).

technologies alongside Microsoft products. And, building relationships and ongoing collaboration was a responsibility of each role – hers and theirs. CP 1331 (Wiley Decl., ¶¶ 22-23).¹⁶ Moreover, each of the male comparators reported up through Rick Rashid in the Microsoft Research (“MSR”) group and then up to Craig Mundie in the Advanced Strategies and Policy organization, just like Ms. Wiley. And, accordingly, she and they *were compared to each other by Microsoft* during the company’s pay and performance review “calibration” (decisionmaking) processes. CP 1331 (Wiley Decl. at ¶¶ 22-23). Microsoft is entitled to argue that for one reason or another, these are not “perfect” comparators. But clearly, whether they are or not is a question of fact for the jury, and should not have been resolved on summary judgment.

Furthermore, as noted above, Ms. Wiley was a “HiPo, P.2.” CP 1044 (Schofield Dep. 56:2-22). This means Microsoft itself expected she would receive two (2) promotions within the next three to five years. CP 1313-17. She received none, and was stuck at Level 66 (and its associated pay level) for three years. A reasonable inference is that Ms. Wiley should have been promoted within her position (that is, advancing to

¹⁶ By way of further example, Jim Oker managed content for events, as Ms. Wiley did. He was also responsible for such comparable communication duties as the internal aspect of the Microsoft Research event, TechFest; while Ms. Wiley was responsible for the external aspect of the same event. *Id.*

higher “levels,” with greater compensation, in the role of Marketing and Communications Director). That is how it is supposed to work according to Microsoft’s own HiPo policies and practices. *See* CP 1327 (Wiley Decl., ¶ 6). The evidence further reflects that her position warranted a pay and promotion increase to at least Level 67.¹⁷

B. “Thompson” Claim

The evidence reflects that Ms. Wiley raised her concerns with Mr. Shaw respectfully and professionally, and as she understood company policies and practices not only encouraged but required her to do. During her entire twenty years at Microsoft, Ms. Wiley was consistently and specifically told to raise any business or other types of concerns directly; and specifically promised that Microsoft would not permit her to be retaliated against for doing so. CP 1328-29 (Wiley Decl., ¶¶ 9-14). There is ample evidence from which a jury may find that Microsoft created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations (and that Ms. Wiley justifiably relied on these promises). Such promises may be found in a number of written

¹⁷ In fact, Frank Shaw assumed she *was* a Level 67. CP 1084 (Shaw Dep. 85:4-23). The company also considered replacing her with Richard Eckel whom everyone knew was a [REDACTED] (“AEO”), and there is no indication this barred him from consideration to replace her. *See* CP 1319. Indeed, Mr. Schofield admits that to be so. CP 1049 (Schofield Dep. 169:16-19).

policies, guidelines, and training materials, as well as other, repeated, representations and practices. Some of the statements from which a jury may find such specific promises are in the so-called “employee handbook” (which at Microsoft is not a hard copy document but an electronic compilation or linkage of different policies accessible through the “HRWeb” within the company intranet system). Some are not.¹⁸

¹⁸ For example, the “Open Door” policy is part of the “employee handbook” set of electronic policies accessible through the “HRWeb.” It specifically assures and obligates employees as follows: “*You are encouraged to air creative ideas, issues, or concerns. *** It is your responsibility to ask about things you do not know or understand, as well as to make suggestions that could improve any part of the company or its operations.*” CP 1338 (emph. added). See also CP 1328-29 (Wiley Decl., ¶¶ 9-14); CP 772-73 (Corr. Wiley Decl., ¶¶ 1-4).

By way of further example, one of the policies within the “employee handbook” compilation of documents accessible on the “HRWeb” is the “Whistleblowing Reporting Procedure and Guidelines.” This policy specifically promises as follows:

*Microsoft needs your assistance to ensure that it fully complies with all laws, company guidelines and standards of ethical conduct. *** Microsoft will not tolerate retaliation against any employee for making a good-faith report, cooperating with an investigation under this procedure or applicable law, or refusing to participate in activities that violate applicable laws, company guidelines, or standards of ethical conduct. Any employee who engages in retaliation shall be subject to disciplinary action up to and including termination.*

CP 776, 778 (emph. added). See also CP 772-73 (Corr. Wiley Decl., ¶¶ 1-4).

The “Standards of Business Conduct” policy is not part of the “employee handbook” set of policies on the “HRWeb” of the intranet system. It is accessible only through an entirely separate website – the “LCAWeb” (“LCA” = Legal and Corporate Affairs). This policy specifically states the following requirements and promises:

*All Microsoft employees are responsible for understanding and complying with the Standards of Business conduct, applicable government regulations, and Microsoft policies. ****

*It is your responsibility to be fully aware of these Standards and follow them. ****

*Openness, Honesty, and Respect: In our relationships with each other, we strive to be open, honest, and respectful in sharing our ideas and thoughts, and in receiving input. ****

The Standards of Business Conduct and the Business Conduct and Compliance Program are endorsed by and have the full support of the Microsoft Board of

As discussed above, the evidence is that Ms. Wiley believed in good faith that what Frank Shaw wanted her to do violated Microsoft policies or guidelines. So, in accordance with Microsoft policy and practices – and the repeated (at least annual), reinforced promises of non-retaliation she received relative to them (*supra* n. 18) – she pointed out to him that she and the company could not comment to the media on technology underlying a pending patent application as he apparently wanted her to do. *See, e.g.*, CP 1328 (Wiley Decl., ¶¶ 9-12).¹⁹ And, the evidence reflects Mr. Shaw was angry with her for deigning to question him and immediately enlisted three especially willing male managers to aid him in a retaliatory campaign to get her removed from her position and destroy her career.

