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Court of Appeals  
Division I  
State of Washington

NO. 74919-6-I

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

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DAWN CORNWELL,

Appellant,

v.

MICROSOFT CORPORATION,

Respondent.

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	STATEMENT OF THE CASE.....	3
	A. Cornwell’s Employment with Microsoft. ....	3
	B. Microsoft’s Performance Evaluation Process.....	4
	C. In 2005, Cornwell Complained That her Female Supervisor Was Favoring One of Cornwell’s Male Coworkers Due to a Romantic Relationship Between the Two.....	6
	D. In Late 2011, Cornwell Told Her New Manager That She Had an Unspecified Past Legal Issue Against Microsoft.....	7
	E. Microsoft Laid Cornwell Off as Part of a RIF in September 2012 After Completing her Evaluation.....	10
	F. Nearly One Month After Microsoft Finalized Cornwell’s “5” Score For 2012, Cornwell Signed Microsoft’s Release Agreement, Releasing All “Known and Unknown” Claims Against Microsoft.....	12
	G. Trial Court Granted Summary Judgment in Favor of Microsoft.....	13
III.	ARGUMENT .....	14
	A. Standard of Review.....	14
	B. The Trial Court Properly Granted Summary Judgment in Favor of Microsoft Because Plaintiff Failed to Establish the Causation Element of Her Retaliation Claim.....	15
	1. The Cases Cited Regarding “Corporate Knowledge” and “Constructive Knowledge” Are Inapplicable Because the Quoted Language Discusses a Different Element of a Prima Facie Case Not Applicable Here. ....	16

2.	There Can Be No Causal Link if the Decision-Makers Had No Knowledge of the Nature of the Legal Issue. ....	19
3.	No Evidence Exists That Anyone Involved in the Performance Score Decision Knew of Cornwell’s Alleged Protected Activity. ....	21
C.	The Court May Also Affirm Summary Judgment on Any of the Other Grounds Supported by the Record.....	27
1.	Cornwell Released All Claims Related to her 2012 Evaluation so her Retaliation Claim Should be Dismissed as a Matter of Law. ....	27
a.	Cornwell Released Both Known and Unknown Claims. ....	28
b.	Cornwell’s Performance Score Was Finalized Before She Signed the Severance Agreement.....	30
2.	Cornwell Never Engaged in the Predicate Protected Activity. ....	32
a.	A Supervisor Favoring her Paramour Does Not Violate the WLAD and Therefore Cornwell’s Prior Legal Issue Is Not Protected Activity, Regardless of Her Attorney’s Retroactive Characterization. ....	33
b.	Cornwell’s Email to Blake Was Not Protected Activity. ....	36
3.	Cornwell’s Retaliation Claim Also Fails Because She Has No Evidence of Prohibited Animus by the Relevant Decision-makers. ....	36
IV.	CONCLUSION.....	37

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>Federal Cases</b>	
<i>Bickings v. Bethlehem Lukens Plate</i> , 82 F. Supp. 2d 402 (E.D. Pa. 2000) .....	29
<i>Clover v. Total Sys. Servs., Inc.</i> , 176 F.3d 1346 (11th Cir. 1999) .....	25
<i>Cohen v. Fred Meyer, Inc.</i> , 686 F.2d 793 (9th Cir. 1982) .....	16
<i>Fox v. Eagle Dist. Co., Inc.</i> , 510 F.3d 587 (6th Cir.2007) .....	20
<i>Gordon v. New York City Bd. of Educ.</i> , 232 F.3d 111 (2d Cir. 2000).....	17
<i>Grizzle v. Travelers Health Network, Inc.</i> , 14 F.3d 261 (5th Cir. 1994) .....	24
<i>Gunther v. Washington Cty.</i> , 623 F.2d 1303 (9th Cir. 1979) .....	16
<i>Keenan v. Allan</i> , 889 F. Supp. 1320 (E.D. Wash. 1995) .....	33
<i>Littleton v. Pilot Travel Centers, LLC</i> , 568 F.3d 641 (8th Cir. 2009) .....	23
<i>Mulhall v. Ashcroft</i> , 287 F.3d 543 (6th Cir. 2002) .....	18, 19
<i>Parker v. Otis Elevator Co.</i> , 9 Fed. Appx. 615 (9th Cir. 2001).....	34
<i>Parra v. Four Seasons Hotel</i> , 605 F. Supp. 2d 314 (D. Mass. 2009) .....	19

<i>Pomales v. Celulares Telefónica, Inc.</i> , 447 F.3d 79 (1st Cir. 2006).....	24
<i>Raad v. Fairbanks N. Star Borough Sch. Dist.</i> , 323 F.3d 1185 (9th Cir. 2003) .....	23
<i>Raney v. Vinson Guard Service, Inc.</i> , 120 F.3d 1192 (11th Cir.1997) .....	23, 26
<i>Reiber v. City of Pullman</i> , 2013 WL 3984442 (E.D. Wash. Aug. 1, 2013) .....	33
<i>Robinson v. Potter</i> , 453 F.3d 990 (8th Cir. 2006) .....	23
<i>Simon v. Simmons Foods, Inc.</i> , 49 F.3d 386 (8th Cir. 1995) .....	17
<i>Sitar v. Indiana Dep’t of Transp.</i> , 344 F.3d 720 (7th Cir. 2003) .....	20
<i>Soloviev v. Goldstein</i> , 104 F. Supp. 3d 232 (D. N.Y. 2015).....	19
<i>Stephens v. City of Topeka, Kan.</i> , 33 F. Supp. 2d 947 (D. Kan.), <i>aff’d</i> 189 F.3d 478 (10th Cir. 1999) .....	20
<i>Stephens v. Erickson</i> , 569 F.3d 779 (7th Cir. 2009) .....	24
<i>Tabor v. Thomas Built Buses, Inc.</i> , 2010 WL 148431 (M.D.N.C. Jan. 12, 2010) .....	21
<i>Tyler v. Univ. of AR Bd. of Trustees</i> , 2010 WL 143704 (E.D. Ark. Jan. 8, 2010), <i>aff’d</i> , 628 F.3d 980 (8th Cir. 2011) .....	20, 21, 22
<i>Wagner v. NutraSweet Co.</i> , 95 F.3d 527 (7th Cir. 1996) .....	29, 30, 32

**State Cases**

*Alonso v. Qwest Commc'ns Co., LLC*,  
178 Wn. App. 734, 315 P.3d 610 (2013).....33

*Bennett v. Shinoda Floral, Inc.*,  
108 Wn.2d 386, 739 P.2d 648-49 (1987).....28

