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STATE OF WASHINGTON
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NO. 94846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT MICROSOFT
CORPORATION

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I. INTRODUCTION

The question before this Court is whether a plaintiff can avoid summary judgment on a retaliation claim without presenting evidence that the decision-maker who took an adverse action had knowledge of the protected activity allegedly giving rise to retaliation. The answer is no. This Court should uphold the Court of Appeals' decision affirming summary judgment in favor of Microsoft.

First, a decision-maker cannot retaliate against an employee for protected activity about which the decision-maker had no knowledge. This Court and numerous lower courts in Washington – along with many federal courts – have held that to establish a claim of retaliation, a plaintiff must prove “knowledge” of the alleged protected activity. This Court should follow precedent and hold that proof of decision-maker “knowledge” is required under Washington law.

Second, this Court should reject Cornwell's proposed “corporate knowledge” standard. A plaintiff claiming retaliation cannot proceed to trial by simply demonstrating that the *corporation* had knowledge of the protected activity if there is no evidence that the *decision-maker* (or any individual involved in the decision) had such knowledge. The “corporate knowledge” standard has been applied to satisfy a distinct fourth “knowledge” element in some jurisdictions, but extending to Washington

(where knowledge is not part of the prima facie test) and allowing corporate knowledge to supplant the causation element would undermine Washington law.

Third, this Court should reject Cornwell's proposed "knew or suspected" standard for determining whether a decision-maker had knowledge of the alleged protected activity. A plaintiff should not be able to proceed to trial by offering nothing more than speculative argument about what the decision-maker may have "suspected." In any event, Cornwell presented no evidence that a decision maker even "suspected" she had engaged in protected activity, making this an inappropriate case for this Court to consider the standard she proposes.

Washington precedents, sound general policy and the facts of this case support affirming. This Court should affirm the requirement of causation in retaliation cases and reject Cornwell's attempt to substitute argumentative speculation for evidence in this case.

II. STATEMENT OF THE CASE

Cornwell's employment at Microsoft was terminated in September 2012 as part of a group reduction in force ("RIF"). Cornwell signed a severance agreement, received generous severance benefits, and waived any claims regarding the termination of her employment. Cornwell's sole claim in this lawsuit arises from her low 2012 performance review score,

finalized a month before her termination, which she claims reflected unlawful retaliation under the Washington Law Against Discrimination (“WLAD”). The only issue on appeal is whether Cornwell presented sufficient evidence to establish a causal link between her alleged protected activity in 2005 (a paramour favoritism complaint) and the alleged adverse action in 2012 (her low performance review score).

A. Facts

In 2005, Cornwell complained of paramour favoritism. As discussed in prior briefing, paramour favoritism refers to a manager favoring a romantic partner over others. This is not gender discrimination under the WLAD, because it is based on a special relationship between two individuals, not based on gender. Microsoft and Cornwell entered into a settlement agreement with a confidentiality provision. CP 114-116, 111. Six years later, in December 2011, Cornwell began reporting to Mary Anne Blake. CP 84-85. Blake and her manager Nicole McKinley are the managerial decision-makers in this case. CP 39-40.

Sometime in late 2011, Cornwell told Blake that Cornwell had a “previous suit” against Microsoft arising from a “previous issue” with a manager, but she did not tell Blake what the “previous issue” involved. CP 119-120; CP 47-48, 54-55, 112, 119. Blake sought guidance from Human Resources and was told that HR had no record of any lawsuit. CP

47-50; CP 49, 51, 52. Blake shared this information with Cornwell and then never mentioned the issue to Cornwell again. *Id.*; CP 88-89.

In a routine mid-year performance check-in meeting in early 2012, Blake met with Cornwell and told her that her performance was trending toward a performance score of “4” (on a scale of 1-5, with 5 being the lowest). CP 65, 67; CP 110-111. Blake met with Cornwell to discuss continuing performance issues throughout 2012, CP 65-66, with Cornwell exhibiting hostile and combative behavior, CP 156-160. Cornwell eventually sent Blake a long email expressing her dissatisfaction with Blake as a manager and, among other things, expressing surprise that Blake had followed up with HR about her legal issue. *Id.* Blake again sought guidance from HR, which told Blake there was an unspecified legal issue in 2005, but that it was resolved and confidential. *Id.*; CP 52, 60. The settlement agreement was not in Cornwell’s personnel file, and there is no evidence anyone then in HR knew the nature of the 2005 “legal issue.”