Directors. *The Board of Directors and management are responsible for overseeing compliance with and enforcing the Standards of Business Conduct.*

Microsoft will not tolerate any retribution or retaliation taken against any employee who has, in good faith, sought out advice or has reported a possible violation.

CP 1340-1344 (emph. added). Microsoft employees receive specific training every year on this policy, and in such trainings Ms. Wiley “was again and again told to ‘speak up’ and raise concerns about laws, regulations, company policies and/or ethics, and specifically promised [she] would not be retaliated against for doing so.” CP 1329 (Wiley Decl., ¶14). *See also* CP 772-73 (Corr. Wiley Decl., ¶¶ 1-4).

¹⁹ As noted above, while Microsoft argues that there is no such company policy or guideline, its senior executive, Craig Mundie, has admitted there is. CP 1040 (Mundie Dep. 32:10-17) (“when patents have been filed, and in prosecution, in order not to disrupt the legal process of prosecuting an application, we ... don’t talk about these applications in any detailed way.”).

Microsoft has presented evidence that its “employee handbook” set of policies on the “HRWeb” is accessible by way of an intranet portal page which contains some self-serving disclaimer language about how “HRWeb contains only general information and guidelines” and “does not create any contractual rights or impose any legal obligations on Microsoft or its subsidiaries, nor does it guarantee specific treatment in any given situation.” CP 793-94 (Scovil Decl., ¶¶ 2-3). And before one can access the various policies that make up this “handbook” s/he must first “sign in” or click through a portal page, which states s/he has “read, understood and accepted” this disclaimer statement. CP 794 (*id.*, ¶ 4). The company has submitted evidence that Ms. Wiley clicked on this portal page to access the “handbook” set of policies on the “HRWeb” a number of times during her 20 years with Microsoft. CP 794-95 (*id.*, ¶¶ 5-6).

However, as noted above, not all of the Microsoft policies are in this “employee handbook” accessible through the HRWeb and this portal/“sign in” page. Moreover, the evidence reflects that, contrary to any disclaimer language in the HRWeb portal page or anywhere else, Microsoft employees (especially managers like Ms. Wiley) are repeatedly and specifically instructed, on at least an annual basis, that they *must* raise their good faith concerns about anything related to company policies, guidelines, and/or legal or regulatory matters; and specifically promised

that Microsoft will not permit or tolerate retaliation for doing so.²⁰ A jury may find from this evidence that any disclaimer language by Microsoft has been negated by its inconsistent representations and practices.

IV. ARGUMENT

A. Standard of Review

This Court reviews an order granting summary judgment de novo. Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. The Court must consider all facts submitted, as well as all reasonable inferences from those facts, in the light most favorable to the nonmoving party. Even if basic facts are undisputed, summary judgment must be denied if reasonable minds could differ on the inferences to be drawn from those facts. Only if reasonable minds could reach but one conclusion from the admissible facts in evidence may summary judgment be granted. CR 56(c); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wash.2d 853, 860-61, 93 P.3d 108 (2004); *Haubry v. Snow*, 106 Wash.App. 666, 670, 31 P.3d 1186 (Div. 1 2001).

²⁰ In fact, as a manager, Ms. Wiley was instructed by Microsoft, “again and again,” in repeated trainings and otherwise, that she could not retaliate against any employee for raising a good faith concern about any such practices, and that she would be subject to termination or other discipline should she do so. CP 1328-29, 1338, 1340-44 (Wiley Dec., ¶¶ 9-14, Exs. 203).

B. Trial Court Erred in Dismissing the WLAD Claim(s)

The trial court improperly weighed the evidence and rendered its own fact-findings as to genuine issues of material fact concerning Ms. Wiley's claim(s) under the Washington Law Against Discrimination ("WLAD"), RCW chapter 49.60, including whether the reasons given by Microsoft for its disparate treatment and adverse action(s) toward her are unworthy of credence, or are pretextual. It is well-established that if the plaintiff in a discrimination case brings forward evidence from which a jury could find that the employer's explanations are unworthy of belief, the jury is entitled to find in her favor on that basis alone. As the U.S. Supreme Court held in *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-48, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000): "Proof that the defendant's explanation is unworthy of credence is [a] form of circumstantial evidence that is probative of intentional discrimination."²¹

The trial court also committed plain error in ruling that the conduct and motives of male managers other than Ms. Wiley's direct supervisor cannot, as a matter of law, be considered a proximate cause of her disparate and adverse treatment.²² This is in direct violation of the U.S.

²¹ See also *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 185, 23 P.3d 440 (2001) (citing *Reeves* in WLAD case).

