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

KIRSTEN WILEY, an individual,

Appellant,

v.

MICROSOFT CORPORATION, a Washington corporation,

Respondent.

REPLY BRIEF OF APPELLANT

SUBMITTED AS REDACTED FOR PUBLIC RECORD
PURSUANT TO TRIAL COURT SEALING ORDER(S) AND GR 15

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I. ARGUMENT

Microsoft's response brief ("Resp. Br.") rests on "straw man" arguments and mischaracterizations of the facts, issues, and the law.

A. **Microsoft Mischaracterizes the Facts and Issues**

1. ***WLAD Claim***

Microsoft mischaracterizes the facts and issues as to Ms. Wiley's WLAD claim. The crux of her claim has always been that Microsoft allowed a group of male managers to proximately cause the destruction of her career; and that they were motivated, at least in part, by gender bias (and thus so was the decision-making process as to Ms. Wiley that they influenced). In other words: Microsoft VP Frank Shaw, along with the three like-minded male managers who assisted him – Tom Pilla (his direct report), David Pritchard (a Senior Director and Chief of Staff to Microsoft's Chief Research and Strategy Officer and Senior Advisor to the CEO, Craig Mundie), and Peter Haynes (a report of Pritchard's) – targeted Ms. Wiley, "set [her] up for failure," and influenced the decision to remove her from her position and thereby ruin her Microsoft career (i.e., the decision that her termination was "predetermined to be the ultimate result"). CP 5 (Complaint, ¶ 3.20).

Microsoft distorts the evidence in an effort to support its argument that "[n]othing even remotely suggests" that the so-called "feedback" process "was anything *other than* a good faith effort to collect feedback with respect to Wiley and her performance and workplace behavior." Resp. Br. at 29 (emph. in orig.). Microsoft spins the evidence regarding

the so-called “feedback process” completely out of context and argues that it is only who is interviewed and who does the interviewing, in isolation, that can possibly matter. This is a straw man effort to ignore the evidence from which the jury may find that Shaw, Pilla, Pritchard and Haynes influenced the entire process as a contrivance to “justify” the decisions that had already been made (also a result of their influence), to remove Ms. Wiley from her position and in the process ruin her Microsoft career.

There is ample evidence from which the jury may find that, caving to pressure from Shaw and his collaborators (Pilla, Pritchard and Haynes), Ms. Wiley’s direct supervisor, Kevin Schofield, had already agreed she would be removed from her position and would not get another marketing or communications (“MarComm”) role, well before this so-called “feedback process” was even initiated.¹ Therefore, the timing of this “feedback process” alone raises material issues of fact as to whether the process was “either not credible, a pretext for discrimination or both.” *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wash.App. 852, 865, 851 P.2d 716 (Div. 1 1993). Moreover, there is specific evidence from which the jury

¹ See Opening Brief (“Op. Br.”) at 9-14; CP 1192 (10/17/10 email from Pritchard to Peterson confirming “consensus” reached at meeting between Pritchard, Haynes and Pilla, with Schofield, to “mov[e]” Ms. Wiley “out of her role quickly”). See also, e.g., CP 1190 (email from Shaw to his Pilla, his direct report, instructing him to “put the hammer down” on Schofield); CP 1115-16 (Pritchard Dep. 110:18-111:7) (acknowledging he, Haynes and Pilla told Schofield he needed to “mov[e]” Ms. Wiley “out of her role quickly”); CP 1111-12 (*id.* at 99:5-16, 101:1-12) (acknowledging pressure he, Haynes and Pilla placed on Schofield that if he did not replace Ms. Wiley immediately his own “credibility” was going to be on the line); CP 1179 (email from Shaw to Pritchard re: his “come to Jesus” meeting with Schofield and how he emphasized to Schofield the “awful consequence that was heading his way”). See also, e.g., CP 1194 (Schofield notes at Kevin/Kirw) (“Understands she won’t get another MarComm role at MSFT”). Frank Shaw’s team even had a cross-organization “consolidation” proposal worked up for Schofield’s group specifically targeting her to be “RIF’d.” CP 1308-09.

may find that Shaw, Pilla, Pritchard and Haynes influenced the gathering and content of the “feedback” in this process, encouraging particular people to go to Mr. Schofield and/or HR to malign Ms. Wiley. CP 1114 (Pritchard Dep. 105:2-4), 1173 (Pilla Dep. 108:3-20), 1196-97 (email from Peter Haynes to HR’s Sheryl Peterson)).

Microsoft ignores a host of other evidence from which the jury may find the entire “feedback process” lacking in credibility, or pretextual (and influenced by Shaw, Pilla, Pritchard and Hayes). This includes the evidence that it was conducted outside the context of the normal procedure at the company for gathering feedback: the annual performance review process. CP 864, 1209.² And the feedback in the normal (and contemporaneous) 2010 performance review process is quite positive and in stark conflict with the criticisms in the so-called “feedback process” influenced by Shaw, Pilla, Pritchard and Haynes. Yet the feedback from the actual performance review process was ignored.³ There is a

² See CP 1194 (Schofield notes at “Kevin/Kirw”) (“Not traditional performance issue”).

³ “Feedback is a critical component of the annual performance review process.” CP 864, 1209. The feedback in Ms. Wiley’s actual annual performance review process was given to Schofield at least as of September 7, 2010 and shared with HR’s Peterson and Scovil at least as of November 4, 2010. See CP 864-65, 1208-12. This includes very positive comments by her fellow managers and partners in other organizations, James Oker, Sandy Torres and Verna Felton, including but not limited to the following:

- “Kirsten does a great job of staying focused on the stuff that matters most, and being clear about the rest and pushing it aside” (James Oker)
- “Kirsten is a fantastic partner in MSR. I can always count on her to be responsive and collaborative” (Sandy Torres)
- “Kirsten is a good business partner. She listens to the concern of the team and does a good job with incorporating that feedback into the plan and making sure the team’s best interests are kept in mind” (Verna Felton)

CP 864, 1208. Ms. Wiley also received “100%” agreement to the following requests (among many others) from her direct reports:

substantial amount of other evidence from which the jury may find the “feedback process” to be lacking in credibility, or pretextual, as well.⁴

The jury is also entitled to find from the evidence that at Microsoft a presentation to an employee like the one made to Ms. Wiley of the so-called “feedback” slide-deck, by her boss and HR, means her days are numbered and the decision has in fact been made to move her out of her job and the company.⁵ That is, the evidence supports a jury finding that

-
- “My Manager effectively communicates the business strategy and how our work aligns to broader goals”
 - “My Manager understands cross-group priorities and works to gain alignment with other groups”
 - “My Manager is effective at managing relationships and expectations with his/her peers and senior leaders”
 - “My Manager delegates work effectively”
 - “My Manager encourages discussions that are open and productive”
 - “My Manager considers points-of-view that are contrary to his or her own”

CP 864-865 (¶¶ 1, 10, 24, 30, 32, 34); CP 1209-11 (same). The annual performance review feedback further contains comments like these from her direct reports:

- “Kirsten is approachable, flexible, and supportive”
- “Wonderful manager, I couldn’t be more pleased”

CP 865, 1212.

