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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAWN CORNWELL,
Appellant,

v.

MICROSOFT CORPORATION, a Delaware corporation,
Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Dawn Cornwell appeals the trial court's decision to grant summary judgment in favor of Microsoft, despite material factual issues for trial. Cornwell's retaliation claim under the Washington Law Against Discrimination ("WLAD") is supported by ample evidence for a jury to conclude that her protected activities were a substantial factor in Microsoft's adverse actions. Cornwell was a 14-year employee at Microsoft with a history of strong performance reviews until her new manager learned that she had a prior "lawsuit" against Microsoft.[1] The manager was suspicious and investigated the issue with Human Resources and other managers. Shortly after learning of her "lawsuit," Cornwell's managers began to criticize her performance unfairly and gave her the lowest performance rating possible. These same managers communicated with Microsoft's Human Resources and Legal departments to discuss Cornwell's previous "lawsuit" in relation to her performance evaluation. Cornwell's managers, in concert with Human Resources, deviated significantly from standard procedures in conducting Cornwell's

[1] Cornwell did not file a formal lawsuit, but she did retain counsel who represented her in a mediation for sex discrimination claims brought under the WLAD. Cornwell referred to this as her "lawsuit." For this reason, Cornwell's complaint is referred to as the "lawsuit" in this brief.

performance evaluation and did not allow Cornwell herself to review her manager's proposed rating.

As a result, Cornwell received the worst possible review score. This review score became known to Cornwell after she was laid off. As a consequence of the review score, Cornwell was turned down for other positions at Microsoft and remains "tainted" to this day by the negative review.

The trial court found that Cornwell could not establish a causal connection between Cornwell's protected activity and Microsoft's adverse actions. The court reasoned that Cornwell's manager did not know that Cornwell's "lawsuit" was based on the WLAD specifically.

The evidence is sufficient to allow a reasonable jury to find a causal connection between her protected activity and the adverse actions. First, Microsoft had "general corporate knowledge" of Cornwell's protected activity. Cornwell's adverse employment action was not the result of an individual manager acting "rogue." It was orchestrated by Human Resources, with whom management consulted during the entire process. Cornwell's managers specifically engaged the Microsoft Human Resources and Legal Department as part of their investigation into the nature of Cornwell's "lawsuit." The trial court erroneously focused on what one particular manager knew, and not on what reasonable inferences

could be drawn from the totality of the evidence that numerous people from various departments at Microsoft were involved in Cornwell's poor performance evaluation.

Second, Cornwell provided sufficient evidence to establish a direct causal chain between her protected activity and Microsoft's adverse employment actions. This is sufficient to establish a causal connection for a WLAD prima facie case. The defenses that Microsoft has raised to undermine this direct causal connection only create issues of fact regarding Blake's knowledge and credibility that should be resolved by a jury at trial.

Washington courts have cautioned against the use of summary judgment in employment discrimination cases. *Frisino v. Seattle School Dist. No. 1*, 160 Wn. App. 765, 777 (2011); *Johnson v. Chevron, U.S.A.*, 159 Wn. App. 18, 27 (2010). Evidence "will generally contain reasonable but competing inferences of both discrimination and nondiscrimination that must be resolved by a jury." *Frisino*, 160 Wn. App. at 777 (citing *Davis v. W. One Auto. Grp.*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007)). In the present case, a jury could make a reasonable inference of retaliation from the evidence. For example, the jury could infer that Cornwell's manager suspected that Cornwell engaged in protected activity based on what she did know about Cornwell's previous "lawsuit," the

actions that she took to investigate the "lawsuit," and the manager's silence in the record on this issue. Because of the competing inferences involved in this case, summary judgment should have been denied.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting summary judgment to dismiss Cornwell's retaliation claim under RCW 49.60.210 by not reviewing the evidence and inferences in the light most favorable to the non-moving party.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court erred by not making reasonable inferences in favor of the non-moving party to establish a causal connection for retaliation when the evidence showed that Microsoft had "general corporate knowledge" that Cornwell engaged in protected activity and then suffered an adverse action. (Assignment of Error No. 1).

2. Whether a plaintiff can establish the causal connection element of a prima facie case of retaliation under RCW 49.60.210 when the protected activity was the proximate cause an adverse employment action. (Assignment of Error No. 1).