²² See, e.g., RP 44 ("there's the instant message between those two employees [referring to IM exchange between Frank Shaw's direct report Tom Pilla and fellow manager Mr. Sohn, discussed *supra* at 4]. But how does that . . . instant message then impute to Frank

Supreme Court's decision in *Staub v. Proctor Hospital*, -- U.S. --, 131 S.Ct. 1186, 1194, 179 L.Ed.2d 144 (2011). In *Staub*, the Court made clear that discriminatory motive may be imputed to the employer under proximate cause analysis when there is evidence from which a jury could find that an employee other than the ultimate decisionmaker performs an act motivated by a discriminatory animus, which is intended by him to cause an adverse employment decision, and his act influences the decisionmaking process. Such evidence supports an inference that the employer's explanation for its decision is pretextual. *Id.* at 1194.²³

As this Court recently (re)emphasized: "Summary judgment should rarely be granted in employment discrimination cases." *Rice v. Offshore Systems, Inc.*, 167 Wash.App. 77, 88, 272 P.3d 865 (Div. 1 2012).²⁴ At trial Ms. Wiley need only show that her gender was more

Shaw, or more importantly impute to Kevin Schofield who had the decision-making authority over Ms. Wiley.") *See also, e.g.*, RP 93 ("Mr. Pilla ... is definitely separated from Mr. Schofield who seems to be the person who has the decision-making authority ... over Ms. Wiley in terms of whether she'll be promoted, whether there will be increases in pay. That decision-making seems to come from Mr. Schofield.").

²³ *Staub* was decided under USERRA, but the Court noted the statutory language is "very similar to Title VII." Both statutes (like the WLAD) prohibit employment actions where discrimination based on a protected characteristic is "a motivating factor" in the action. 131 S.Ct. at 1190-91. The courts apply *Staub* to Title VII and other anti-discrimination statutes. *See, e.g., Shelley v. Geren*, 666 F.3d 599, 610 (9th Cir. 2012) (reversing summary judgment in ADEA case); *Chattman v. Toho Tenax America, Inc.*, 686 F.2d 339, 351-53 (6th Cir. 2012) (reversing summary judgment in race case under Title VII and analogous Tennessee Human Rights Act).

²⁴ *See also, Johnson v. Dep't. of Soc. & Health Servs.*, 80 Wash.App. 212, 226, 907 P.2d 1223 (Div. 2 1996).

likely than not a “motivating” factor (i.e., a proximate cause) in Microsoft’s disparate treatment and adverse action(s) toward her.²⁵ She need not show her gender was the sole factor, a “but for” factor, nor even “a determining factor.” *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wash.2d 302, 311, 898 P.2d 284 (1995). And it is well-settled that at the summary judgment stage her burden is “minimal,” and “does not even need to rise to the level of a preponderance of the evidence.” *Fulton v. Dep’t of Soc. & Health Servs.*, 169 Wash.App. 137, 152, 279 P.3d 500 (Div. 2 2012) (quoting *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994)). An employee needs to produce very little evidence in order to overcome the employer’s summary judgment motion (and provide the basis for a jury verdict in her favor). *Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995). Summary judgment “should rarely be granted in employment discrimination cases” because the “ultimate question,” as to motivation and proximate causation, “is one that can only be resolved through a searching inquiry – one that is most appropriately conducted by a fact finder, upon a full record.” *Schnidrig v. Columbia Mach., Inc.*, 80

²⁵ An adverse action is any tangible change in employment status or terms and conditions of employment, such as “hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits.” *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998) (emph. added). The trial court committed plain legal error as to this issue, as well. See RP 45 (“there is no question that there was some organization going on in an effort to at least see Ms. Wiley *removed from that position*. I am not sure whether there was an effort to remove her from the company.”) (emph. added).

F.3d 1406, 1410 (9th Cir. 1996). As this Court has long emphasized: “employers infrequently announce their bad motives orally or in writing.” *Sellsted v. Washington Mutual Savings Bank*, 69 Wash. App. 852, 860, 851 P.2d 716 (Div. 1 1993), *overruled on other grounds by Mackay*, 127 Wash.2d 302.²⁶ Thus circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff’s burden at trial to show a protected characteristic was a motivating factor in the challenged employment decision. *Costa v. Desert Palace*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *Sellsted*, 69 Wash.App. at 860; *Rice*, 167 Wash.App. at 89.

The trial court erred in its application of the *McDonnell Douglas* burden-shifting framework of summary judgment analysis. It also erred in applying an unduly high and rigid burden of production on Ms. Wiley (in effect, requiring direct or smoking gun evidence of gender discrimination). It further weighed the evidence and rendered its own fact-findings as to genuine issues of material fact.

More specifically, when evaluating summary judgment motions in discrimination cases under the WLAD, Washington courts have largely

²⁶ See also, e.g., *Rice*, 167 Wash.App. at 87-93; *Johnson v. Chevron*, 159 Wash.App. 18, 27, 244 P.3d 438 (Div. 1 2010). Indeed, as the U.S. Supreme Court emphasized in *Staub*, because it is common for injuries to have multiple proximate causes or “motivating factors,” the direct supervisor’s exercise of judgment does not necessarily negate or cut-off the potential proximate causation of a non-decisionmaker’s discriminatory action(s).