*Chadwick v. Northwest Airlines, Inc.*,  
33 Wn. App. 297 (1982), *aff'd*, 100 Wn. 2d 221, 667  
P.2d 1104 (1983).....28, 30

*Estevez v. Faculty Club of Univ. of Wash.*,  
129 Wn. App. 774. 120 P.3d 579 (2005).....32

*Fradkin v. Northshore Util. Dist.*,  
96 Wn. App. 118, 977 P.2d 1265 (1999).....31

*Francom v. Costco Wholesale Corp.*,  
98 Wn. App. 845, 991 P.2d 1182 (2000).....14, 18

*Keck v. Collins*,  
184 Wn.2d 358, 357 P.3d 1080 (2015).....14, 27

*McGowan v. State*,  
148 Wn.2d 278, 60 P.3d 67 (2002).....15

*Miller v. Dep't of Corr.*,  
36 Cal. 4th 446, 115 P.3d 77, 30 Cal. Rptr. 3d 797  
(2005).....34, 35

*Milligan v. Thompson*,  
110 Wn. App. 628, 42 P.3d 418 (2002).....16

*Nationwide Mut. Fire Ins. Co. v. Watson*,  
120 Wn.2d 178, 840 P.2d 851 (1992).....28

*Taylor v. City of Los Angeles Dep't of Water & Power*,  
144 Cal. App. 4th 1216, 51 Cal. Rptr. 3d 206 (2006).....22

**Rules**

CR 56 .....27

**Federal Statutes**

FMLA .....21  
Title VII and the Equal Pay Act.....30, 31

**State Statutes**

Washington’s Law Against Discrimination.....28

## I. INTRODUCTION

The trial court properly granted summary judgment in favor of Microsoft. The court held that Dawn Cornwell cannot establish the required causation element of her retaliation claim under the Washington Law Against Discrimination (“WLAD”) because the decision-makers who gave Cornwell a low performance score in 2012 had no knowledge of her alleged protected activity that occurred seven years earlier. In fact, despite her highly dramatized statement of facts to this Court, there is no evidence in the record that a single person involved in the decision – whether in management, Human Resources, or legal – had knowledge of Cornwell’s alleged protected activity. Microsoft has over 100,000 employees – more than the entire population of the city of Everett – and it is not reasonable to assume that any individual has knowledge of all issues raised by an employee throughout her career at Microsoft.

Having presented no evidence that any individual was aware of her alleged protected activity, Cornwell now asks the Court to adopt a new rule of law that would effectively eliminate the causation requirement of a retaliation claim by allowing a plaintiff to survive summary judgment even if no one involved in the decision has knowledge of any alleged protected activity. In this case, Cornwell is asking the Court to hold that as long as anyone at Microsoft at any time knew that she engaged in

alleged protected activity seven years earlier, the jury could infer that the subsequent performance score was retaliation. In doing so, Cornwell asks this Court to significantly change Washington law. Citing a handful of cases from other federal circuit courts holding that “general corporate knowledge” is sufficient to establish the **knowledge** element of a retaliation claim (which is not an element of a prima facie case under Washington law), Cornwell asks the Court to hold that corporate knowledge – without any evidence of actual knowledge by any decision-maker – is sufficient to establish the **causation** element of a retaliation claim. Cornwell’s argument is not supported by the case law.

To survive summary judgment, Cornwell must present evidence establishing a causal link between some protected activity and an adverse action. The trial court correctly held that if the decision-makers had no knowledge of her alleged protected activity, there can logically be no causal link. Cornwell has failed to establish the causation element of her retaliation claim, and summary judgment is proper.

The trial court’s decision granting summary judgment may also be affirmed on three other grounds that are supported by the record: (1) Cornwell signed a full release of all “known and unknown claims” against Microsoft, which waives all claims in this lawsuit; (2) Cornwell did not engage in any legally-cognizable “protected activity” that could have led

to the retaliation she claims (her complaint of favoritism due to a consensual relationship does not implicate the WLAD); and (3) even if the decision-makers hypothetically knew of Cornwell's protected activity in 2005, there is no evidence of animus by them.

The trial court examined Cornwell's claim and determined that she had no evidence on which to go to trial. Rank speculation and unsupported conspiracy theories are not enough to survive summary judgment. This is precisely why summary judgment is available, and the result is just. The Court should affirm the trial court decision granting summary judgment to Microsoft on one or more of the above grounds.

## **II. STATEMENT OF THE CASE**

### **A. Cornwell's Employment with Microsoft.**

Microsoft hired Cornwell in March 1997 as a Customer Service Representative. CP 73-75, 79 (Cornwell Dep. 76:21-78:20, 87:8-9). She worked in various roles until transitioning into the position of Release Program Manager, reporting to Mary Anne Blake, in December 2011. CP 84-85 (Cornwell Dep. 112:14-17, 116:5-25). Cornwell's employment was terminated in September, 2012, as part of a larger reduction in force ("RIF"), in which three other employees in her group were also laid off. CP 58-59 (Blake Dep. 89:20-90:16); 144-145 ¶ 3.

**B. Microsoft's Performance Evaluation Process.**

During Cornwell's employment, Microsoft conducted annual employee performance evaluations. CP 45-46 (Blake Dep. 23:13-24:4); *see* CP 94 (Cornwell Dep. 144:9-17). Microsoft's fiscal year runs from July 1 to June 30, so the 2012 fiscal year concluded on June 30, 2012. CP 45-46 (Blake Dep. 23:13-24:4); CP 80 (Cornwell Dep. 94:18-21). For the relevant time period, under Microsoft's numerical ranking system, a score of "1" was considered the highest performance score and a "5" the lowest. CP 41-43 (Blake Dep. 14:20-15:18, 16:3-23).

In February, managers met with their employees for mid-year check-in meetings to discuss performance. CP 94-96 (Cornwell Dep. 144:9-146:18). Although actual scores were not included on mid-year paperwork, managers often told employees they were trending to a certain performance score. CP 65, 67 (Blake Dep. 159:15-21, 207:8-15); *see also* CP 94-96 (Cornwell Dep. 144:9-146:18). For example, in early 2012, Cornwell's manager told her that her performance was trending toward a "4." CP 65, 67 (Blake Dep. 159:15-21, 207:8-15); CP 110-111 (Cornwell Dep. 193:19-194:9).