IV. STATEMENT OF FACTS

A. Cornwell was a Long-Time Employee with an Excellent Employment Record.

Dawn Cornwell started working for Microsoft in 1997. Throughout the next decade, she earned very strong review scores and consistently exceeding the expectations of her managers. CP 213, 221. She was promoted several times, eventually earning the title of Program Manager. *Id.*

B. Cornwell Raises Valid, Good Faith Concerns about Sex Discrimination and Retaliation.

In 2004, Cornwell worked as a Program Manager reporting to Lisa Chiang. Cornwell met with Chiang's manager, Todd Parsons, to discuss her performance. Cornwell expressed her concern that Chiang was favoring one of Cornwell's peers, Rich Neal, because Chiang was dating him. Chiang had allowed him to travel first-class to India, while denying Cornwell a business trip to Salt Lake City. CP 213-214. Parsons told Cornwell, "You have never been a low performer and you never will be." *Id.* In that meeting, Parsons asked Cornwell if she thought Chiang and Neal were dating. Cornwell said that was apparent to her and several others. *Id.*

A month later, Chiang was removed as manager and placed into a new role. As a result, Cornwell reported directly to Parsons. CP 214. But

Parsons acted very differently towards Cornwell. He did not meet with her or give her any praise, despite the fact that she was working the equivalent of three full-time positions. She reasonably feared that Parsons was angry with her for reporting Chiang's discrimination. *Id.* Although Cornwell received very positive responses on a client survey, Parsons issued her a negative performance review in 2005, and falsely stated that Cornwell's clients and customers were dissatisfied with her results. *Id.* Cornwell reported all of this to Microsoft Human Resources. She hired an attorney and, ultimately, through mediation, she and Microsoft reached a settlement agreement. CP 214.[2]

C. Cornwell Earns a Promotion in a Different Department.

In the next few years, Cornwell was very successful, earning a promotion to a level 61. She was again promoted, this time to a level 62, in September 2010. CP 215. Microsoft reorganized in July 2011, and she served as a Program Manager reporting to Mark Robbins-Linford. He consistently praised Cornwell's performance, and often referred to her as his "rock star." *Id.*

In November 2011, Mary Anne Blake took over as Cornwell's manager. At around the same time, Cornwell assumed the duties of her

[2] The settlement agreement is filed under seal at CP 397-398 and not discussed here.

previous manager, Mark Robbins-Linford, while also performing her former duties. In short, her workload doubled. CP 216.

D. Blake Learns of Previous Claims by Cornwell and Begins to Treat her Differently.

Blake found out that Cornwell had a previous "lawsuit" against Microsoft and treated her poorly thereafter. Blake learned of the prior lawsuit in December 2011 when Blake asked Cornwell to get mentorship from one of Blake's friends within Microsoft. When Cornwell learned that this person reported to Todd Parsons, she told Blake that she would prefer to find another mentor. Blake repeatedly asked Cornwell why she would not mentor with her friend. Cornwell concluded that Blake would not stop asking until she received a satisfactory response, so Cornwell finally explained that she did not feel comfortable because she previously had legal claims against Parsons. Cornwell told her she could not discuss the details. CP 216.

In February 2012, Blake met with Cornwell for the midyear FY 2012 performance review. At the beginning of the meeting, Blake told Cornwell that she had specifically followed up with Human Resources about Cornwell's "lawsuit" and was told there was nothing on file. Blake pressed the issue and asked Cornwell if she had signed anything. Cornwell confirmed that she had (but was shocked that this was a primary

subject at a performance meeting). CP 216-217. Blake then asked Cornwell what would happen if they merged with Parsons' team. Cornwell responded that she had a copy of the paperwork with the terms and conditions and that if she needed to produce it at a later time, she could. Blake asked if she should discuss further with Human Resources. Cornwell responded that she signed a confidentiality agreement, and that she could not discuss it anymore. *Id.* From these conversations, Blake understood that Microsoft had agreed to change Parsons' review score of Cornwell and that Cornwell could not be assigned to a position that reported to Parsons. CP 54-55 (Blake Dep. 65:21-66:14); 156.

Blake's mid-year feedback contained many unfounded and surprising criticisms. Cornwell discussed the inaccuracies with Blake, and Blake orally agreed to change them. In the end, however, Blake only changed one sentence. CP 217-218.