(but not rigidly) adopted the federal burden-shifting framework of analysis announced by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). *See, e.g., Hill*, 144 Wash.2d at 180.²⁷ As the U.S. Supreme Court has cautioned and our state Supreme Court has agreed: “The prima facie case method established in *McDonnell Douglas* was ‘never intended to be rigid, mechanized, or ritualistic’” or the exclusive means of proving a discrimination claim. *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983); *Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wash.2d 355, 363, 753 P.2d 517 (1988).²⁸

Since *McDonnell Douglas* was decided in 1973, the U.S. Supreme Court and Washington courts (including this Court), have made it even more clear that the framework announced in that case should not be applied in a “rigid, mechanized, or ritualistic” manner; that it should be used “flexibly to address the facts in different cases”; and it should not be

²⁷ While federal employment cases may be a “source of guidance,” the WLAD is often construed more liberally or broadly than are federal employment statutes because, unlike federal law, our state legislature has made clear the WLAD embodies a strong “make-whole” policy and one of “the highest priority,” which is to be given a “liberal construction” in order to effectuate its “broad” overarching purpose to eliminate discrimination. *Marquis v. City of Spokane*, 130 Wash.2d 97, 109, 922 P.2d 43 (1996).

²⁸ Indeed, as noted in *McDonnell Douglas* itself, because the facts in employment discrimination cases vary, the framework or guideline announced in that case “is not necessarily applicable in every respect in differing factual situations.” 411 U.S. at 802 n.13. Instead, the prima facie elements and tool of analysis should be used “flexibly to address the facts in different cases” and should not be “viewed as providing a format into which all cases of discrimination must somehow fit.” *Grimwood*, 110 Wash.2d at 363.

“viewed as providing a format into which all cases of discrimination must somehow fit.” *Id.* For example, courts now make clear that direct or “smoking gun” evidence of discriminatory animus is unnecessary, because there will seldom be “eyewitness” testimony as to the employer’s mental process and “employers infrequently announce their bad motives orally or in writing.” *Hill*, 144 Wash.2d at 179. Circumstantial, indirect, and inferential evidence will suffice to discharge the plaintiff’s burden at trial to show a protected characteristic was a motivating (a proximate cause) factor in the challenged treatment or decision. *See Costa*, 539 U.S. 90; *Sellsted*, 69 Wash.App. at 860; *Rice*, 167 Wash.App. at 89. And, it is now well-settled that a jury may render its ultimate fact-finding as to discrimination based solely on its finding that the employer’s stated non-discriminatory reasons are “unworthy of credence” or pretextual. *Reeves*, 530 U.S. at 147 (“Proof that the defendant’s explanation is unworthy of credence is [a] form of circumstantial evidence that is probative of intentional discrimination”); *Hill*, 144 Wash.2d at 185.

While the *McDonnell Douglas* framework should not be “viewed as providing a format into which all cases of discrimination must somehow fit,” and should be used “flexibly to address the facts in different cases,” it is still frequently used as an analytical “tool to assist plaintiffs at the summary judgment stage so that they may reach trial.” *Shelley*, 666

F.3d at 607 (quoting *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002)). Under this framework, the plaintiff bears an initial burden of production as to a prima facie case of discrimination. This burden is minimal, and requires only that she present evidence from which a jury may infer that “a motivating” (a proximate cause) factor in the disparate treatment was a discriminatory animus. *Shelley*, 666 F.3d at 608 (quoting *O’Connor v. Consol. Caterers Corp.*, 517 U.S. 308, 312, 116 S.Ct. 1307, 134 L.Ed.2d 433 (1996)). A prima facie case may be established by submitting evidence that plaintiff (1) belongs to a protected class, (2) the employer treated her less favorably in the terms and conditions of employment than a similarly-situated, non-protected employee, (3) doing substantially the same work. *Washington v. Boeing Co.*, 105 Wash.App. 1, 13, 19 P.3d 1041 (Div. 1 2000) (citing *Johnson*, 80 Wash.App. at 227).²⁹ Once the plaintiff satisfies her burden of production as to a prima facie case, it is presumed that the employer’s acts “if otherwise unexplained, are more likely than not based on the consideration of impermissible factors.” *Sellsted*, 69 Wash.App. at 862 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)).

²⁹ The elements for a prima facie case are not absolute, but vary based on different factual situations. *McDonnell Douglas*, 411 U.S. at 802; *Grimwood*, 110 Wash.2d at 363.

The burden then shifts to the employer to produce evidence of a non-discriminatory reason for its treatment or action. *Grimwood*, 110 Wash.2d at 364. If the employer meets this burden, the presumption of discrimination that otherwise existed against it is rebutted and drops out of the picture. *Hill*, 144 Wash.2d at 182. The burden then shifts back to the employee to identify evidence sufficient to raise a genuine issue of material fact as to whether the employer's stated reason is "unworthy of credence" or pretextual.

Microsoft has submitted evidence in support of its treatment and decisions as to Ms. Wiley to the effect that she suddenly became a terrible performer after over 19 years of stellar performance; and it has submitted criticisms about her from Frank Shaw and the three men with whom he privately collaborated to cause her removal, Tom Pilla, David Pritchard and Peter Haynes; as well as the "feedback" process discussed above. The question then becomes whether she has met her burden of producing evidence sufficient to raise a genuine issue of material fact from which the jury may infer, and find, that the reason given by Microsoft is pretextual. *Sellsted*, 69 Wash.App. at 859; *Rice*, 167 Wash.App. at 89. This is the only question at this stage. And, she "is not required to produce evidence beyond that already offered to establish the prima facie case, nor introduce direct or 'smoking gun' evidence." *Rice*, at 89 (citing *Sellsted*, at 860).