Beginning in June or July, managers met to determine final performance scores for annual reviews. CP 94-96 (Cornwell Dep. 144:9-146:6). Managers scored employees relative to their peers, meaning that

not every employee could receive a high score. CP 91 (Cornwell Dep. 134:9-18). Employees who received low scores were expected to improve their performance and, without improvement, could face separation. CP 92-93 (Cornwell Dep. 135:21-136:4). As a natural consequence of such attrition, if a low performer left the company during the fiscal year, an employee in that group 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 (Cornwell Dep. 136:10-18).

As part of the review process, employees would self-select certain peers to provide feedback regarding the employee's performance. CP 291 (Cornwell Dep. 147:10-15). Peer feedback was one factor to be considered in determining an employee's overall performance score, but was not dispositive. CP 304 (Blake Dep. 193:1).

After several managerial meetings throughout June and July, evaluation scores were finalized by July or August, and then were delivered to the employees in early to mid-September. CP 61-62 (Blake Dep. 137:17-138:3); CP 94-96 (Cornwell Dep. 144:9-146:6). In Cornwell's case, Microsoft finalized her 2012 score, which is the **entire basis of her lawsuit**, on August 14, 2012, nearly a month before she signed a release of all known and unknown claims. CP 143.

**C. In 2005, Cornwell Complained That her Female Supervisor Was Favoring One of Cornwell's Male Coworkers Due to a Romantic Relationship Between the Two.**

In 2005, Cornwell complained that her then-supervisor, a female, had a conflict of interest in violation of Microsoft's policy because the supervisor was having a romantic relationship with one of Cornwell's male peers. CP 114-115 (Cornwell Dep. 197:7-198:1). As described in her opening brief, Cornwell complained that her manager allowed the male peer to travel to India, while denying Cornwell a trip to Salt Lake City. Opening Brief at 5 (citing CP 213-214). There is no evidence that Cornwell complained about observing any sexual conduct or inappropriate behavior between the two. *See* CP 213-214.

At the time, Cornwell obtained a lawyer, threatened litigation, and negotiated a settlement that included a strict confidentiality provision, barring the parties from discussing the matters involved. CP 116, 111 (Cornwell Dep. 201:20-25, 194:23-25). Cornwell read and understood the confidentiality provision and took it seriously. CP 112-113 (Cornwell Dep. 195:1-4, 196:3-5). Following the settlement, Cornwell transferred to a different department at Microsoft and continued working without incident. CP 215 ¶ 5. She received promotions and good performance scores after making her complaint. *Id.* ¶¶ 5, 20.

**D. In Late 2011, Cornwell Told Her New Manager That She Had an Unspecified Past Legal Issue Against Microsoft.**

Mary Anne Blake, Senior Program Manager, supervised Cornwell from late 2011 through the end of her employment in September 2012. CP 44 (Blake Dep. 20:1-14). Blake's manager at the time was Nicole McKinley, Director, Program Management. CP 39-40 (Blake Dep. 11:14-12:8).

At one point in either late 2011 or early 2012, Cornwell told Blake that Cornwell had a "previous suit" against Microsoft arising from a "previous issue" with a manager. CP 119-120 (Cornwell Dep. 208:1-209:13). Cornwell did not disclose the nature of the "previous issue." *Id.*; CP 47-48, 54-55 (Blake Dep. 53:15-54:21, 65:24-66:14). She knew she was bound by the confidentiality clause in the release she signed in connection with the 2005 issue. CP 112, 119 (Cornwell Dep. 195:1-14; 208:15-19).

As a new manager, Blake was not sure how to proceed so she followed up with her assigned Human Resources Manager for guidance. CP 47-50 (Blake Dep. 53:15-54:21, 57:13-58:11). Blake was initially told there was no record of any lawsuit, and she shared this information with Cornwell. CP 49, 51, 52 (Blake Dep. 57:13-20, 61:20-24, 62:7-14). That

was the only time Blake mentioned the issue with Cornwell. CP 88-89 (Cornwell Dep. 209:16-210:20).

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

Eventually, Blake was told that there was an unspecified legal issue in 2005, but that it was resolved and confidential. CP 52, 60 (Blake Dep. 62:7-14, 124:11-23). Blake never knew anything regarding the substance of Cornwell's 2005 legal issue during Cornwell's employment. CP 47-48, 54-55, 122 (Blake Dep. 53:15-54:21, 65:24-66:14; Cornwell Dep. 211:4-20). Other than hearing that an unspecified matter was resolved confidentially several years earlier, Blake had no further discussions with anyone at Microsoft concerning this matter and that was the end of her limited inquiry into the subject. CP 49-50, 52-55 (Blake

Dep. 57:13-20, 58:12-23, 62:7-14, 64:14-65:5, 65:14-66:16); CP 122 (Cornwell Dep. 211:4-16).<sup>1</sup>

Nicole McKinley also never had any knowledge of the nature of the legal issue. CP 144 ¶ 2. McKinley was carbon copied on Blake's email to Human Resources asking about Cornwell's prior claims, but Cornwell never mentioned the issue to McKinley. *Id.* And, like Blake, McKinley never learned the substance or nature of Cornwell's legal issue during Cornwell's employment, nor did she discuss it with others. *Id.*

Likewise, there is no evidence that any of the Human Resources professionals working with Blake or McKinley had knowledge of the substance of Cornwell's prior legal issue. The evidence in the record is actually to the contrary. Blake testified that when she checked with Human Resources, she was told there was nothing on file. CP 49, 51, 52 (Blake Dep. 57:13-20, 61:20-24, 62:7-14). Emails also prove that the Human Resources representatives working with Blake at the time (Jan Dyer and Mary Stokes) had no knowledge of the legal issues. CP 150-154, 156.

Cornwell relies on a single email from Dyer to McKinley, in which Dyer indicated she would be meeting with LCA (Microsoft's legal team)

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<sup>1</sup> The repeated claim in Cornwell's brief that Blake was "hyper-focused" on this issue is one of many instances where Cornwell's brief veers into fictionalized melodrama. Sending one to two emails on a subject Cornwell improperly raised is a modest and natural response by Blake.

about Cornwell and would have “LCA eyes on the review write up.” CP 161. But there is no evidence that Dyer ever learned the nature of the previous legal issue or that anyone from LCA had a role in deciding that Cornwell would receive a “5” score. Furthermore, there is no evidence that anyone involved in any decisions regarding Cornwell in 2012 – whether in management, Human Resources, or legal – was involved in resolving Cornwell’s 2005 legal issue seven years earlier.

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

In early 2012, Blake met with Cornwell and told her she was trending toward a performance score of “4,” a low score. CP 65, 67 (Blake Dep. 159:15-21, 207:8-15); CP 110-111 (Cornwell Dep. 193:19-194:9). Blake continued meeting with Cornwell to discuss performance issues throughout 2012. CP 65-66 (Blake Dep. 159:22-160:8).