⁴ For example, in many instances what was being complained about was not even within the complainant’s own observations (hearsay). Op. Br. at 16 (citing CP 1202 (Peterson Dep. 50:19-25), 1052 (Schofield Dep. 211:9-15)). In addition, while Microsoft argues 17 people were interviewed and just happened to make the same or similar negative statements, the evidence indicates they were collaborating. *Id.* and n.13 (citing CP 1204, 1206). Moreover, the jury may find that when one compares the Microsoft-produced interview notes and summaries to the “feedback process” slide deck, it is evident that “[m]ost of the negative comments including the most scathing words on the slides can be traced back to 2 individuals, Heather Mitchell and Ann Paradiso.” CP 1329-30 (¶¶ 16-17) (citing documents compared). Paradiso had little to no interaction with Ms. Wiley for approximately 4 years. And Mitchell was a well-known back-biter who liked to talk behind people’s backs, whom Kevin Schofield has admitted is inaccurate in her observations. Op. Br. at 16-18 (citing CP 1216-18, 1229, 1234, 1055-61, 1298).

⁵ Ms. Wiley, as a long-time manager, knew this is what the “slide deck” presentation of the so-called “feedback process” meant. See CP at 1252 (“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”). The jury may credit her testimony. Indeed, Microsoft manager Peter Haynes has not only admitted but boasted as much. CP 1254 (“I have been instrumental in getting Kirsten Wiley removed from

the actions of Frank Shaw and his three male manager collaborators succeeded in “set[ting] [her] up for failure” and influencing the decisions to remove her from her position and that her termination was “predetermined to be the ultimate result.” CP 5 (Complaint at ¶ 3.20).⁶

At the trial court, Microsoft argued strenuously (and erroneously) that these actions cannot possibly be found by the jury to comprise an adverse action because (it argued) Ms. Wiley “remains, to this day, a Microsoft employee.” CP 61 (Mtn. at 16).⁷ But it was and is undisputed

Microsoft (if that in fact ever happens”). It also remains undisputed that if she were to interview for another job at Microsoft, the hiring manager would look at her last performance review and talk to her last manager before making an offer. CP 1105 (Pritchard Dep. 27:10-23). Her last review is now a job killer. CP 1259-71. And her last manager has thrown her under the bus. In fact, Senior Director (and Craig Mundie’s chief-of-staff) David Pritchard has admitted Microsoft had gone beyond the point of no return with Ms. Wiley such that the “situation was beyond repair” (with which Kevin Schofield “agreed”). CP 1110-12.

⁶ Microsoft argues Ms. Wiley “declined the offer” of a coach or mentor. Resp. Br. at 12. The jury may find otherwise. Ms. Wiley has testified that she already had a number of mentors. CP 196-197 (Wiley Dep. 237:24-238:2). The jury may also find from other evidence she did not “decline[] the offer.” For example, in her email to Schofield of April 15, 2011 (CP 285-86, at 285) she actually responded as follows:

I need to understand what you mean by coaching on how to “improve your strategic leadership.” It will be a much more meaningful interaction if you provide specific examples of where you observed interactions that lacked Strategic Leadership and how you would have handled the situation differently. This criticism is very different from the feedback you provided in December which was focused on communication style, and it was not a core message in what was communicated during the annual review process. As you can imagine, receiving three different and inconsistent managerial messages in such a short period of time leads one to request more specific, objective and material examples.

⁷ Remaining technically “employed” while on leave and without any actual job is not the same thing as “no adverse action.” The jury may also find from the evidence that her treatment by Microsoft is what *caused* her to have to go on leave (at her doctor’s direction); and while she was on leave she was replaced in her job by a less-qualified male. Microsoft argues “Wiley remained in her position for almost a year after receiving the feedback before commencing leave on her doctor’s direction.” Resp. Br. at 34. But the jury may infer from the evidence that the only reason Microsoft did not remove her from her position right away, as had been decided before the so-called “feedback process” was even started, is because she had retained counsel who had written to Microsoft about her legal claims and the company knew firing her then would be an admission she was right about their intentions, and would look even more plainly retaliatory. Her counsel sent a letter to Microsoft about her legal claims on December 16, 2010, and served her complaint February 16, 2011. She stayed on with the company after

that she had no job at Microsoft, and had been replaced in her position with a male.⁸

Indeed, as the trial court noted: “there is no question that there was some organization going on in an effort to at least see Ms. Wiley *removed from that position*.” RP 45 (emph. added).⁹ It is also undisputed that Microsoft has now terminated her. Resp. Br. at 2 n.1 (“Wiley is no longer a Microsoft employee.”).¹⁰

filing suit, but was excluded from emails and meetings and generally shunned. She then had to go on leave per doctor’s instruction. CP 1330, 1430 (Wiley Decl., ¶17 and Ex. 5).

⁸ A disputed issue of material fact exists as to whether her replacement, Kevin Kutz, is also less-qualified. Microsoft asserts Ms. Wiley has offered “no evidence regarding Kutz’s qualifications for the position.” Resp. Br. at 13, n.3. In fact, she has offered a good deal of specific evidence. See Op. Br. at 20 n.14 and the evidence cited therein (re:

██████████). In addition, Microsoft has submitted no evidence rebutting that he had lesser performance reviews than she and never received any of the prestigious awards she did (e.g., the HiPo and Bench program designations, and Gold Star bonus). It is also unrebutted that he was selected to replace her over a female (K. Berschauer) who was the recognized “successor” to the position. CR 1331-32, 1432 (Wiley Decl., ¶24 and Ex. 6).

Moreover, it is a disputed issue of material fact whether Mr. Kutz was from Frank Shaw’s organization of Corporate Communications. Microsoft’s assertion that he “did not work in Corporate Communications” is contradicted by its own records. Microsoft cites to one of Mr. Schofield’s declarations for this assertion. Resp. Br. at 13 n.3 (CP 598 at ¶ 20). But that declaration simply makes this conclusory claim with no evidentiary support. Microsoft’s own records show Kevin Kutz was in the “CORPCOMM” organization before he was selected to replace Ms. Wiley. CP 1129 (at ll. 111, 112, 146). This reflects the reality that he reported directly to the public sector communications group and, while not a “direct report” of Shaw’s, the group to which he did directly report in turn reported up to Shaw within Corporate Communications.

⁹ The trial court erred, however, in (1) rendering its own fact-finding (“*I am not sure* whether there was an effort to remove her from the company” (RP 45, emph. added)); and (2) ignoring well-established law that an “adverse action” is *any tangible change in employment status or terms and conditions of employment*, including but not limited to “hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision [proximately] 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).

¹⁰ Microsoft makes the self-serving and conclusory assertion that this is “for reasons that are neither germane to this appeal nor in the record on appeal.” *Id.* These facts about her recent termination are quite germane. Ms. Wiley is filing a RAP 9.11 motion to submit three pages of additional new evidence (correspondence between Microsoft and Ms. Wiley’s medical provider regarding the company’s post-trial court ruling termination of her employment and benefits altogether). The jury may find from this evidence, just as she alleged, that her termination was “predetermined to be the ultimate result” of the

In addition to the evidence of pretext discussed above, there is substantial other circumstantial evidence from which the jury may find that gender bias was at least *a* motivating factor in the actions and chain of events proximately caused by the pressure applied to Mr. Schofield (and his boss above him) by Shaw, Pilla, Pritchard and Haynes. Microsoft consistently mischaracterizes this evidence.