Under Microsoft’s performance review system at that time, employees who received low scores were expected to improve their performance and, without improvement, could face separation. CP 92-93. As a natural consequence of such attrition, an employee with an average or slightly below average performance score who failed to improve her

performance over the year could receive a lower score at her next evaluation. CP 93. In August 2012, McKinley and Blake finalized Cornwell's final performance score as a "5," the lowest possible review score. CP 129, CP 143. That 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. Cornwell's annual performance review meeting was rendered unnecessary by the RIF, and Blake did not personally discuss Cornwell's "5" performance rating with her. CP 63-64; CP 310.

No evidence suggests that Blake, McKinley, or any of the HR professionals working with them (Jan Dyer and Mary Stokes) knew of the substance of Cornwell's 2005 complaint. CP 47-55, 122, 144, 150-154, 156. No evidence suggests anyone in Microsoft's legal department (LCA) disclosed the 2005 confidential agreement to Blake, McKinley, or HR. And no evidence suggests that anyone in LCA played any role in determining Cornwell's 2012 performance rating. Cornwell points to a single email in which Dyer wrote McKinley that she was meeting with LCA about Cornwell and would have "LCA eyes *on the review write up.*" Petition at 8 (citing CP 161). No evidence suggests that LCA played any role in the *review score*, regardless of whether LCA reviewed the written performance review. Finally, no evidence suggests that anyone involved

in any decision regarding Cornwell in 2012 – not management, HR, or legal – was involved in resolving Cornwell’s 2005 legal issue.

B. Procedural History

The trial court granted summary judgment in favor of Microsoft on the basis that the decision-makers had no knowledge of any protected activity, and therefore Cornwell could not establish a causal link between any protected activity and any adverse action. The Court of Appeals affirmed, holding that “general corporate knowledge” of prior protected activity was not enough to establish causation: “We decline Cornwell’s invitation to adopt the “general corporate knowledge” principle for retaliation cases. In accordance with existing law, Cornwell needed to provide evidence that Blake or McKinley had knowledge that she had engaged in protected activity prior to Cornwell’s termination.” Opinion at 13.

Further, the Court of Appeals rejected Cornwell’s argument – unsupported by any evidence – that “Blake suspected the legal issue was more likely than not a discrimination complaint or some other protected activity.” As the Court of Appeals explained: “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.” Opinion at 14.

This Court granted review on December 6, 2017.

III. ARGUMENT

Under the WLAD, to establish a claim of retaliation a plaintiff must prove *three* elements: (1) protected activity; (2) adverse employment action; and (3) a causal link between the two. *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). This Court should affirm the Court of Appeal’s decision and hold that to establish causation, a plaintiff must present evidence that the decision-maker had knowledge of the alleged protected activity. This Court should reject Cornwell’s proposed “corporate knowledge” and “knew or suspected” standards as inconsistent with Washington law.

A. Under Existing Washington Law – and in Numerous Other Jurisdictions – a Plaintiff Must Demonstrate That the Decision-Maker Had Knowledge of the Plaintiff’s Protected Activity.

A retaliation claim under the WLAD “can only come about by the performance of an intentional act.” *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906, 726 P.2d 439, 443 (1986). Of course, a person cannot retaliate against someone else for something they do not know occurred. “Retaliatory conduct involves both motive and

intent.” *Id.* at 906-907. “Retaliation is, by definition, an intentional act.” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168, 173–74, 125 S. Ct. 1497, 1504, 161 L. Ed. 2d 361 (2005). A manager cannot retaliate against an employee for protected activity about which the manager does not know. Thus, in order to prove a causal link between the protected activity and the adverse action, the plaintiff must establish that the decision-maker had knowledge of the protected activity. This Court should confirm that the standard under Washington law is whether the decision-maker had such “knowledge.”