An employee may show that the employer's proffered non-discriminatory reason is "unworthy of credence" through a variety of types of circumstantial, indirect, and/or inferential evidence. For instance, she may do so by submitting evidence from which the jury may infer that the employer's articulated reasons are not based in fact; or, if they have some basis in fact, they are not really motivating factors or were insufficient to motivate the adverse employment decision. *Sellsted*, 69 Wash.App. at 859, n.14.

Ms. Wiley has presented ample evidence sufficient to raise a genuine issue of material fact as to whether the reason given by Microsoft is pretextual. For example, she performed at the highest levels at Microsoft for 19 years, with accolades from virtually everyone who worked with her. But Microsoft argues that suddenly her whole personality changed and she became a "bully;" "disrespectful" of others; that she "beat up" on Mike Houlihan at Microsoft's PR consulting firm; she "micromanaged" her team; and people "feared" her. This glaring disconnect, alone, is sufficient to raise a genuine issue of material fact as to whether the reason given by Microsoft is unworthy of belief. A sudden drop in performance ratings, spike in performance criticisms, and/or an employer's failure to properly document alleged performance deficiencies before making the alleged performance-based decision at issue, is

circumstantial evidence from which a jury may find pretext (and discrimination). *See, e.g., Carlton v. Mystic Transp.*, 202 F.3d 129, 137 (2nd Cir. 2000).

By way of further example, the evidence that during the relevant time there were 16 executives reporting to Microsoft CEO Steve Ballmer (including Craig Mundie) and all except the head of HR were male, as well as the evidence that in Mr. Mundie's organization where Ms. Wiley worked there was not a single female executive reporting to him (*supra* at 2-3), is evidence from which the jury may infer pretext (and discrimination). So is the admitted "good old boy's club" culture of Frank Shaw's group, with whom Ms. Wiley worked (*supra* at 3-4). *See Bergene v. Salt River Project Agric. Improv. & Power Dist.*, 272 F.3d 1136, 1143 (9th Cir. 2001) (noting "no women supervisors" during plaintiff's tenure with employer apart from HR department, and holding absence of female supervisors may be considered evidence of pretext in failure to promote).

Moreover, Ms. Wiley has presented evidence that the males in Frank Shaw's group commonly referred to her as "Mrs. No" and "Bitch." It is well-settled that "[r]emarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision" but they may well be "*evidence* that gender played a part." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, S. Ct. 1775, 104

L. Ed 268 (1989) (emph. in original).³⁰

In short, the trial court disregarded the following highly relevant facts from which the jury may reasonably infer (and find) not only pretext, but discriminatory motive: Four Microsoft executives were out to get Ms. Wiley removed from her job and plainly acted in concert to influence and cause her removal. They were all males, and in fact, included members of an admitted “good old boy’s club” within Microsoft. Male members of the “good old boy’s club” referred to Ms. Wiley as “Bitch” and “Mrs. No.” The four male executives out to get Ms. Wiley removed from her job also include Tom Pilla (Frank Shaw’s direct report, in this “good old boy’s club”), who [REDACTED]

[REDACTED] *Supra* at 3-5. The trial court dismissed all of this important circumstantial evidence out of hand – calling it mere “generalization or opinion evidence” (RP 96:11-17) – and failed to understand how the motivations of anyone other than Ms. Wiley’s direct supervisor could be relevant. It simply ignored substantial evidence as to how this male “gang of four” put pressure on Ms. Wiley’s direct manager

³⁰ Under *Price Waterhouse*, if a female employee establishes a prima facie case and the employer meets its burden of production as to non-discriminatory reason(s) for adverse treatment or action, sexist and demeaning comments will be relevant to proving pretext, and discrimination. *Frank v. United Airlines, Inc.*, 216 F.3d 845, 854-55 (9th Cir. 2000).

to remove her from her job, making their motivations critically important.

In other words, the trial court ignored the “cat’s paw” doctrine of liability recognized by the U.S. Supreme Court in *Staub*. As the Court explained in *Staub*, it is common for injuries to have multiple proximate causes. Thus, though an ultimate decisionmaker may not have himself acted in a discriminatory fashion toward the employee or retaliated against her, he may have received information from others in the decisionmaking process tainted by impermissible discriminatory motive. Under traditional tort law, the exercise of judgment by the ultimate decisionmaker does not break the causal link or prevent the earlier agent’s action(s) and discriminatory motive from being a proximate cause of the harm. *Staub*, 131 S.Ct. at 1192.³¹ This is a fact-intensive inquiry (at least given the evidence in this case), not properly resolved on summary judgment.³² In

³¹ Proximate cause requires only some direct relation between the injury asserted and the injurious conduct alleged, and excludes only those links that are too remote or purely contingent. The ultimate decisionmaker’s exercise of judgment does not automatically render a link to the other agent’s bias “remote” or “purely contingent” when the other agent’s biased action tainted or otherwise influenced the ultimate decision. In such a situation the ultimate decisionmaker’s exercise of judgment is also a proximate cause of the employment decision, but it is common for employment decisions to have multiple proximate causes. The Court therefore rejected a “hard-and-fast rule” that an independent investigation by the decisionmaker breaks the causal link. *Id.* at 1192-93. See also, e.g., *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007) (same).