For example, Microsoft tries to cast Ms. Wiley as a problem employee about whom there were long-standing and widespread, serious performance and communication-skill criticisms, consistent with those in the so-called “feedback process” discussed above. It relies on the declaration testimony of Kevin Schofield to support its argument that “over the years – and well before the arrival of Frank Shaw . . . – multiple individuals discussed amongst themselves or raised with Schofield their frustration or concern about Wiley’s lack of responsiveness and her abrupt communications style.” Resp. Br. 4-5. But the evidence belies this assertion. At least the evidence is disputed, including by Microsoft’s own conflicting testimony and feedback documents, and for the jury to resolve.

The jury is entitled to find from the evidence that no criticisms anyone had about Ms. Wiley’s performance or communications skills/style were considered “serious” until after Frank Shaw and his group

actions undertaken and influenced by Shaw and his three male manager collaborators. CP 5 (Complaint, ¶ 3.20). The jury may find from the evidence that: (a) the decision was already made before the so-called “feedback process” was even initiated to remove Ms. Wiley from her position; (b) her treatment by Microsoft is what caused her to have to go on medical leave; (c) while she was on this leave the company replaced her with a less-qualified male (from Shaw’s Corporate Communications organization); and (d) she has now been terminated altogether, just as was “predetermined to be the ultimate result.”

of like-minded male managers decided to target her for removal after she deigned to tell Shaw “no” on a work issue. In fact, contrary to his declaration testimony, her direct supervisor, Kevin Schofield, has admitted this in his deposition.¹¹ At best, his declaration is inconsistent with his deposition testimony. Inconsistency as to the employer’s articulated “performance-related reasons” for its treatment of the employee “raises a material issue of fact as to whether they are either not credible, a pretext for discrimination or both.” *Sellsted*, 69 Wash.App. at 865. *See also, e.g., Rice v. Offshore Systems, Inc.*, 167 Wash.App.77, 92-93, 272 P.3d 865 (Div. 1 2012) (employer’s “reasons are called into question by the inconsistent reasons given and evidence rebutting their accuracy and credibility”); *Dominguez-Curry v. Nev. Transp. Dep’t*, 424 F.3d 1027, 1037 (9th Cir. 2005) (plaintiff may show pretext “by showing that the employer’s proffered explanation is unworthy of credence because it is inconsistent or otherwise not believable”).¹²

¹¹ Schofield testified he did not recall any serious concerns being expressed to him about her prior to the Spring of 2010. CP 1045-47 (77:14-79:11); *see also* CP 1194 (Schofield notes at “Kevin/Kirw”) (“Peter Haynes suggested as though he’s been giving feedback to Kevin for over a year. Kevin suggests he’s only been getting this since spring.”).

¹² There is other evidence of contradictory statements by Microsoft managers from which the jury may find the “poor performer/abrupt communicator” explanation for its treatment of Ms. Wiley lacks credibility, or is pretextual. For example, despite numerous emails authored by Shaw to the contrary, he maintains that he was never upset with Ms. Wiley and never put any pressure on Schofield whatsoever to remove her. *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 between Haynes and Shaw re: “new patent,” containing expletives, and in which Shaw states “I’m getting hot now”); CP 1179 (private email from Shaw to Pritchard re: Shaw’s “come to Jesus meeting” with Schofield in which he emphasized the “awful consequence that was heading his way”); CP 1190 (private email from Shaw to his direct report Pilla, telling him to “put the hammer down” on Schofield).

The record also belies Microsoft's claim that Ms. Wiley "freely admits that she struggled to work effectively with Corporate Communications." Resp. Br. at 5-6. A review of the very deposition pages cited by Microsoft shows she has admitted no such thing. She simply agreed with the question from Microsoft counsel that "there was some *tension between the two organizations at times.*"¹³

It remains undisputed that Ms. Wiley was employed at Microsoft for over 20 years, many of them as a manager, and that by the company's own standards and definitions (not her mere "subjective" belief) she was, until Frank Shaw joined Microsoft, an undisputed "star." The jury may find that while her performance reviews might contain some constructive criticisms, like all performance reviews do, it is beyond reasonable dispute that her last four performance reviews (before she was targeted for removal by Shaw, and his collaborators Pilla, Pritchard and Haynes) were very positive reviews, by the company's own standards. They were as follows: 2006 – Achieved,¹⁴ Strong; 2007 – Exceeded, 20%¹⁵; 2008 –

¹³ CP 149 (143:24-25) (emph. added). She also said there was "tension" because "[she] ran afoul of Frank . . . [and] they would call me Mrs. No and bitch"). CP 150 (144:10).

¹⁴ "Achieved" was 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).

¹⁵ "Exceeded" was the highest rating possible at the time and was defined 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.
- Demonstrated all competencies required for the position.

Achieved, 20%; 2009 – Achieved, 20%. She was designated a “high potential” (“HiPo”) employee.¹⁶ She was selected for the prestigious “Bench” program in 2008 and it ran for two years. And in 2010 she was awarded the coveted and highly-competitive “Gold Star” bonus of \$80,000 in stock. It is likewise undisputed that before Mr. Shaw’s arrival, Ms. Wiley received superlative after superlative in her performance reviews.¹⁷

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

- 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.

¹⁶ Microsoft’s definition of a “HiPo” is one who is *superior to a “high-performer,”* who “[d]emonstrates 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. Craig Mundie has testified there are approximately 1,800 people in his organization (which includes Ms. Wiley) and within it there are ordinarily only twenty or thirty (out of the 1,800) designated HiPos – that is, *less than 2% receive this distinction.* CP 1036-1039 (Mundie Dep. 18:6-21:9).

Microsoft also miscasts the issue with regard to Ms. Wiley’s HiPo designation. She does not contend it was a guarantee or promise of promotion. This is not part of her *Thompson* claim. But her receipt of this extraordinary designation is strong circumstantial evidence from which the jury is entitled to find (1) Microsoft’s contention that she was a poor performer with serious behavior or communication issues is not credible; and (2) it is more likely than not she would have been promoted to at least one higher grade level (Level 67), absent a motivating influence of gender bias.

¹⁷ *See, e.g.,* CP 1010 (2007 review, MSFT404958) (“You are a huge asset to the organization and a fantastic contributor. Thanks for all of the hard work this year”); CP 1017 (2008 review, MSFT404964) (“You’ve been doing really solid work this year. Thank you: I really appreciate it”); CP 1021 (2009 review, MSFT404967) (“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”). In addition, as noted above, the feedback she received as part of her actual 2010 performance review process was very positive and in conflict with that in the so-called “feedback process” influenced by Shaw, Pilla, Pritchard and Haynes. *See supra* n.3. In short, the jury may find from the evidence that before Shaw arrived and began his campaign to remove her from her position and in the process ruin her Microsoft career, Ms. Wiley received high praise from her direct reports, her peers and partners in other organizations, and those she worked with and assisted, including Bill Gates and Craig Mundie. CP 1327-28 (Wiley Decl. ¶¶ 6-7).

A sudden drop in performance ratings, spike in criticisms and/or employer's failure to properly document alleged performance deficiencies before making an alleged performance-based decision, 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).