Blake began meetings with her management team in June 2012 recommending that Cornwell be rated as a “4.”<sup>2</sup> CP 56-57 (Blake Dep. 87:22-88:16). After consultation between Blake and other managers, and with the approval of McKinley, the managers decided to give Cornwell a

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<sup>2</sup> Although Cornwell emphasizes several positive peer reviews, one of the reasons peer reviews were not dispositive is that they were generally solicited by employees from **friendly** co-workers (who were not likely to provide negative feedback). CP 291 (Cornwell Dep. 147:10-15). Regardless, even Cornwell’s peer feedback references performance problems consistent with Blake’s testimony. *See* CP 163-164 (noting Cornwell’s “lack of follow through,” and “reactive” approach).

final score of “5.” CP 56-57 (Blake Dep. 87:22-88:16); CP 144-145 ¶ 3.<sup>3</sup> Cornwell’s final score was locked into Microsoft’s system in August, 2012. CP 129 ¶ 5, CP 143.

McKinley approved the decision to include Cornwell in the RIF in August of 2012, as part of a larger RIF involving three other employees in McKinley’s organization. CP 58-59 (Blake Dep. 89:20-90:16); CP 144-145 ¶ 3. The RIF occurred around the same time that Microsoft was communicating performance reviews to employees. CP 310.

Because the RIF was a group layoff, Microsoft’s Human Resources team coordinated the notification to employees and all communications regarding the process of terminating employment. CP 183-184 (Blake Dep. 148:16-150:5). There was no written policy regarding performance evaluation meetings for terminated employees and in some circumstances a RIF could logically eliminate the need (or desire) to hold a performance evaluation meeting. Blake followed the instructions of her Human Resources representative regarding notifying Cornwell of the layoff and uploading her evaluation into the system. *Id.* Microsoft informed Cornwell that it was eliminating her position on September 5,

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<sup>3</sup> Jean Wenzel, a former manager in McKinley’s organization, remembers Blake and McKinley advocating rating Cornwell at a “5” at one particular manager meeting, but she does not specify when that meeting occurred. CP 211-212. It is undisputed that multiple meetings occurred and the decision to rate Cornwell as a “5” was both difficult for the management team and was discussed by and communicated to all managers, including Wenzel. CP 193.

2012. CP 72, 102-106 (Cornwell Dep. 65:16-18; 181:24-185:5).

Cornwell's evaluation score – which was finalized the month prior – was uploaded into the performance-management system, but not until after Cornwell received notice of the layoff. CP 68 (Blake Dep. 209:1-6). Due to the timing of the RIF, which occurred right before performance meetings were typically held, Blake understood that Cornwell's annual performance review meeting would be replaced by the RIF meeting, and that Blake would not deliver Cornwell's "5" rating. CP 63-64 (Blake Dep. 150:6-17, 156:2-14); CP 310.

**F. Nearly One Month After Microsoft Finalized Cornwell's "5" Score For 2012, Cornwell Signed Microsoft's Release Agreement, Releasing All "Known and Unknown" Claims Against Microsoft.**

When Microsoft terminated Cornwell's employment on September 5, 2012, it provided Cornwell with its standard Severance Agreement and Release. CP 132-136. In pertinent part, the Agreement states as follows:

I understand my rights and obligations under applicable law, **and I agree, to release (i.e., give up) all known and unknown claims** that I currently have against Microsoft, its officers, directors, subsidiaries, affiliates, agents and/or employees..., except claims that the law does not permit me to waive by signing this Agreement.

CP 132; CP 103-104 (Cornwell Dep. 182:15-17, 183:1-14) (emphasis added). Cornwell signed the Agreement and dated it September 11, 2012.

CP 104-105 (Cornwell Dep. 183:18-184:5). **Cornwell admits that before she signed the Agreement, she reviewed it in full, consulted with her lawyer, and understood its terms.** CP 102-107 (Cornwell Dep. 181:24-186:7). She knew prior to signing that she was trending to a “4” and that performance scores were finalized. CP 95-96 (Cornwell Dep. 145:18-146:6); CP 110-111 (Cornwell Dep. 193:19-194:9).

**G. Trial Court Granted Summary Judgment in Favor of Microsoft.**

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

On January 29, 2016, the King County Superior Court granted Microsoft’s Motion for Summary Judgment on the first ground. CP 341-342; RP 40:4-13. The court held that Cornwell was unable to establish the

causation element of her retaliation claim because there was no evidence that the decision-maker had knowledge of Cornwell's 2005 complaint. RP 40:4-13. The court denied Cornwell's motion for reconsideration of that decision on February 23, 2016 (CP 343-344), and Cornwell timely appealed to this Court. CP 338-344.

### III. ARGUMENT

#### A. Standard of Review.

“Appellate review of an order granting summary judgment is the same as the superior court’s.” *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 852, 991 P.2d 1182, 1186 (2000). Summary judgment is proper, and the Court should affirm the decision, if the record shows “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” *Id.* (citing CR 56). “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).

The trial court granted the motion for summary judgment on one of four grounds raised by Microsoft. This Court may affirm the trial court

decision on any grounds that are supported by the record, and therefore, Microsoft may properly argue any such grounds. *McGowan v. State*, 148 Wn.2d 278, 287-288, 60 P.3d 67 (2002).

**B. The Trial Court Properly Granted Summary Judgment in Favor of Microsoft Because Plaintiff Failed to Establish the Causation Element of Her Retaliation Claim.**

The Court should affirm the summary judgment dismissal of Cornwell’s retaliation claim because there is no evidence in the record that any individual involved in the decision to give Cornwell a low performance score in 2012 had knowledge of her alleged 2005 protected activity. In the absence of any evidence supporting a causal link, Cornwell argues that Microsoft’s general “corporate knowledge” –that **someone** at Microsoft knew about the legal issue at some point in time – is sufficient to establish causation if Microsoft’s Human Resources or legal team were involved in the decision regarding the performance score, and thus a factfinder could “infer” cause without evidence. But while corporate knowledge may be sufficient to establish the “knowledge” element of a retaliation claim (required by some circuits), the Court should not change Washington law to hold that corporate knowledge is sufficient to establish the required causation element if in fact no one in a decision-making capacity knew about any alleged protected activity. Knowledge is

not required as a separate element under Washington law, but is logically a required part of causation. Cornwell’s retaliation claim was properly dismissed by the trial court and the decision should be affirmed.