In *Wilmot*, this Court held a plaintiff can establish the causation element of a claim of workers’ compensation retaliation “by showing that the worker filed a workers’ compensation claim, that the employer had knowledge of the claim, and that the employee was discharged.” *Wilmot*, 118 Wn.2d at 69. The Courts of Appeals have consistently held that a plaintiff must show the decision-maker(s) involved “knew” or “had knowledge” of the plaintiff’s protected activity. “To show retaliation based on protected activity, ***a plaintiff must provide evidence that the individuals he alleges retaliated against him knew of his protected activity.***” *Marin v. King Cty.*, 194 Wn. App. 795, 818, 378 P.3d 203, 217 (2016), *rev. denied* 186 Wn.2d 1028 (2016) (emphasis added); *see also Woodbury v. City of Seattle*, 198 Wn. App. 1069, 2017 WL 1906110 at *4

(2017); *Tang v. City of Seattle*, 194 Wn. App. 1054, 2016 WL 3800634 at *11 (2016); *Young v. King Cty.*, 195 Wn. App. 1048, 2016 WL 4442571 at *6 (2016); *Michkowski v. Snohomish Cty.*, 185 Wn. App. 1057, 2015 WL 677397 at *5 (2015), *rev. denied*, 184 Wn.2d 1004 (2015).

Further, many other courts – including the First, Seventh, Eighth, Ninth, and Eleventh Circuits – have held that to establish causation the plaintiff must show that the individual decision-maker “had knowledge,” “knew” or was “aware” of the protected activity. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (requiring evidence that the decision-makers “in fact were aware of her complaints.”); *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197–98 (11th Cir. 1997) (“plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff’s protected expression”); *Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009) (“Clearly, a superior cannot retaliate against an employee for a protected activity about which he has no knowledge.”); *Littleton v. Pilot Travel Centers, I.I.C.*, 568 F.3d 641, 645 (8th Cir. 2009) (decision-maker “had no knowledge” of the protected activity, despite the fact that the senior manager and Human Resources Director were aware); *see also Robinson v. Potter*, 453 F.3d 990, 994 (8th Cir. 2006); *Pomales v. Celulares Telefónica, Inc.*, 447 F.3d 79, 85 (1st Cir. 2006).

The “knowledge” standard strikes the appropriate balance in WLAD cases. Requiring a plaintiff to provide evidence of decision-maker knowledge recognizes that there can be no causal link between protected activity and a later adverse action if the decision-maker has no knowledge of the claimed protected activity. Washington case law is clear that to prove causation, a plaintiff does not have to provide direct evidence of retaliatory motive or intent. *Francom*, 98 Wn. App. at 862. Plaintiff must still produce direct or circumstantial evidence of the decision-maker’s “knowledge” to meet the causation requirement.

B. This Court Should Reject Cornwell’s Proposed “Corporate Knowledge” Standard Because It Eliminates the Causation Requirement.

This Court should reject Cornwell’s request to adopt the Second Circuit’s “general corporate knowledge” standard because it applies only in jurisdictions that require proof of a fourth element (knowledge), and extending the standard to substitute for causation would undermine established Washington law.

In jurisdictions that follow the “corporate knowledge” standard, like the Second Circuit, plaintiffs 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 *Gordon*, the Second Circuit held that general corporate knowledge was sufficient “to satisfy the *knowledge* requirement.” *Id.* at 116 (emphasis added). But the court did not hold that corporate knowledge was sufficient to satisfy the *causation* element (the fourth element in the four-part test). Even under the *Gordon* framework, the plaintiff must present evidence that the decision-maker had knowledge or acted upon orders of a superior who had knowledge. *Id.* at 117. Under Second Circuit precedent, “Plaintiff cannot rely on general corporate knowledge alone to satisfy the third “causal connection” prong.” *Ehrbar v. Forest Hills Hosp.*, 131 F. Supp. 3d 5, 34 (E.D.N.Y. 2015).

Cornwell is asking this Court not only to adopt the Second Circuit’s corporate knowledge standard but to extend that standard and hold that corporate knowledge is sufficient to establish both “knowledge” and “causation.” Cornwell cites no authority showing that any jurisdiction has taken this position, and Cornwell provides no sound reason for this Court to do so.