There is a substantial amount of other evidence from which the jury may find pretext and/or otherwise infer that gender bias was at least a motivation in the targeting of Ms. Wiley by Shaw, Pilla, Pritchard and Haynes, and one of the proximate causes of the decision to remove her from her position (and in the process destroy her Microsoft career). For example, the jury may find from the evidence that Shaw, Pilla, Pritchard and Haynes were just as angry with Ms. Wiley's boss, Kevin Schofield, as they were with her. *See, e.g., CP 1254, 1303.*¹⁸ Indeed, as Microsoft admits, he agreed with Ms. Wiley that they should not be giving an interview about the details of this new research technology, as the

¹⁸ In this private email exchange between Haynes and his boss Pritchard, Haynes complains about Schofield and secures Pritchard's agreement that he will not put Schofield "in the mix" to provide feedback on Haynes as part of his annual performance review. Among other things, Haynes states the following:

I have been instrumental in getting Kirsten Wiley removed from Microsoft (if that in fact ever happens), something that Kevin should have done years ago. *** Frank Shaw told after yesterday's Craig [Mundie] meeting that he was appalled by how bad their thinking was. I'm not prepared to be burned by Kevin in my review simply because he has not performed as a manager/marketer, particularly now that feedback is apparently such an important part of the [annual performance] review process.

If you are looking for one single person to introduce negative feedback into my review, Kevin is your guy. Although doing that would seem to be prejudicial.

See also CP 1194 (Schofield notes, at "Kevin/Kirw") ("Kevin viewed as a bully, difficult, defensive to work w/ (per Peter Haynes)").

interview with KUOW would likely require. Resp. Br. at 10 (“Wiley *and Schofield* declined to pursue further discussions with the report.”) (emph. added).¹⁹ Yet, they did not target Kevin Schofield, the male, for replacement.²⁰ The record is replete with references that they were only trying to get rid of Ms. Wiley, the female.

By way of further example, the jury may infer gender bias was at least a motivating factor, and one of the proximate causes of the removal of Ms. Wiley and destruction of her Microsoft career from the fact that she was replaced by a less-qualified male, Kevin Kutz – from Frank Shaw’s Corporate Communications organization, no less.²¹

In addition, the jury is entitled to consider the dearth of female senior managers at Microsoft as circumstantial evidence of a motivating

¹⁹ See also CP 768 (email from Schofield to Wiley and Shaw on 3/30/10 (at 3:44) (stating “[t]his does seem like kind of a troublesome story” that “takes us to a couple of places we don’t really want to go with not a lot of upside”).

²⁰ The jury may find from the evidence that they threatened him, as part of the pressure applied to influence him to remove her. But Schofield’s boss, Rick Rashid, has admitted he never considered terminating Schofield; and Shaw, Pilla, Pritchard and Haynes never suggested to him that he should discipline Schofield much less terminate him. CP 1094 (Rashid Dep. 19:1-21); see also CP 1079 (Shaw Dep. 56:2-7).

²¹ As noted above, contrary to Microsoft’s assertion that Ms. Wiley “offers no evidence regarding Kutz’s qualifications for the position” (Resp. Br. 13 n.3), she has offered specific evidence from which the jury may find he had lesser qualifications than she (as well as at least one other woman who was the designated “successor” to Ms. Wiley and her position). She has also offered specific evidence from which the jury may find that Kutz was in Shaw’s Corporate Communications organization before being put into Ms. Wiley’s position. See *supra* n.8. See also Op. Br. at 20 and n.14. Microsoft also mischaracterizes the facts (and applicable law) in its argument that because Schofield hired Ms. Wiley and also hired Kutz there is an inference of non-discrimination. At summary judgment, the evidence and all inferences from it must be viewed in the light most favorable to Ms. Wiley, not the light most favorable to Microsoft. Moreover, there is ample evidence from which the jury may find any inference rebutted because after Schofield hired Ms. Wiley he came under intense pressure from Shaw, Pilla, Pritchard and Haynes (to which he caved) to remove her and replace her with Kutz, a less-qualified male from Shaw’s Corporate Communications organization. That is, the jury may find that after Schofield hired Ms. Wiley, Shaw and his three male manager collaborators not only influenced and proximately caused the decision to remove her from her position but also influenced and proximately caused the decision that Kutz be hired to replace her.

factor of gender bias.²² Likewise, the jury is entitled to infer from the evidence that Microsoft's senior male executives are oblivious to women in the workplace and wholly uninformed about gender discrimination issues.²³ The jury is also entitled to infer bias from the circumstantial evidence that Frank Shaw's Corporate Communications organization is known by women as an "old boy's club" or "old boy's network."²⁴ Moreover, the jury is entitled to draw an inference of a motivating factor of gender bias from these facts: (1) among those in this "old boy's club"

²² During the relevant time there were 16 executives reporting to Microsoft CEO Steve Ballmer, including Craig Mundie, and all of them except the head of Human Resources ("HR") were male; and not a single one of the 15 business organizations at Microsoft was headed by a female. Further, in Mundie's organization, where Ms. Wiley, Shaw, Pilla, Pritchard and Haynes worked, there was not a single female executive reporting to him. CP 1331; CP 1032-1033 (Mundie Dep. 12:1-9, 13:3-8). A lack of women supervisors apart from the HR department may be considered evidence of pretext. *Bergene v. Salt River Project Agric. Improv. & Power Dist.*, 272 F.3d 1136, 1143 (9th Cir. 2001).

²³ Craig Mundie has also admitted that he 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). Also, the Women Employee Resource Group ("ERG") is the largest group of women employees at Microsoft, with more than 12,000 members (CP 1331), yet he had never even heard of it. CP 1035 (*id.* 16:22-24).

²⁴ Microsoft asserts (without any evidence) that the "old boy's club" or "old boy's network" reputation of Shaw's Corporate Communications organization "was a reference to tenure, not gender." Resp. Br. at 30-31. Shaw testified as follows in his deposition:

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 (38:17-22) (*emph. added*). The question was clearly if he knew any *woman in his group* regarded it this way. And he did not say this view of his group by women had nothing to do with gender and was merely a reference to "tenure." Nor does he say this in his declaration, cited by Microsoft. His declaration simply states that at the time he joined Microsoft he reported to a woman (the Senior VP for the Central Marketing Group). CP 763 (¶ 8). This has nothing to do with whether women regarded his group as an "old boy's club," and does not indicate the term was a reference to "tenure." Nowhere in his deposition or declaration does Shaw deny his group was regarded *by women* as an "old boy's network" or "old boy's club" and he knew it. It is also admitted there were no changes in how males treated females within this group or in other groups after he took over the Corporate Communications organization. CP 1170-71 (Pilla Dep. 21:18-22:2).

was Tom Pilla, who worked directly with Shaw to target Ms. Wiley and apply pressure on her boss, Kevin Schofield, to remove her from her position and in the process ruin her Microsoft career; and (2) he exchanged sexist and sexually demeaning instant messages (“IM”) on his Corporate Communications (workplace) computer with a fellow male Microsoft manager.²⁵ Microsoft makes the self-serving and conclusory assertions that “[t]his exchange has nothing to do with Wiley or her claims,” is “irrelevant,” and should be regarded as nothing more than mere “gossip between personal friends” that “had nothing to do . . . really with Microsoft at all.” Resp. Br. at 32. Clearly such issues are for the jury to decide.²⁶ The jury may also find the evidence that men in the Frank

²⁵ See CP 1279-82 (instant messages at 2:11, 2:20, and 2:24) and CP 1287 (instant messages between Tom Pilla and Adam Sohn in which Sohn refers to the [REDACTED] and in which Pilla states as to another female [REDACTED]). Both Pilla and Sohn were Microsoft marketing and communications managers at the time they engaged in this IM exchange on their work computers and through the company IM system. See CP 1119 (at l. 51); CP 1175 (Pilla Dep. 129:23-24). The jury may infer the reference to [REDACTED] relates to a female associated with the [REDACTED] with whom Pilla and Sohn worked as part of their Microsoft “MarComm” jobs. (The content of this IM exchange has been designated “Highly-Confidential-Attorney’s Eyes Only” (AEO) by Microsoft and ordered sealed/redacted by the trial court. CP 353-55, 807-12.)