To make a prima facie case of retaliation under Washington law, an employee must show that she engaged in a statutorily protected activity, the employer took adverse employment action against her, and there is a causal link between the activity and adverse action. *Milligan v. Thompson*, 110 Wn. App. 628, 638, 42 P.3d 418, 424 (2002). Essential to a causal link is evidence that the **decision-maker was aware that the plaintiff had engaged in the protected activity**. See *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982) (fact that decision-maker was unaware of plaintiff’s complaint “breaks the requisite causal link” for retaliation claim); *Gunther v. Washington Cty.*, 623 F.2d 1303, 1316 (9th Cir. 1979) (retaliation claim failed because no evidence that decision-maker “actually knew that the plaintiffs raised such claims”). Here, there is no evidence in the record establishing the causation element.

**1. The Cases Cited Regarding “Corporate Knowledge” and “Constructive Knowledge” Are Inapplicable Because the Quoted Language Discusses a Different Element of a Prima Facie Case Not Applicable Here.**

Cornwell argues that the Court should adopt the “general corporate knowledge” standard, citing several federal cases. But the cases and “key

passage” cited by Cornwell discuss a different element of a prima facie case of retaliation. In *Gordon*, the primary case cited by Cornwell, the court explained that a “plaintiff claiming retaliation must prove: (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). The trial court instructed the jury that to prove the second element (knowledge), the plaintiff was required to show that the defendant’s agents knew of the plaintiff’s protected activity. *Id.* at 116. The Second Circuit reversed, holding that general corporate knowledge was sufficient “to satisfy the **knowledge** requirement.” *Id.* at 116 (emphasis added). The court did not hold that corporate knowledge was sufficient to satisfy the causation element.<sup>4</sup>

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

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<sup>4</sup> The *Gordon* court noted that lack of knowledge of individual agents is admissible as evidence of a lack of causal connection and that retaliation can be inferred if “circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge.” *Gordon*, 232 F.3d at 117. As discussed further in Section B.3, *infra*, there are no circumstances evidencing knowledge by any individual involved in the decision to give Cornwell a “5” score and no evidence of a superior with the requisite knowledge.

element of prima facie retaliation case is that “the employer had actual or constructive knowledge of the protected conduct”).

In contrast, to establish a retaliation claim under the WLAD, Cornwell was required to prove **three** elements (not four): (1) that the plaintiff engaged in statutorily protected activity; (2) that an adverse employment action was taken; and (3) that there is a causal link between the employee’s activity and the employer’s adverse action. *Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 861-62, 991 P.2d 1182 (2000). Therefore, the authorities cited by Cornwell are inapposite and do not support Cornwell’s request that the Court stretch the general corporate knowledge principle to establish not only knowledge (which is not separately required under Washington law) but also the required causation element of her claim.

Even with regard to the knowledge element alone, other courts have held that actual knowledge of the decision-makers is required to establish that element. For example, in *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002), the court affirmed the grant of summary judgment for the employer because the plaintiff presented no evidence that the decision-makers had knowledge of the plaintiff’s protected activity. The court held that summary judgment was proper because the plaintiff did not rebut the testimony of the decision-makers and “offer[ed] only conspiratorial

theories, not the specific facts required” to defeat summary judgment. *Id.* Such is the case here.

**2. There Can Be No Causal Link if the Decision-Makers Had No Knowledge of the Nature of the Legal Issue.**

Cornwell is correct that knowledge is not a separate element of the prima facie case of retaliation under Washington law; however, as the trial court properly analyzed, knowledge **is** necessary to establish the causation element of a prima facie case. Specifically, the trial court held that when the decision-makers have no knowledge of the protected activity, there is obviously no causal link between the protected activity and any adverse action.

It is undisputed that the decision-makers for Cornwell’s performance score were Blake and McKinley. The only evidence in the record is that Blake and McKinley were aware of Cornwell’s prior legal issue. But an unspecified “legal issue” is not protected activity for purposes of a WLAD retaliation claim; instead, the decision-maker must know the issue was discrimination, and brought under the anti-discrimination laws. *See, e.g., Soloviev v. Goldstein*, 104 F. Supp. 3d 232, 251 (D. N.Y. 2015) (lawsuit that does not allege discrimination is not protected activity); *Parra v. Four Seasons Hotel*, 605 F. Supp. 2d 314, 335 (D. Mass. 2009) (“participation in the wage litigation does not constitute a

“protected activity” under Title VII because it did not concern discrimination made unlawful by the statute”); *see also Fox v. Eagle Dist. Co., Inc.*, 510 F.3d 587, 591 (6th Cir.2007) (holding that plaintiff was not opposing an unlawful employment practice when he stated only that he intended to file a lawsuit against his employer and did not mention age discrimination as the basis for the suit). To be protected activity, the employee must clearly state that her complaint is based on her protected status under anti-discrimination laws. *See Sitar v. Indiana Dep’t of Transp.*, 344 F.3d 720, 727-28 (7th Cir. 2003) (employee never told supervisor “sex discrimination was her real problem” which “doom[ed] her claim” of retaliation).

Moreover, where the decision-maker knows only of a “lawsuit,” but not a “discrimination lawsuit,” the plaintiff is unable to establish the required causal link. *See, e.g., Stephens v. City of Topeka, Kan.*, 33 F. Supp. 2d 947, 964-65 (D. Kan.), *aff’d* 189 F.3d 478 (10th Cir. 1999) (mere knowledge of unidentified lawsuit does not provide requisite knowledge because there was no showing defendant knew the lawsuit of plaintiff was based upon discrimination); *Tyler v. Univ. of AR Bd. of Trustees*, 2010 WL 143704, at \*5 (E.D. Ark. Jan. 8, 2010), *aff’d*, 628 F.3d 980 (8th Cir. 2011) (decision-makers were “aware of the fact that [plaintiff] had previously filed and settled a lawsuit,” but “had **no knowledge of the details of that**

**lawsuit”); *Tabor v. Thomas Built Buses, Inc.*, 2010 WL 148431, at \*6-7 (M.D.N.C. Jan. 12, 2010) (no evidence “Defendant knew the nature of the lawsuit” which “**could just as reasonably have been related to any number of issues which are not implicated or protected by Title VII.**”).**

Cornwell’s supervisors knew she had a legal issue involving a manager and a prior performance review score– but did not know what it was about. The issue could have been about safety, Sarbanes-Oxley, wage and hour, FMLA, any number of things.<sup>5</sup> The trial court properly concluded that under these circumstances, Cornwell is unable to establish the requisite causal link and her retaliation claim must be dismissed.