³² Indeed, the Court held that an employer may escape liability only if it can conclusively establish that the adverse decision was completely unrelated to and not influenced in any way by the biased act(s). The Court rejected the Seventh Circuit’s standard, which had held that a “cat’s paw” case could not succeed unless the non-decisionmaker exercised such “singular influence” over the decisionmaker that the decision was the product of “blind reliance.” 131 S.Ct. at 1190 (quoting and reversing *Staub v. Proctor Hospital*, 560 F.3d 647, 659 (7th Cir. 2009)).

addition, the evidence reflects that Frank Shaw and the men with whom he conspired to influence and cause the decision to remove Ms. Wiley were as angry with Kevin Schofield as they were with Ms. Wiley. *See, e.g.*, CP 1303. Yet they did not go after him, the male, and there is no indication anyone ever considered replacing Mr. Schofield. His boss, Rick Rashid, acknowledged he never considered terminating Mr. Schofield and that Messrs. Shaw, Pilla, Pritchard and Haynes never suggested he should discipline, much less terminate, him. CP 1094 (Rashid Dep. 19:1-21); *see also* CP 1079 (Shaw Dep. 56:2-7). The record is replete with references that they were only trying to get rid of Ms. Wiley, the female.

Furthermore, evidence of inconsistent statements is a textbook example of what is sufficient to raise a genuine issue of material fact as to whether the reason given by the employer for its adverse treatment or action toward the employee is unworthy of belief. Here, despite numerous emails authored by Frank Shaw to the contrary, he maintains that he was never upset with Ms. Wiley and that he never put any pressure on Kevin Schofield whatsoever to get rid of her or remove her from her position. *Cf., e.g.*, CP 1076-83, 1085-90 (Shaw Dep. 50:1-25, 54:9-56:7, 61:7-64:20, 88:24-90:4, 92:11-94:11), *with* CP 1159 (private email exchange between Mr. Haynes and Mr. Shaw re: “new patent,” containing expletives, and in which Mr. Shaw states to Mr. Haynes “I’m getting hot

now”), CP 1179 (private email from Mr. Shaw to Mr. Pritchard re: “come to Jesus meeting” with Mr. Schofield and “awful consequence that was heading his [Schofield’s] way”), and CP 1190 (private email from Mr. Shaw to Mr. Pilla re: “put the hammer down”). The jury may infer, and find, from such discredited denials alone that Microsoft VP Frank Shaw has something to “hide” and the company’s articulated non-discriminatory reason for its treatment and action toward Ms. Wiley is pretextual.

Moreover, as discussed above, Ms. Wiley has presented ample evidence raising genuine issues of material fact about whether the whole “feedback” gathering process was concocted to try to back-fill some justification, after-the-fact, for the decision that had already been made to remove her from her position. *See supra* at 14-18.³³ A jury is entitled to look at all the evidence and decide whether the “feedback” process was a clever maneuver by Microsoft to justify a decision already made to remove Ms. Wiley – and hence pretextual – or not.

³³ As discussed above, the evidence reflects that the decision had already been made to remove Ms. Wiley from her position before this “feedback” gathering process was even conducted. The evidence reflects that the complainants were collaborating. The evidence reflects there were very positive statements about Ms. Wiley which were ignored. The evidence also reflects that the really negative statements used against Ms. Wiley in the “feedback” slide deck can be traced back to just two people whose criticisms, a jury may find, are riddled with credibility issues: Heather Mitchell and Ann Paradiso. Ms. Wiley has also produced evidence reflecting that what was purportedly “complained” about with regard to her in this “feedback” process was encouraged and influenced by Messrs. Shaw, Haynes, Pritchard and Pilla and/or not even within the complainants’ own observations (hearsay and double-hearsay). *See id.*

Likewise raising genuine issues of material fact as to pretext is the evidence that Ms. Wiley has been replaced in her position by a male (from the same organization Frank Shaw belongs to); [REDACTED]; and he was hired to replace her even though a female was the recognized “successor” to Ms. Wiley and her position. *Supra* at 5-7, 20 and nn. 3-5, 14. *See e.g., O’Connor*, 517 U.S. at 313 (replacement of plaintiff with non-protected person is circumstantial evidence of pretext and discrimination).

Pay and Promotion Claim and/or Additional Evidence of Pretext

Furthermore, in addition to the evidence presented about her [REDACTED] [REDACTED] male replacement, Ms. Wiley has submitted evidence of disparate treatment based on gender in pay and promotions. This has been raised not only as a stand-alone WLAD claim, but also as additional circumstantial evidence with regard to her disparate treatment/WLAD claim regarding being removed from her position and having her Microsoft career destroyed. Thus even if the trial court determined that Ms. Wiley had not met her summary judgment burden of production with regard to a stand-alone pay and promotion claim (which she has), this evidence was still, along with the other evidence discussed above, highly probative of her claim regarding removal from her position and destruction of her Microsoft career.