Adopting Cornwell’s argument and allowing proof of “corporate knowledge” to meet the requirement of proving a causal link would cancel the statutory intent and motive components of a retaliation claim. Under Cornwell’s theory, as long as a plaintiff can prove that someone in the

corporation at some point in time knew about the protected activity, the plaintiff has established causation, *even if no one involved in the decision-making process was in fact aware of the protected activity.*

That is precisely the case here. 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 in original). After full discovery, including 11 depositions, Cornwell has not identified a single person who was aware of her protected activity and who was involved in the review score decision. Because she cannot establish a causal link, she instead asks this Court to hold that "corporate knowledge" is enough to survive summary judgment. Without any evidence that any individual involved in the decision knew about the protected activity, Cornwell's claim must fail.

C. This Court Should Reject Cornwell's Proposed "Knew or Suspected" Standard Because It Is Speculative and Inappropriate

Adopting Cornwell's proposed standard – what the decision-maker "knew or suspected" – is not appropriate because the standard by its very terms invites speculation, which is often simply argument, and the standard is not accepted in Washington or the Ninth Circuit.

Citing a single Ninth Circuit case, Cornwell asks this Court to adopt a “knew or suspected” standard. This Court should reject that standard for several reasons. First, the Ninth Circuit has not adopted “knew or suspected” as a standard. Only one case has used that language, and its application should be limited to the facts of that case. Second, the standard is inherently speculative because it focuses on what the decision-maker may have “suspected.” *Basically, the courts would be asked to speculate about what the decision-maker may have speculated.* In this case, the “knew or suspected” standard is especially inappropriate because Cornwell invites this Court to speculate that the decision-makers suspected incorrectly about the nature of Cornwell’s 2005 complaint.

As an initial matter, “knew or suspected” is not an established standard in the Ninth Circuit for determining whether the decision-maker had sufficient knowledge of the protected activity to support a causal link. The Court of Appeals cited the *Cohen* case for the correct standard, namely, whether the employer is “aware” of the protected activity. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). The Ninth Circuit has cited this standard with approval in numerous other cases. *See, e.g., Hurst v. Falcon Air Express Inc.*, 650 Fed. Appx. 299, 300 (9th Cir. 2016). While Cornwell cites one case that uses the “knew or suspected” language,

Hernandez v. Spacelabs Med. Inc., 343 F.3d 1107, 1113 (9th Cir. 2003), not a single Ninth Circuit case embraces that language as the test.

Further, the court's reference to "knew or suspected" in *Hernandez* must be viewed in the context of the facts of that case. In *Hernandez*, the plaintiff filed an internal complaint with Human Resources, alleging his manager was sexually harassing a female employee. *Hernandez*, 343 F.3d at 1110. The plaintiff immediately told one of his supervisors and other co-workers about his internal report, and his supervisor immediately told him he "was now in trouble." *Id.* The HR Manager notified the plaintiff's manager about the harassment allegations the next day and conducted an investigation. *Id.* at 1111. Three weeks later, the plaintiff's manager terminated the plaintiff. *Id.* Although the manager claimed he did not know it was the plaintiff who had made the complaint, it was undisputed that ***the manager knew a complaint of sexual harassment had been made***, and plaintiff presented evidence demonstrating the manager knew it was plaintiff who made the complaint. Under those circumstances, the court held the plaintiff had presented sufficient evidence to show that the manager "knew or suspected" plaintiff complained about him. *Id.* at 1114. The focus was still on evidence indicating the manager had knowledge of the protected activity. The "suspected" language made sense in the context of that case, on very different facts than here, but should not be

extended more broadly as a substitute for evidence of a manager's "knowledge."

D. Even Under the "Knew or Suspected" Standard, this Court Should Affirm the Court of Appeals' Decision Because Cornwell's Speculative Arguments are Not Evidence Sufficient to Avoid Summary Judgment

Regardless whether this Court continues to require proof of "knowledge," as articulated by numerous state and federal cases, or adopts a new standard of "knew or suspected," this Court should affirm. The Court of Appeals 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 *evidence* from which a finder of fact could properly infer decision-maker knowledge. This Court should affirm because a plaintiff cannot rely on argumentative speculation in place of evidence on an essential element of the claim to avoid summary judgment.¹ "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." *Meyer v.*

¹ As one example of Cornwell's argumentative speculation, Cornwell argues that "Blake and Human Resources were hyper-focused on Cornwell's previous legal issues with Microsoft." Pet. at 7. In fact, the evidence shows Blake discussed the issue only twice with her direct manager and her HR representatives, did so for the purpose of seeking guidance, and did not pursue the matter further after being told it was confidential. CP 47-52, 60, 88-89. Her request for guidance was exactly what this Court would expect of a manager.