**3. No Evidence Exists That Anyone Involved in the Performance Score Decision Knew of Cornwell’s Alleged Protected Activity.**

Multiple cases have held that there is no causal link when the individual decision-maker has no knowledge of the protected activity – even if there is general corporate knowledge. For example, in *Tyler*, 2010 WL 143704, despite the fact that some agents of the employer were aware of and involved in the plaintiff’s earlier lawsuit, the district court granted summary judgment because **the plaintiff presented no evidence that the**

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<sup>5</sup> Ironically, as discussed below, her favoritism complaint is not even a discrimination complaint under the WLAD. It was only retroactively characterized as such by Cornwell’s prior attorney.

**decision-makers had knowledge of the details of the earlier lawsuit.**

*Id.* at \* 5. Here, there is even less – the plaintiff never did file a lawsuit, and her dispute did not relate to anything protected by the WLAD.

Cornwell cites a single case – *Taylor v. City of Los Angeles Dept. of Water and Power* – for the proposition that a decision-maker’s constructive knowledge is sufficient to establish causation. *Taylor v. City of Los Angeles Dep’t of Water & Power*, 144 Cal. App. 4th 1216, 1236, 51 Cal. Rptr. 3d 206, 219 (2006). But *Taylor* is distinguishable because the court was deciding a motion to dismiss in that case – brought at the beginning of the case – not a motion for summary judgment, brought after all of the evidence is in. In *Taylor*, the plaintiff alleged that he was actively providing information to the employer’s EEO office in support of a subordinate’s discrimination claim, and on ten separate occasions his manager took action against him within days of an act of opposition by the plaintiff. *Id.* The court held that the plaintiff sufficiently **pleaded** the causal link between his protected activity and the adverse action to state a cause of action. *Id.* But to survive summary judgment, Cornwell must do more than plead a causal link; she must **submit evidence** in support of her allegations. She has not done so.

Many other courts – including the First, Fifth, Seventh, Eighth, Ninth, and Eleventh Circuits – have held that knowledge by the decision-

maker is required to establish causation. *See Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (affirming summary judgment for the employer because – even though most principals in the district were aware of plaintiff’s complaints – the plaintiff “fails to point to any evidence in the record supporting her assertion that...the particular principals who made the allegedly retaliatory hiring decisions, in fact *were* aware of her complaints. Without any such evidence, there is no genuine issue of material fact.”); *Raney v. Vinson Guard Service, Inc.*, 120 F.3d 1192, 1197–98 (11th Cir.1997) (affirming summary judgment for the employer, holding that “[s]ince corporate defendants act only through authorized agents, in a case involving a corporate defendant **the plaintiff must show that the corporate agent who took the adverse action was aware of the plaintiff’s protected expression**”); *Littleton v. Pilot Travel Centers, LLC*, 568 F.3d 641, 645 (8th Cir. 2009) (no causal link where the decision-maker did not know of the protected activity, despite the fact that the senior manager and Human Resources Director were aware); *Robinson v. Potter*, 453 F.3d 990, 994 (8th Cir. 2006) (plaintiff “cannot show causation because none of the members of the hiring committee knew about her pending EEOC complaint...**Her assertions the committee must have known because some members of HR knew about the complaint are insufficient.**”);

*Grizzle v. Travelers Health Network, Inc.*, 14 F.3d 261, 268 (5th Cir. 1994) (plaintiff failed to make out prima facie case of retaliation because she could produce no evidence that decision-maker knew of her complaints to other superiors); *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.... This alone dooms [plaintiff’s] claims”); *Pomales v. Celulares Telefónica, Inc.*, 447 F.3d 79, 85 (1st Cir. 2006) (employee’s retaliation claim failed because there was no evidence that manager who discharged employee knew about her prior harassment complaint to senior manager).

Furthermore, the trial court did not err in limiting the inquiry to what Blake knew, as Cornwell contends. Opening Brief at 25. The trial court specifically asked Cornwell to present **evidence** supporting the assertion that there was corporate knowledge of the protected activity, influencing the decision to give Cornwell a low review score:

MR. BEAN: ...if a manager gets a hint that there was a problem, then we’re going to get -- we can have wink, wink, nod, nod, and cases -- legitimate cases with a wink and a nod will get dismissed because –

THE COURT: That point’s well taken, **but where is the evidence of the winks and the nods?**  
RP 34:11-16 (emphasis added).

Cornwell has provided no such evidence. The evidence shows that Blake and McKinley had no knowledge of the nature of Cornwell's prior complaint. It is undisputed that Microsoft was bound by the same confidentiality agreement that prevented Cornwell from discussing her previous legal issues. Furthermore, although Cornwell alleges that Microsoft's legal team and Human Resources knew about the nature of the issues, **there is no evidence in the record of any individual with knowledge of the substance of Cornwell's seven year-old legal issues.** In fact, the evidence shows that the Human Resources representatives working with Blake at the time had no knowledge of the legal issues. CP 150-154, 156.

Furthermore, although Human Resources representative Jan Dyer indicated she would be meeting with LCA (Microsoft's legal team) about Cornwell and would have "LCA eyes on the review write up," the fact that someone from LCA **might** have known about the nature of the legal issues, and could have told Dyer about it, is pure speculation, especially given that the underlying issues were seven years old. *See Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999) ("because "could have told" is not the same as "did tell," **it would be pure speculation" to infer that manager with knowledge of the protected activity had shared that information with the decision-maker**). Microsoft has over

100,000 employees, more than the population of many cities. Any particular individual – whether in Human Resources or legal – cannot possibly be aware of every issue ever raised by a Microsoft employee. The law requires Cornwell to show evidence of causation, which by necessity requires evidence of knowledge of the decision-makers involved in the action at issue. If Cornwell can survive summary judgment here by merely alleging that Microsoft as a corporation knew of her alleged protected activity – even if no individual involved knew – then any employer with a human resources or legal department can be held strictly liable for a retaliation claim as long as an employee raised a complaint at some point in the past.

A plaintiff must “show a defendant’s awareness with more evidence than mere curious timing coupled with speculative theories.” *Raney*, 120 F.3d at 1197. Cornwell has no evidence that Dyer ever learned the nature of the legal issues, no evidence that anyone from LCA had a role in the decision to give Cornwell a “5” score, and no evidence that any person who had knowledge of Cornwell’s previous legal issues breached Microsoft’s confidentiality obligations by sharing that information. There is no evidence in the record of knowledge because the decision-makers did not know. *See* CP 47-48, 54-55 (Blake Dep. 53:15-54:21, 65:24-66:14); CP 144 ¶ 2.