As discussed above, Ms. Wiley presented detailed comparison evidence as to pay and promotions (grade levels) with regard to several similarly-situated males. *Supra* at 5-7, 20-24, nn. 3-5, 14-17. The trial court erected an unduly heightened standard for such evidence, while also improperly weighing the evidence and rendering its own fact-findings as to it. For example, the trial court erroneously held that for such comparison evidence to raise a genuine issue of material fact the plaintiff must prove, at the summary judgment stage, that the comparators are similarly situated in *all respects*. See RP 94:12-15:

And then there is the evidence of comparators. And the problem that I have with the comparators is that they are to be similarly situated in all material respects. And I'm just not seeing that in these comparators. I'm looking at the six comparators and I'm seeing significant difference in education. I'm seeing significant difference in functionality. And I'm not seeing significant difference in terms of the pay and the benefits.³⁴

As this Court has emphasized: “[p]roof of different treatment by way of comparator evidence is relevant and admissible but not required, and in many cases is not obtainable.” *Johnson*, 159 Wash.App. at 33. The

³⁴ *Cf. also, e.g.*, CP 995-996, 1003-1004 (discussed *supra* at 5-7, 20-24, nn. 3-5, 14-17) (detailed evidence of criteria for and significant differences in Microsoft performance review ratings, and comparable review ratings, pay and promotions (grade levels) as between Ms. Wiley and several male peers, including, but not limited to, her male replacement), *with* RP 70:7-10 (“My confusion was more about when you look at the employee performance evaluations that were done and the way they’re reported, achieved versus the level above achieved, how much difference is really there?”), and RP 71:4-12 (“my issue is let’s say that there are two employees at Microsoft; one scores an achieved; one scores an exceeded. What is the difference in reality between those two employees? One might be slightly better than the other or it might be a significant difference.”).

employee is only required to submit evidence sufficient to raise a genuine issue of material fact from which the jury may infer that a protected characteristic was a motivating factor in the employer's decisions. She is not required to further prove she was "treated differently" than a non-protected employee.³⁵ Certainly for purposes of meeting her "minimal" burden at the summary judgment stage, she is not required to show non-protected employees are similarly situated in all respects. She need only present evidence sufficient to raise a genuine issue of fact as to whether she was treated less favorably than similarly-situated males doing "*substantially the same work.*" *Washington*, 105 Wash.App.at 13; *Johnson*, 80 Wash.App. at 227. Ms. Wiley has clearly done so.

Questions about who is "similarly situated" and doing "substantially the same work" as a plaintiff are workplace-specific, fact-intensive inquiries. As discussed above, the evidence reflects all of the males listed in the chart at pages 12-13 of Microsoft's motion (CP 57-58) interfaced regularly with Ms. Wiley as substantial parts of their job duties; her job and theirs consisted of research projects that were highly technical and required a deep understanding of the technology; she and they all had to position research technologies alongside Microsoft products; and

³⁵ Indeed, the Washington State pattern jury instructions do not include a comparator element, and it is plain (and not harmless) error for a trial court to give an instruction suggesting such an element exists. *Id.* at 32-34.

building relationships and ongoing collaboration was a responsibility of her role and theirs.³⁶ In fact, she and they were compared to each other *by Microsoft* for purposes of its pay and performance review calibration/decisionmaking processes. *Supra* at 22-23.³⁷

Furthermore, as discussed above, Ms. Wiley was a “HiPo, P.2,” which means Microsoft expected that she would receive two (2) promotions within the next three to five years. That is how it is supposed to work according to Microsoft’s own HiPo policies and practices. And other evidence likewise indicates her position warranted a Level 67 (at least). *Supra* at 23-24, n. 17. She received no promotions and was instead stuck at Level 66 (and the compensation associated with that grade level) for three years. *Supra* at 23. A jury is entitled to infer from this evidence, as well, that Ms. Wiley reasonably should have been promoted within her position of Marketing and Communications Director (advancing to higher grade “levels” with greater compensation).

³⁶ While Microsoft makes a conclusory and self-serving argument that these males’ “job responsibilities and performance metrics were radically different than Plaintiff’s,” even it concedes that at least “two of the six” males Ms. Wiley referenced in her deposition had the same “supervisors and decisionmakers on their compensation and promotion.” CP 57 (Motion at 12). And while Microsoft asserts “[m]any of them hold highly technical jobs in different organizations having little to do with the public relations function Plaintiff performed,” even it does not contend *all* of them did. *Id.*

³⁷ This is an admission by Microsoft that these men are appropriate comparators to Ms. Wiley. At least, it is evidence from which a jury may reasonably infer that they are.

In sum, as in *Rice*, the record contains ample evidence from which a jury may reasonably find that Microsoft's articulated non-discriminatory reason for its disparate treatment and adverse action(s) toward Ms. Wiley is "unworthy of belief," and summary judgment on her WLAD claim(s) is therefore improper and must be reversed. *Rice*, 167 Wash.2d at 92-93.