Univ. of Washington, 105 Wn.2d 847, 852, 719 P.2d 98, 102 (1986)
(emphasis added).

Neither Rule 56 nor the WLAD preclude the use of summary judgment in employment cases, and this Court should not discourage its use. “Summary judgment motions are important to the process of resolving disputes.” *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396, 402 (1997). “The purpose of summary judgment is not to cut litigants off from their right of trial by jury if *they really have evidence which they will offer on a trial*, it is to carefully test this out, in advance of trial *by inquiring and determining whether such evidence exist.*” *Keck v. Collins*, 184 Wn.2d 358, 369, 357 P.3d 1080, 1085 (2015) (quotation and alteration omitted, emphasis in original). If the plaintiff in an employment discrimination case cannot present evidence to support her claim, she should not be allowed to avoid summary judgment and waste the court’s and the parties’ resources in an unnecessary trial. That is precisely the case here. This Court should affirm the important and appropriate role that summary judgment plays in our legal system.

Cornwell essentially argues that because she is a woman and had a prior legal issue involving a male manager and review scores, Blake must have “suspected” the prior issue involved discrimination. This is speculation, not direct or circumstantial evidence, because Cornwell has

presented no evidence of what Blake suspected. Cornwell's case is far more speculative than any case upon which she relies. Cornwell argues that Blake "knew or suspected" she engaged in statutorily protected activity because: (1) Cornwell had a prior legal action that involved a performance rating; (2) that involved 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. Cornwell omits several facts, most important of which is that there is no evidence, direct or circumstantial, that *any individual* involved in Cornwell's employment in 2012 had knowledge of her alleged protected activity seven years earlier.

This contrasts starkly with *Hernandez*, where multiple individuals knew about the plaintiff's complaint, and the decision-maker himself knew a complaint of sexual harassment had been made. On that evidence, a fact finder could reasonably infer the manager learned plaintiff was the source of the complaint, either from co-workers or from the supervisor who told plaintiff he "was in trouble." Here, by contrast, nothing in the record suggests that *any* person involved in the 2012 review score decision (either in HR or in Cornwell's department) knew of her alleged protective activity in 2005: unlike *Hernandez*, no co-worker or supervisor

was aware of her complaint, the managers who established her rating were not the targets of (or involved in) that complaint, and the alleged retaliatory action took place years (not weeks) after the complaint. And no evidence suggests anyone at Microsoft (besides Cornwell herself) violated the confidentiality obligations in Cornwell's 2005 agreement.

Further, despite taking Blake's deposition, Cornwell has presented no evidence regarding what Blake "suspected." In lieu of evidence, Cornwell asks this Court to speculate as to what Blake may have speculated – a double-barreled invitation to ignore the record, which is insufficient to survive summary judgment under settled Washington law. *See, e.g., Meyer*, 105 Wn.2d at 852. "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." *Michkowski*, 185 Wn. App. 1057 at *5. The concerns raised by the Court about the difficulty of proving intent are not raised here. Without any direct or circumstantial evidence of the decision-maker's knowledge of the protected activity, intent is not a disputed fact.

Microsoft has over 100,000 employees and it is not reasonable to assume that any individual has knowledge of all issues raised by an employee throughout her career at Microsoft. The fact that someone in legal may have known about Cornwell's prior legal issue and could have told HR, who could have told Blake, does not raise an issue of fact sufficient to survive summary judgment. "[B]ecause "could have told" is not the same as "did tell," it would be *pure speculation*" to infer that a person with knowledge of the protected activity had shared that information with the decision-maker. *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999).

This Court has long held that mere speculation is insufficient to survive summary judgment. After extensive discovery, Cornwell has presented nothing more than speculation to support her case, and summary judgment was appropriate. This Court should affirm the decision.

IV. CONCLUSION

This Court should reject the "corporate knowledge" standard as inapplicable to a claim for retaliation under the WLAD and hold that a plaintiff must establish a decision-maker had "knowledge" of alleged protected activity to prevail on a retaliation claim. This Court should affirm the decision of the Court of Appeals and affirm summary judgment in favor of Microsoft.

RESPECTFULLY SUBMITTED this 2nd day of February, 2018.

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