The trial court carefully tested Cornwell's case, inquiring into and determining that Cornwell had no evidence on which to go to trial. This is precisely the situation for which summary judgment was intended. *See Keck*, 184 Wn.2d at 369. Although the WLAD is liberally construed, a plaintiff must still present evidence to defeat summary judgment. *See CR 56*. The trial court properly concluded that there is no evidence that the decision-makers had knowledge of protected activity, and thus there can be no causal link between the protected activity and the adverse action. The Court should affirm the trial court's decision granting summary judgment on Cornwell's retaliation claim.

**C. The Court May Also Affirm Summary Judgment on Any of the Other Grounds Supported by the Record.**

The trial court properly granted Microsoft's motion for summary judgment on the causation issue, but there are three other valid grounds that are supported by the record and upon which the Court may affirm the summary judgment decision.

**1. Cornwell Released All Claims Related to her 2012 Evaluation so her Retaliation Claim Should be Dismissed as a Matter of Law.**

Cornwell's retaliation claim also fails as a matter of law because by signing a Severance and Release Agreement in mid-September 2012, nearly a month after Microsoft finalized her 5 rating, Cornwell released

“all known and unknown claims” against Microsoft. The release explicitly included “any and all claims or causes of action arising under... any federal, state, local or foreign law **relating to employment discrimination.**” CP 132 (emphasis added). Cornwell’s retaliation claim under the Washington Law Against Discrimination (WLAD) falls within the scope of this release language. Thus, by voluntarily signing the Agreement, Cornwell released her potential retaliation claim, regardless of whether she knew of her exact performance review score at the time she signed the Agreement.

**a. Cornwell Released Both Known and Unknown Claims.**

Whether Cornwell knew about her specific performance score at the time she signed the release is irrelevant (and she certainly knew it was going to be low). A release of employment discrimination claims asserted under Washington’s Law Against Discrimination is governed by contract law and will generally be upheld absent fraud, misrepresentation or mutual mistake. *See Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851, 856 (1992); *Chadwick v. Northwest Airlines, Inc.*, 33 Wn. App. 297, 303 (1982), *aff’d*, 100 Wn. 2d 221, 667 P.2d 1104 (1983).

Courts routinely uphold broad releases that include a release of “unknown” claims. *See, e.g., Bennett v. Shinoda Floral, Inc.*, 108 Wn.2d

386, 388, 739 P.2d 648-49 (1987) (upholding release of “claims that are known and unknown, suspected and unsuspected” ); *Wagner v. NutraSweet Co.*, 95 F.3d 527, 533 (7th Cir. 1996) (“When a release is broadly worded, as this one was, to cover all claims, ‘known and unknown,’ the plaintiff is giving up the right to sue that she might otherwise have on claims related to her employment that could arise under any law.”); *Bickings v. Bethlehem Lukens Plate*, 82 F. Supp. 2d 402, 408 (E.D. Pa. 2000) (“**[A] release that bars unknown claims will be enforced**, even if a party claims that it was unaware of the matter at the time the release was executed.”).

In this case, Cornwell voluntarily signed the Agreement in exchange for receiving severance benefits, releasing all relevant claims against Microsoft whether known or unknown. She admits that she knew at the time she signed it that she was releasing both known and unknown claims, and even consulted with an attorney about that clause. Plaintiff’s present retaliation claim (brought under the WLAD) clearly falls within the types of claims explicitly released under the Agreement. Her claim is based entirely on her 2012 performance score, and consequences flowing from that score. Therefore, regardless of whether Cornwell knew about her performance review score she knowingly and voluntarily released any

entitlement to bring this claim against Microsoft. For this reason alone, this claim must be dismissed.

**b. Cornwell's Performance Score Was Finalized Before She Signed the Severance Agreement.**

Although Cornwell alleges that she first learned about her low performance score in February 2014, that date is irrelevant for determining whether her claim is barred by the release. That's because the events giving rise to plaintiff's retaliation claim occurred before she signed the Agreement.

Plaintiff knew far in advance of signing the Agreement that a negative performance score was coming – her manager told her she was trending to a 4, which is low. Plaintiff's knowledge of this possibility is enough to bring it within the scope of the release. "A release generally extends to all matters within the parties' contemplation at the time it is executed." *Chadwick*, 33 Wn. App. at 302, 654 P.2d at 1217.

In *Wagner v. NutraSweet Co.*, 95 F.3d 527, 533 (7th Cir. 1996), the plaintiff sought to bring claims against her former employer under Title VII and the Equal Pay Act. On a motion for summary judgment, the plaintiff argued that the release of all "known and unknown" claims did not cover claims that she could not have known about at the time she signed. She claimed that at the time she signed her agreement, she did not

know (and could not have known) that her male successor was paid much higher bonuses than she had received while they were both performing comparable work.<sup>6</sup> She alleged that her claim did not accrue until she **discovered** the injury, which was after she signed the agreement. The court rejected plaintiff's arguments, holding that in "release cases, the question is not when ... the date of accrual [was], but rather whether the plaintiff is **knowingly giving up the right to sue** on some claims, **or all claims that are in general terms predictable.**" *Id.* (emphasis added). Accordingly, the court held that the release included plaintiff's claims of unequal pay and foreclosed plaintiff's lawsuit.

Similarly, here, Cornwell admitted that she understood that, by signing the Agreement, she was releasing all claims – both known and unknown. CP 102-104 (Cornwell Dep. 181:24-183:20). And although Cornwell may not have known precisely that she had received a "5" performance rating when she signed the Agreement, Cornwell admitted that she knew performance review scores were typically locked and finalized by July. CP 96 (Cornwell Dep. 146:1-6). Thus, Cornwell would

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<sup>6</sup> The plaintiff's argument was based on case law regarding the "discovery rule," which is commonly applicable to determining the statute of limitations for tort claims. Under the "discovery rule," a cause of action does not accrue until the plaintiff knows the essential elements of the cause of action. *See, e.g., Fradkin v. Northshore Util. Dist.*, 96 Wn. App. 118, 122, 977 P.2d 1265, 1268 (1999).

have known in September, when she signed the Agreement, that her FY12 performance review score had already been determined.

Moreover, Cornwell was informed well before she waived her claims that the review score would not be favorable. Cornwell understood the performance rating process, Blake told her in February 2012 that she was “trending to a 4,” and Blake continued having performance discussions with Cornwell for the next six months. Thus, Cornwell recognized that she was not meeting Blake’s performance expectations.

Based on these facts, it is undisputed that Cornwell “knowingly” gave up the right to sue on a claim that was “in general terms predictable.” *See Wagner*, 95 F.3d at 533. Thus, Cornwell’s claim is barred by the release and the Court should affirm the summary judgment dismissal on this basis.