C. Trial Court Erred in Dismissing the "*Thompson*" Claim

The trial court also misapprehended and misapplied the law, and improperly weighed the evidence and rendered its own fact-findings, in dismissing Ms. Wiley's *Thompson* claim. *Thompson v. St. Regis Paper Co.*, 102 Wash.2d 219, 685 P.2d 1081 (1984), established that "[e]mployer obligations may ... arise independent of traditional contract analysis when the employer creates an atmosphere of job security and fair treatment with promises of specific treatment in specific situations and the employee relies thereon." *Gagliardi v. Denny's Restaurants, Inc.*, 117 Wash.2d 426, 433, 815 P.2d 1362 (1991). The employee must show "that (1) the employer created an atmosphere of job security and fair treatment with promises of specific treatment in specific situations[;] and (2) the employee justifiably relied on those promises." *Thompson*, 102 Wash.2d at 230. Each of the elements of this claim "presents an issue of fact," which may be decided on summary judgment only if reasonable minds could not possibly differ in resolving them. *Korslund v. Dyncorp Tri-*

Cities Services, Inc., 156 Wash.2d 168, 185, 125 P.3d 119 (2005) (citing *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 522-23, 525, 826 P.2d 664 (1992)).³⁸

Ms. Wiley has produced ample evidence from which a jury may find that Microsoft (repeatedly) promised specific treatment in specific situations – that it would not permit retaliation for raising good-faith concerns about actual or possible violations of any company policies or guidelines (or codes of conduct or ethics, or legal or regulatory standards). She has also produced evidence from which a jury may find she had a reasonable expectation that Microsoft would follow this promise based on the mandatory terms of its policies, guidelines and trainings, and/or its pattern of practice or conduct; and from which a jury may find Microsoft breached this commitment. *See supra* at 24-28, nn. 18-20.³⁹

Microsoft erroneously argues (and the trial court erroneously agreed) that “a plaintiff cannot justifiably rely on an employer’s ‘promise’

³⁸ *See also Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wash.App. 52, 61, 199 P.3d 991 (Div. 1 2008) (accord). Moreover, the “Berg rule” applies to the question of whether an employer made promises of specific treatment in specific circumstances, which modified what would otherwise be “at will” employment. Extrinsic evidence is admissible as to the entire circumstances under which an employer’s statements were made “as an aid to ascertaining the parties’ intent.” *Swanson*, 118 Wash.App. at 523 (citing *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990)).

³⁹ *See also Strother v. Southern California Permanente*, 79 F.3d 859 (9th Cir. 1996) (timing is evidence of causal connection even where defendant advances reasons for adverse action because jury can refuse to believe those reasons); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002) (same).

of specific treatment in an employee handbook where that handbook expressly disclaims any intent to make such a promise.”⁴⁰ Our state Supreme Court in *Swanson* rejected this argument. The disclaimer in that case, like Microsoft’s, “purport[ed] to conclusively establish that all employees are terminable at will ... and that nothing defendant ever has done or ever will do by way of promises to employees can constitute a binding obligation on its part”. The Court “reject[ed] the premise that this disclaimer can, as a matter of law, effectively serve as an eternal escape hatch for an employer who may then make whatever unenforceable promises of working conditions it is to its benefit to make” because “[a]n employer’s inconsistent representations can negate the effect of a

⁴⁰ CP 64 (Motion at 19). Microsoft points to this language in its electronic “employee handbook” of “linked” policies or sites accessible through the HRWeb of its intranet system:

This handbook and the linked sites are intended to provide general information and guidelines only. They are not to be read as creating any express or implied promise or contract for employment, for any benefit or specific treatment in any specific situation. Nothing in this handbook or in the linked sites changes the at-will nature of your employment relationship with Microsoft. ***

This handbook and the linked sites are not intended to be legal documents.

CP 65 (quoting, in part, CP 294 (“About this Handbook” page)). This page further states: “Some of the guidelines, policies, and benefits described in this handbook and/or the linked sites are also defined in legal documents and formal company statements. If there is a conflict between any legal document or formal company statement and this handbook or the linked sites, the document or statement controls.” CP 294 (not quoted by Microsoft).

disclaimer[.]” *Id.* at 532.⁴¹ Ms. Wiley has produced evidence of (repeated) representations and practices by Microsoft inconsistent with its disclaimer language, which a jury is entitled to find negate the disclaimer. *See supra* at 25-28, nn. 18-20.

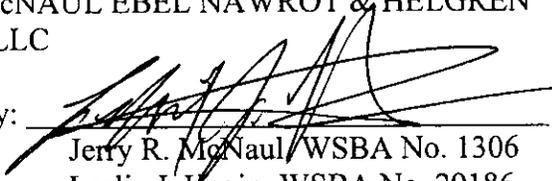
In short, as in *Swanson* and its numerous progeny, there are material facts in dispute from which a jury may find Microsoft “negated the effect of the disclaimer” through “inconsistent representations and practices,” and from which it may find Ms. Wiley justifiably relied on “these representations rather than the disclaimer.” Therefore, “[t]he issue was improperly resolved on summary judgment.” *Kuest*, 111 Wash. App. at 53 (citing *Swanson*).

V. CONCLUSION

For the foregoing reasons, this Court must reverse the trial court’s summary judgment ruling in its entirety.

Respectfully submitted this 22nd day of March, 2013.

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⁴¹ *See also Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d. 349, 364-365, 20 P.3d 921 (2001) (accord); *Kuest v. Regent Assisted Living, Inc.*, 111 Wash.App. 36, 53, 43 P.3d 23 (Div. 1 2002) (accord); *Payne v. Sunnyside Cmty Hosp.*, 78 Wash.App. 34, 42, 894 P.2d 1379 (Div. 3 1995) (same).

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on March 22, 2013, I arranged for the foregoing Brief of Appellant to be served by way messenger to:

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