²⁶ In addition to erroneously arguing or implying that the inferences to be drawn from this IM exchange should be construed in the light most favorable to the company rather than Ms. Wiley, Microsoft asserts this exchange between Pilla and his Microsoft manager “friend” does not “mention or even indirectly refer to Wiley.” Resp. Br. at 32. Such “direct evidence” of discrimination is unnecessary. The jury is entitled to find this is relevant circumstantial evidence regarding the gender-discriminatory mindset or motive of one of the key players in the group of male managers who collaborated with Shaw to target Ms. Wiley and directly put pressure on her boss (and her boss’s boss) to remove her from her position and in the process ruin her Microsoft career. That is, the jury may find this exchange relevant to the motives of a manager whom the jury may also find influenced the decisionmaking process and was a proximate cause of its result.

Microsoft’s “stray remarks” argument is likewise off the mark. Resp. Br. at 32 n.18. Each of the federal trial court cases cited by Microsoft involve slurs by persons who were completely unconnected to the decisionmaking process or adverse action – not someone like Pilla, whom the jury may find from the evidence was directly and intimately involved in influencing the decisionmaking process as to Ms. Wiley. See CP

Shaw/Tom Pilla “old boy’s club” of Corporate Communications called Ms. Wiley “Bitch” and “Mrs. No” indicative of gender bias.²⁷

Furthermore, the jury is entitled to find relevant, and indicate of gender bias, the specific evidence regarding gender disparity in grade level-promotions (e.g., Level 66 vs. Level 67) and associated pay.²⁸ Ms. Wiley has submitted detailed evidence about the significance of different performance review ratings and other accolades and achievements relative

1190 (email from Shaw to his Pilla, his direct report, instructing him to “put the hammer down” on Schofield); CP 1115-16 (Pritchard Dep. 110:18-111:7) (acknowledging he, Haynes and Pilla told Schofield he needed to “mov[e]” Ms. Wiley “out of her role quickly”); CP 1111-12 (*id.* at 99:5-16, 101:1-12) (acknowledging pressure he, Haynes and Pilla placed on Schofield that if he did not replace Ms. Wiley immediately his own “credibility” was going to be on the line). Nor does this IM exchange make a mere “vague reference” gender. It is well-established 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); *see also Frank v. United Airlines*, 216 F.3d 845, 854-55 (9th Cir. 2000) (sexist and demeaning comments are relevant to proving pretext, and discrimination) (citing *Price Waterhouse*).

²⁷ CP 1330 (Wiley Decl., ¶18); CP 1048 (Schofield Dep. 130:3-21) (admitting Pilla told him people in Shaw’s group referred to Ms. Wiley as “Mrs. No”). *See also* CP 1292 (MS0004768). Tom Pilla did not deny telling Ms. Wiley that people in his and Shaw’s organization referred to Ms. Wiley as “Mrs. No” and/or the “B or bitch woman.” CP 1174 (Pilla Dep. 116:14-19). This is a party admission, and thus, certainly not hearsay as erroneously argued by Microsoft. ER 801(d)(2). Moreover, Ms. Wiley is obviously not offering these statements for “the truth of the matters asserted” as Microsoft argues, i.e., that she *is* a “bitch” or in fact acts like “Mrs. No.” ER 801(c). For this reason, too, these statements are not hearsay. These are statements which are being offered, not for the truth of the matters asserted but as admitted communicative acts from which, in themselves (whether or not “true”), the jury may infer a discriminatory mindset or motive of the men in the “old boy’s club” of Corporate Communications with whom Ms. Wiley worked; and whom, the jury may also find from the evidence, influenced and proximately caused the decision to remove her from her position, and thereby ruin her Microsoft career. *See also supra* n. 25 (and authorities cited therein).

²⁸ Microsoft’s emphasis on cases concerning denials of promotions to a different job is off-point. The promotion relevant to Ms. Wiley disparate treatment claim concerns **grade-level promotions (and associated pay)**, and her stagnation at level 66 despite her accomplishments and compared to men whom the jury may find from the evidence are similarly-situated. Microsoft mischaracterizes this evidence in other ways, as well. For example, this evidence relates not only to stand-alone disparate treatment/WLAD claim. It is also, at minimum, additional circumstantial evidence with regard to her disparate treatment/WLAD claim regarding being targeted and removed from her position, and having her Microsoft career destroyed, by a group of male Microsoft managers – which, as discussed above, has always been the crux of her WLAD case.

to Microsoft's pay and promotion decisions, according to Microsoft's own standards and definitions. *See* Op. Br. at 5-7, nn.3-5; 21-24 nn.15-17.²⁹ Microsoft is entitled to argue that for one reason or another, these are not "perfect" comparators. But whether or not they were doing "substantially the same work" as Ms. Wiley did is a question of fact for the jury, which should not be resolved on summary judgment. *Washington v. Boeing Co.*, 105 Wash.App. 1, 13, 19 P.3d 1041 (Div. 1 2000) (citing *Johnson v. Dept. of Soc. & Health Servs.*, 80 Wash App. 212, 227, 907 P.2d 1223 (Div. 1 1996)). Indeed, the evidence is unrebutted that each of the male comparators listed by Ms. Wiley reported up through Rick Rashid in the Microsoft Research ("MSR") group, as she did, and as such she and they ***were compared to each other by Microsoft for purposes of its grade-level and pay decisions.*** CP 1331 (Wiley Decl. ¶22).

²⁹ Microsoft distorts the detailed comparator evidence as to grade-levels (and associated pay) as "nothing but [Ms. Wiley's] own bare testimony that she 'interfaced' with these men during the course of her job and she and they engaged in 'ongoing collaboration' to do their jobs." Resp. Br. at 27; *id.* at 28 (referring to the evidence as an "interface argument"). In fact, the evidence is specific that these males and Ms. Wiley not only interfaced regularly as essential parts of their jobs, but her job and theirs all consisted of highly detailed research projects and required a deep understanding of the technology. The evidence is specific that she and they all had to position research technologies alongside Microsoft products. The evidence is likewise specific that building relationships and ongoing collaboration was a responsibility of her role and theirs. By way of further specific example, Jim Oker managed content for events just as Ms. Wiley did (e.g., he was 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). CP 1331 (Wiley Decl., ¶23). In addition, as noted above, Ms. Wiley was a "HiPo, P.2." CP 1044 (Schofield Dep. 56:2-22). Microsoft's own documents show this means it was expected that she would receive two (2) promotions within the next three to five years. CP 1313-17. Yet she received none, and was stuck at Level 66 (and its pay level) for three years, while these males were at level [REDACTED]. In fact, Frank Shaw assumed she *was* a Level 67. CP 1084 (Shaw Dep. 85:4-23). And the company considered replacing her with Richard Eckel, whom everyone knew was a [REDACTED] ("AEO"), and that did not bar him from consideration. CP 1319; CP 1049 (Schofield Dep. 169:16-19).