## **2. Cornwell Never Engaged in the Predicate Protected Activity.**

Cornwell’s retaliation claim also fails because she cannot establish the “protected activity” element of her prima facie case. Under Washington law, Cornwell must “prove that her complaints went to conduct that was at least arguably a violation of the law.” *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798. 120 P.3d 579, 590 (2005). Furthermore, a “general complaint about an employer’s

unfair conduct does not rise to the level of protected activity in a discrimination action under WLAD absent some reference to the plaintiff's protected status.” *Alonso v. Qwest Commc’ns Co., LLC*, 178 Wn. App. 734, 754, 315 P.3d 610, 620-21 (2013). Cornwell cannot establish the predicate protected activity because her prior legal issue did not raise valid WLAD claims and her email to Blake in April 2012 did not oppose discriminatory conduct or reference any protected status.

**a. A Supervisor Favoring her Paramour Does Not Violate the WLAD and Therefore Cornwell’s Prior Legal Issue Is Not Protected Activity, Regardless of Her Attorney’s Retroactive Characterization.**

Cornwell complained that her manager was engaged in a consensual romantic relationship with one of Cornwell’s peers, and that the manager was favoring the peer because of the romantic relationship. Such a romantic relationship – even if it results in the peer receiving favored treatment – is not a prohibited practice under the WLAD and therefore Plaintiff’s complaint would not be considered protected activity. *See, e.g., Reiber v. City of Pullman*, 2013 WL 3984442, at \*10 (E.D. Wash. Aug. 1, 2013) (“**reporting a suspected affair between co-workers is not protected activity**” under the WLAD); *Keenan v. Allan*, 889 F. Supp. 1320, 1375 n. 66 (E.D. Wash. 1995) (“Preferential treatment on the basis of a consensual relationship between a supervisor and an employee

does not constitute a cognizable sex discrimination claim under Title VII for other employees.”); *Parker v. Otis Elevator Co.*, 9 Fed. Appx. 615, 617 (9th Cir. 2001) (plaintiff’s “complaints about the romantic relationship [between his manager and a co-worker] cannot be characterized as protected activities because the activities about which he allegedly complained are not prohibited by Title VII” and there was “nothing in the record to suggest that [plaintiff] thought the relationship violated Title VII”).

Cornwell relies upon a mediation letter submitted by her attorney in 2006 and a single California case – *Miller v. Dep’t of Corr.*, 36 Cal. 4th 446, 115 P.3d 77, 30 Cal. Rptr. 3d 797 (2005) – to demonstrate that her paramour favoritism claim was at least arguable. But the attorney’s letter acknowledges that federal law on the subject undercuts Cornwell’s claim, and then argues that it “is not at all clear” that Washington courts would follow this precedent, without providing a single citation to authority holding a paramour favoritism claim actionable under similar facts. CP 227. Cornwell admits that she complained that the relationship violated Microsoft’s **conflict of interest policy**, CP 114 (Cornwell Dep. 197:7-11), not discrimination on the basis of sex, and her attorney’s attempt to retroactively characterize the complaint as arising under the WLAD does not make her otherwise invalid claim “arguable.” Cornwell’s claim was

about paramour favoritism, not gender discrimination. Assume instead that Cornwell's female manager attended the University of Washington and Cornwell attended Washington State University. If Cornwell complained that her manager favored Cornwell's male coworker (who attended the University of Washington), that claim would not implicate the WLAD. Even if Cornwell then hired an attorney, who recharacterized the claim as a gender discrimination claim under the WLAD, it would not change the underlying basis of Cornwell's complaint: a claim of favoritism, not gender discrimination, and not protected under the WLAD.

The *Miller* case is likewise unpersuasive. There, the court distinguished the "great majority" of federal courts that held that an isolated instance of favoritism toward a "paramour" does not constitute a violation of Title VII because the plaintiffs alleged not an "isolated" affair, but "widespread favoritism" that created an "atmosphere that was demeaning to women." *Miller*, 115 P.3d at 463, 470. By contrast, Cornwell's 2005 claim was that her supervisor engaged in an isolated workplace affair and accorded special benefits to one sexual partner. It was not "widespread favoritism." Thus, because Cornwell cannot prove the conduct was at least arguably a WLAD violation, it cannot form the basis for a retaliation claim and Plaintiff's retaliation claim should be dismissed.

**b. Cornwell's Email to Blake Was Not Protected Activity.**

Cornwell's April 2012 email to Blake is likewise not protected activity. Cornwell's email stated that she was surprised that Blake followed up with Human Resources about her legal issue. CP 159. Cornwell did not raise a claim of retaliation, did not mention any protected status, and did not even indicate that she felt Blake was treating her differently because of the legal issue (which would not be a protected status in any case). Furthermore, Cornwell admits that she never complained to anyone at Microsoft that she felt Blake was retaliating against her. CP 123-124 (Cornwell Dep. 228:19-229:24). Cornwell's email cannot plausibly be considered protected activity under the WLAD.

The Court should affirm summary judgment because Cornwell cannot establish the protected activity element of her retaliation claim.

**3. Cornwell's Retaliation Claim Also Fails Because She Has No Evidence of Prohibited Animus by the Relevant Decision-makers.**

Finally, Cornwell attempts to show animus by arguing that Blake was "hyper-focused" on her legal issue. But the evidence does not support this characterization of the facts. The evidence demonstrates that after **Cornwell** brought up the legal issue in late 2011, Blake spoke with her Human Resources representative and then told Cornwell that there was no

record of the legal issue. That was the end of the conversation. In April, **Cornwell** brought up the legal issue again and Blake reached out to her Human Resources representative for guidance. Blake then learned that there was a confidential legal issue that had been resolved in 2005. That was the extent of Blake's inquiries into the legal issue. Far from being "hyper-focused," the evidence shows that Blake discussed the issue only once with her direct manager and her Human Resources representatives, did so for the purpose of seeking guidance, and did not pursue the matter further after being told it was confidential.

#### IV. CONCLUSION

The trial court properly granted summary judgment in favor of Microsoft, holding that Dawn Cornwell had not established the causation element of her retaliation claim. In addition, there are other valid grounds, supported by the record, for dismissing Cornwell's claim on summary judgment. Therefore Microsoft respectfully requests that the Court affirm the trial court decision granting summary judgment in favor of Microsoft.

RESPECTFULLY SUBMITTED this 18th day of July, 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 18, 2016, I caused to be served a true and correct copy of the Brief of Respondent to the following party at this address:

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