The trial court erred in ignoring the fundamental facts (and law) of proximate causation.³⁰ It is common for injuries to have multiple proximate causes. Restatement (Second) Torts §§ 435, 435B and Comment *a*. Thus, though an ultimate decisionmaker (or investigator) may not have himself acted in a discriminatory fashion, she may have received information from others in the decisionmaking (or investigation) process tainted by impermissible motive. Under traditional tort law, the exercise of judgment by the investigator or ultimate decisionmaker does not break the causal link or prevent the earlier agent's action and discriminatory motive from being a proximate cause of the harm. *Id.* (cited in *Staub v. Proctor Hosp.*, – U.S. –, 131 S.Ct. 1186, 1192, 179 L.Ed

³⁰ Contrary to Microsoft's contention, Ms. Wiley has certainly not "waived" her theory of proximate causation by not specifically citing *Staub* in her summary judgment opposition brief. A case is not a "theory." Her theory of proximate cause is not a "new" theory of liability raised for the first time on appeal. It has always been the crux of her WLAD claim. As noted above, she pleaded in her complaint and has always argued that Shaw and his three male manager collaborators targeted Ms. Wiley for removal from her position, and in the process the destruction of her Microsoft career, and influenced or proximately caused these results by applying pressure to her boss (and her boss's boss); and otherwise influencing the so-called "feedback gathering" process used to "justify" these decisions already made and influenced by them. *See supra* at 1 (quoting CP 5 (Complaint, ¶ 3.20)); *see also, e.g.*, CP 973-78 (Mem. in Opp. to MSJ). It is irrelevant whether Ms. Wiley labeled her basic theory of proximate cause a "cat's paw doctrine" or supported it with a specific citation to *Staub* in her lower court brief. The trial court was presented with the theory of her case and the evidence supporting it, and had ample opportunity to consider both. Nor was the discussion of proximate causation, and *Staub* for that matter, a mere "passing reference made at oral argument" as Microsoft claims. *See* RP (44:17-45:16) (specifically discussing *Staub* and proximate cause). In short, the theory of proximate cause was central to the lower court briefing and hearing discussion, and the trial court not only considered it but ruled on it. This is completely unlike the case cited by Microsoft – in which the trial court was never presented with the theory at all, never had an opportunity to consider it let alone rule on it (as the appellant conceded); and she only raised it for the first time in her **appellate reply brief**. *Kellar v. Est. of Kellar*, 172 Wash.App. 562, 579, 291 P.3d 906 (Div. 1 2012) ("[o]n appeal, she did not assign error to the trial court's failure to find error on that basis"; "**did not articulate the argument until her reply brief**"; "**the trial court did not rule on it**"; and she "does not claim on appeal that she raised [it] below") (emph. added).

2d 144 (2011)).³¹ This is a fact-intensive inquiry (at least given the evidence in this case), for the jury to resolve.³²

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 "hard-and-fast rules" that had been applied by some federal courts (not in the Ninth Circuit) – (1) that an investigation by the decisionmaker breaks the causal link, and (2) that a proximate causation case could not succeed unless the non-decisionmaker exercised such "singular influence" (that is, acted as a "cat's paw") over the decisionmaker that the decision was the product of "blind reliance" – have been rejected. *Id.* at 1190, 92-93 (quoting and reversing *Staub v. Proctor Hosp.*, 560 F.3d 647, 659 (7th Cir. 2009)). See also *Poland v. Chertoff*, 494 F.3d 1174, 1182 (9th Cir. 2007).

³² Microsoft also misconstrues *Staub* and its progeny. It argues that "Shaw was not Wiley's supervisor" (Resp. Br. at 35) (the same error the trial court made at Microsoft's invitation). This is not necessary under proximate cause analysis. One need not be the direct supervisor of the employee nor the ultimate decisionmaker. While *Staub* left undecided whether the influencing actors must be at the supervisory or managerial level of an employer, here not only Shaw but also Pilla, Pritchard and Haynes are all managers. Microsoft is further incorrect in its claim that a plaintiff must establish at trial that the biased actor was "*the* cause of an adverse employment action." Resp. Br. at 35. The case from a federal district court in Ohio cited by Microsoft as supporting this assertion does not even say this. That would be but-for causation not proximate causation. All that is required at trial is for the plaintiff to establish (by circumstantial or pretext evidence) that a biased supervisor or manager was *a* proximate cause of the adverse treatment. And at summary judgment, all that is required is evidence (circumstantial or pretext) from which the jury may find that a biased supervisor or manager was a proximate cause of the adverse treatment. Ms. Wiley has submitted such evidence.

The other cases cited by Microsoft are also distinguishable. They involve situations where there was no evidence that a biased actor had any influence over the decision in issue. Here, as discussed above, there is ample specific evidence from which a jury may find that Shaw, Pilla, Pritchard and Haynes influenced the decision to remove Ms. Wiley from her position; the decision had in fact been made well before the so-called "feedback process" was even initiated; and the "feedback" of this process was itself influenced by these men. As discussed above, there is also ample circumstantial evidence from which the jury may find that gender bias was at least a motivating factor in their actions – including but not limited to the "old boy's club" nature of the Shaw/Pilla Corporate Communications organization; the IM exchange of Shaw's direct report in that "old boy's club," Tom Pilla (who also worked directly to pressure Schofield and influence the decision to remove Ms. Wiley from her position); the fact that Shaw, Pilla, Pritchard and Haynes were plainly as angry with Schofield as they were with Wiley but only targeted her, and not him; and the fact that Ms. Wiley was replaced by a male, whom the jury may find from the evidence was from the "old boy's club" of Corporate Communications and was less-qualified than Ms. Wiley as well as at least one other female who was the designated successor to the position. The one case that Microsoft cites from Washington (or even within the Ninth Circuit), *Bichindaritz v. Univ. of Wash.*, 2012 WL 1378699 (W.D. Wash. 2012), is not a summary judgment case. It is a bench trial ruling. The statements about proximate case and *Staub* are **bench-trial fact findings**.

2. “Thompson” Claim

Microsoft constructs a series of straw man arguments with regard to Ms. Wiley’s *Thompson* claim, including but not limited to the erroneous argument that the only “policy” or practice that can matter for such a claim is a written policy that specifically “bars public comment on patented technology” and promises employees will not be retaliated against for refusing to make public comment on patented technology. Resp. Br. at 42.³³ The source of a specific promise need not be one limited to patents. There is ample evidence from which the jury may find she reasonably relied upon a number of company policies, guidelines, representations and practices which not only specifically encouraged, but required, her to raise her good faith concerns, and which specifically promised she would not be retaliated against for doing so. See Op. Br. at 25 n.8.³⁴

³³ The trial court was invited by Microsoft to make this error and did so, holding: “in the absence of a ‘no commenting on patents’ policy or evidence that Shaw asked Wiley to violate such a policy, Wiley could not show the necessary justifiable reliance.” *Id.* at 44.

³⁴ Microsoft also mischaracterizes the facts as to the patent technology/KUOW interview issue. First, it makes the misleading assertion that “[w]hatever confidentiality concerns Microsoft might have with pending patent *applications* had been made irrelevant with respect to the patent in issue, which had been published, literally, two *years* earlier. Resp. Br. at 10 (emph. in orig.). The “*patent in issue*” had not been published for two years. At most, only the application had. Further misleading, or at least disputed by other evidence, are Schofield’s declaration statements that “Microsoft has no ‘policy’ that it will not comment on patent applications”; and “we regularly comment on technologies that are subject to patent applications.” CP 597 (ll. 7-11, and ll. 45-47). These assertions are in direct conflict with the testimony of another Microsoft witness: the company’s Chief Technology Officer Craig Mundie. Mr. Mundie has admitted that “when patents have been filed, and are 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”; and this has been true the entire time he has been at Microsoft. CP 1040 (Mundie Dep. 32:10-17)). As discussed above, conflicting testimony by the employer is a classic example of evidence from which the jury may find pretext.

Moreover, as Microsoft admits, Schofield agreed with Ms. Wiley that they should not be giving an interview about the details of this new research technology, as the interview with KUOW would have required. Resp. Br. at 10 (“*Wiley and Schofield* declined to pursue further discussions with the report.”) (emph. added). More specifically, the jury may find from the evidence that her boss agreed with Ms. Wiley

Nor is Microsoft's argument accurate that Ms. Wiley "did not identify a specific promise on which she claims to have relied" (Resp. Br. at 44). The jury may find she was very specific about the promise, but at her deposition she simply could not recall exactly where the promise was currently housed by the company among its voluminous sets of policies on its various intranet websites. This is far different from the cases cited by Microsoft where the plaintiff could not identify the policy on which she relied, in any detail. *Cf. Bulman v. Safeway, Inc.*, 144 Wsh.2d 335, 27 P.3d 1172 (2001); *Klontz v. Puget Sound Power & Light Co.*, 90 Wash.App. 186 (Div. 2 1998).³⁵

The jury is also entitled to infer from the fact that her boss agreed with Ms. Wiley on this matter that, whether or not she was right about the company's policy about commenting on the research technology concerning this patent, she had a good faith belief that what Frank Shaw wanted her to do would violate a company policy, guideline or practice.

that what Shaw wanted them to do would require a detailed discussion of new research technologies related to this particular patent (Virtual Assistant), which is "a very different thing than the way we build messaging and talking points for products and platform technologies" (because "Research Technologies are so much more open-ended and its super-tough to try to boil them down to talking points that we can limit a conversation to"); the patent on these new research technologies was related to "one of the 'forward patenting' sessions the company has run" where "there isn't an existing working prototype" so "it would be a "purely theoretical conversation about a new thing" – with a "researcher [Eric] who was not involved with th[is] patent and who would like us to dial back PR on this project"; and "the last time that Eric did discuss the Virtual Assistant, Craig [Mundie] asked him to specifically touch on the healthcare scenario only." CP 768 (email at 2:25), 769 (email at 1:14 and at 12:54).

³⁵ Nor does Ms. Wiley's subsequent declaration "contradict" her prior testimony. It clarifies and updates it (after her further review of voluminous materials in production, including the voluminous policies of Microsoft on different intranet websites). At most, Microsoft's arguments go to the weight of the evidence or to witness credibility, which are for the jury to resolve. Microsoft also appears to argue that the corrected declaration should not be considered. Resp. Br. at 45 ("even if Wiley's 'corrected' declaration is considered"). But its motion to strike was rejected by the trial court. CP 799-802.

The company's specific assurances of non-retaliation are not conditioned on the employee being right about her concerns. They require only that she act with good faith, clearly a factual determination for the jury.³⁶

Microsoft argues its disclaimer at the front of the "employee handbook" set of policies on its "HRWeb" intranet site bars Ms. Wiley's *Thompson* claim as matter of law.³⁷ It is unrebutted, however, that not all of the Microsoft policies and guidelines requiring employees to voice their concerns, and promising that Microsoft will not tolerate retaliation against them for doing so, are even in the "Handbook" set of policies on the Website. For example, some are contained in entirely separate sets of policy documents (accessible through a completely different intranet website) – just like the situation in *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 826 P.2d 664 (1992).³⁸

³⁶ See Op. Br. at 25 n.18 (quoting policies specifically encouraging and requiring employees "to air creative ideas, issues, or concerns"; and "speak up and raise concerns about laws, regulations, company policies and/or ethics"; and promising that "Microsoft will not tolerate retaliation against any employee for making a *good-faith* report... or refusing to participate in activities that violate . . . company guidelines," and "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") (emph. added). See also CP 1329 (Wiley Decl., ¶14), 772-73 (Corr. Wiley Decl., ¶¶1-4) (describing specific training she received every year on the "Standards of Business Conduct" policy, which is not part of the "handbook" set of policies accessible through the HRWebsite but on an entirely separate LCAWebsite, during which annual trainings she "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.").

³⁷ See Resp. Br. at 47 ("The Handbook contains multiple, unambiguous disclaimers that make clear its intent to avoid any contractual promise, implied or otherwise.").

³⁸ See Op. Br. at 25 and n.18. Nor are the principles of *Swanson* dependent upon its fact-pattern. In many cases, with fact patterns different from the particular one of *Swanson*, our Supreme Court has held that each element of a *Thompson* claim "presents an issue of fact," which may be decided on summary judgment only if reasonable minds could not possibly differ in resolving them. See, e.g., *Korlund v. Dyncorp Tri-Cities Servs. Inc.*, 156 Wash.2d 168, 185, 125 P.3d 119 (2005) (citing *Swanson*).

Also misplaced is Microsoft's attempted reliance on *Quedado v. Boeing Co.*, 168 Wash. App. 363 (Div. 1 2012). Unlike the plaintiff in that case (as well as the others cited by Microsoft at n.31 of its brief), Ms. Wiley has offered specific evidence from which the jury may find that the disclaimer has been negated by Microsoft's inconsistent representations and practices. *See* Op. Br. at 25-28, nn.18-20.³⁹ *Quedado* and the other cases cited by Microsoft are not disclaimer-negation cases.

Our state Supreme Court has made clear that pursuant to the "context rule" of *Berg v. Hudesman*, one is to examine "extrinsic evidence relating to the entire set of circumstances under which the contract was formed, including the subsequent conduct of the contracting parties and the reasonableness of the parties' respective interpretations." Thus, whether the parties intended an employer's representations or assurances to be part of the employment agreement or relationship is an issue of fact subject to *Berg* rule analysis. All of the relevant documents and the subsequent conduct of the parties is to be reviewed to determine the fact issue of whether the employee was reasonable in his or her belief regarding the alleged employer policy, guidelines, representations or practice. *Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 364-65,

³⁹ This includes, for instance, the specific training she received every year on the "Standards of Business Conduct" policy (which is not in the "handbook" set of documents accessible through the HRWebsite but on a separate LCAWebsite) – in which, notwithstanding and contrary to the disclaimer language, she 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).

20 P.3d 921 (2001) (citing *Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990); *Swanson v. Liquid Air Corp.*, 118 Wash.2d 512, 522-23, 826 P.2d 664 (1992)). Accordingly, because there are material facts in dispute from which a jury may find Microsoft “negated the effect of the disclaimer” through its other, “inconsistent representations and practices,” and from which the jury may find Ms. Wiley reasonably relied upon “these representations rather than the disclaimer,” this “issue was improperly resolved on summary judgment.” *Kuest v. Regent Assisted Living, Inc.*, 111 Wash.App. 36, 53, 43 P.3d 23 (Div. 1 2002) (citing *Swanson*). See also, e.g., *Payne v. Sunnyside Comm. Hosp.*, 78 Wash.App. 34, 42, 894 P.2d 1379 (Div. 3 1995) (same).⁴⁰

B. Microsoft Mischaracterizes the Law

As it did at the trial court, Microsoft invites error by suggesting that “direct evidence” is needed or is superior to circumstantial evidence. See, e.g., Resp. Br. at 11 (“She has no evidence that Shaw made any comments about her gender”). Microsoft consistently disparages and invites this Court to ignore the substantial circumstantial evidence in this case by mislabeling it “no evidence,” “subjective perception,” “suspicion,” “bald assertions,” and “speculat[ion].”⁴¹ It is well-settled that courts (and

⁴⁰ Microsoft cites *Payne* and mischaracterizes it as having affirmed “summary judgment where disclaimer appeared on handbook’s first page and plaintiff had read it.” Resp. Br. at 49-50 n.33. In fact, the court in *Payne* held the opposite. It held that the employer’s disclaimer was clear and the plaintiff had read it, but *reversed* summary judgment because (like here) “[o]ther evidence indicates the [employer] acted inconsistently with the disclaimers.” *Payne*, 78 Wash.App. at 42-43.

⁴¹ Microsoft also invites this Court to repeat the trial court’s error of weighing disputed evidence and making its own fact-findings. See, e.g., Resp. Br. at 16 (“The trial court found no evidence *establishing* this element”); 17 (“the trial court *found* that Wiley did not establish pretext”); 26 (“the trial court *found* that these men are *not* similarly situated

juries) are not to treat direct and circumstantial evidence differently.⁴²

Microsoft argues that the U.S. Supreme Court's pretext case of *Reeves* "is not relevant here" because "*Reeves* was not a summary judgment case" but rather arose in the context of a JNOV motion.⁴³ In fact, the Washington Supreme Court has made clear that the evidentiary standard **at the summary judgment stage** in a WLAD case **is even more favorable to plaintiffs** than the one established by *Reeves* as to the post-trial/JNOV stage. The Court in *Hill v. BCTI Income Fund-I*, 144 Wash.2d 172, 186, 23 P.3d 440 (2001), applied the "hybrid-pretext" standard of *Reeves* to the JNOV context. But it specifically noted the different and

to Wiley") (emph. in orig.); 28 ("the trial court further held that Wiley had **failed to establish** that she was treated less favorably than these 'comparators' with respect to her compensation"). At the summary judgment stage the plaintiff need not "establish" anything. The opposite is true. All she needs to do is present **evidence sufficient to raise a material issue of fact** as to her claims. And the Court is to consider all facts and inferences from the facts in the light most favorable to the plaintiff. See, e.g., *Haubry v. Snow*, 106 Wash.App. 666, 670, 31 P.3d 1186 (Div. 1 2001).

⁴² All an employee must establish at trial is that "a discriminatory reason more likely than not motivated the defendant's decision." *Dominguez-Curry*, 424 F.3d at 1037. Microsoft is wrong that "[t]his requires either 'direct evidence' of discrimination or, in the absence of such evidence, **sufficient circumstantial evidence.**" Resp. Br. at 20 (emph. added). Microsoft cites *Fulton v. Dep't of Soc. & Health Servs.*, 169 Wash.App. 137, 147-48, 279 P.3d 500 (Div. 2 2012), for this assertion. But *Fulton* simply notes that the *McDonnell-Douglas* burden-shifting scheme is "commonly used where, as here, a plaintiff has brought an individual, disparate treatment lawsuit and she lacks direct evidence of discriminatory motive" and notes the "*McDonnell-Douglas* burden-shifting scheme allows a plaintiff to prove discriminatory motive through circumstantial evidence." *Id.* at 148 and n.17. It is well-settled that "[i]n responding to a summary judgment motion ... a plaintiff may produce **direct or circumstantial evidence** demonstrating that a discriminatory reason more likely than not motivated the defendant's decision, **or** alternatively may establish a prima facie case under the burden-shifting" framework of *McDonnell-Douglas*. *Dominguez-Curry*, 424 F.3d at 1037 (emph. added). And it is well-settled that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Costa v. Desert Palace*, 538 U.S. 90, 100, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003). See also *Sellsted*, 69 Wash. App. at 860; *Rice*, 167 Wash. App. at 89.

⁴³ See *Reeves v. Sanderson Plumb. 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").

distinguishable standard that exists *at the summary judgment stage*, which is *more favorable to plaintiffs: the “pretext-only”* standard established by this Court in *Sellsted* (and adopted by the Supreme Court in *Fell v. Spokane Trans. Auth.*, 128 Wash.2d 618, 911 P.2d 1319 (1996)).⁴⁴

II. CONCLUSION

For the reasons addressed above and in Appellant’s opening brief, this Court must reverse the trial court’s ruling in its entirety.

Respectfully submitted this 22nd day of May 2013.

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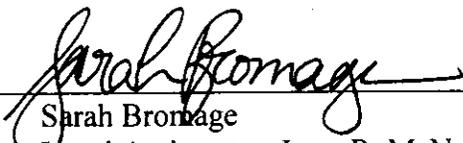
⁴⁴ *Id.* at 188 n.11 (distinguishing the more liberal “pretext-only” standard cases of *Sellsted* and *Fell* as being summary judgment cases, not JNOV cases). In short, the only way that “*Reeves* is not relevant here” is in the sense that under Washington law the evidentiary standard applicable to a plaintiff at the summary judgment motion stage remains the one established in *Sellsted* and *Fell*, and is *even more liberal* than the one articulated in *Reeves* (and *Hill*) in the post-trial/JNOV motion context. At the summary judgment stage, a plaintiff overcomes a defendant’s motion if she presents “*pretext-only*” evidence – that is, evidence which, when construed in the light most favorable to her claims (including all inferences to be drawn from the evidence), is sufficient to raise a genuine issue of fact jury as to whether either (1) the employer’s reasons for the allegedly discriminatory action are unworthy of credence, *or* (2) the employer’s decision was more likely than not motivated by discriminatory reasons. *Fell*, 128 Wash.2d at 643 n.32. *See also Rice*, 67 Wash.App. at 92-93 (same); *Dominguez-Curry*, 424 F.3d at 1037 (same).

DECLARATION OF SERVICE

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

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