On April 13, 2012, Cornwell and Blake had a one-on-one meeting to discuss Cornwell's performance. During that meeting, Cornwell expressed concern that she was not being fairly reviewed. CP 218.

E. Blake Investigates Cornwell's Prior "Lawsuit" Involving Her Prior Review Scores and Another Microsoft Manager.

Mary Anne Blake contacted Jan Dyer in Human Resources to try to investigate Cornwell's prior "lawsuit" against Microsoft. On April 19, 2012, Blake wrote:

> In our discussion regarding Dawn, I let you know she had told me that she took legal action against MS due to review scores in the past. You had mentioned that you would do more investigation as nothing popped out to you, and I suggested you follow up with Todd Parsons,[3] as she mentioned he was the target and as part of the condition of her employment she can't work on his team. I just looked at her profile on Managepoint and noticed that she was on a leave of absence from 9/13/2005 to 2/26/2007. **I hope this helps with your detective work.**

CP 156 (emphasis added).

During this same time, Microsoft Human Resources advised Blake about Cornwell's prior performance. Mary Stokes wrote:

> Will be interested in how this goes. Curious about what Nicole refers to below. **I look at the review history and she was a 3 last year**."

CP 152 (emphasis added).

Jan Dyer, also in Microsoft Human Resources, wrote a second email that requested more information about Cornwell's statement that she "sued MS when she was in Todd Parson's org," and explained that

[3] Mary Anne Blake's manager, Nicole McKinley, previously reported to Todd Parsons. CP 126 (Cornwell Dep. 242: 2).

Cornwell's managers "all seem to be tip toeing around this employee 'considering her history.'" CP 155. Blake and Human Resources were hyper-focused on Cornwell's previous legal issues with Microsoft.

F. Cornwell Objects to the Focus on Her Previous Legal Claims against Microsoft.

On April 19, 2012, Cornwell sent an email to Blake discussing their previous meeting and clarifying Cornwell's role in the organization. CP 157-160. In that email, she reiterated her concern about Blake's focus on her previous claims:

> I was surprised to hear you say you followed up with HR about my lawsuit. I did not and do not believe that this has ANY impact on my job, performance, or with you. I have tried for years to put this behind me. I am still confused as to why you reached out to them. This is a private and resolved matter in which I had to sign a confidentiality agreement about. Because of you doing this I lost some trust in you and am afraid that you will communicate to others about this. I do not want a negative perception or reputation. This matter is between Microsoft and me only.

CP 159.

Despite Cornwell's concerns, management continued to pursue information on Cornwell's previous legal issues. Dyer raised the issue of these past legal matters with another manager, Nicole McKinley, and escalated the investigation of Cornwell to the Microsoft Legal Department. This escalation coincided directly with the ongoing calibration of Cornwell's performance review. In an email entitled

"Calibration File comments/ questions," Dyer wrote to McKinley on June 4, 2012:

> I have a meeting with LCA [Microsoft Legal Department] today about Dawn Cornwell. I will let you know what I find out. At the very least, we will have some LCA eyes on the review write up.

CP 161.

G. Blake Creates a Negative Performance Review by Ignoring Positive Feedback and Disregarding Microsoft Policy.

Microsoft mandates that a performance review of all employees be conducted for their work at the end of Fiscal Year 2012 (that period ended on June 30, 2012). CP 162. Cornwell's peer reviews were outstanding. CP 163-164. Cornwell received reviews from nineteen of her peers. Mark Robbins-Linford, (Cornwell's prior manager who should have conducted Cornwell's mid-year review), wrote:

> Despite several re-orgs and numerous changes in her management, Dawn was able to stay the course, perform well and produce quality work. I enjoy working with Dawn. She is smart, detail oriented and methodical in managing projects and releases. Dawn partners extremely well with others and has established a rapport and positive reputation with the many teams she works with. Dawn's hard work and dedication are greatly appreciated!

CP 164. Sixteen other reviewers were similarly positive. *Id.*

In early July 2012, Cornwell wrote and uploaded her self-assessment.[4] CP 218. Microsoft policy is that the manager should follow up with the employee to finalize the review. CP 166. Blake never did. CP 218. Microsoft's policy creates a nine-step process for conducting performance reviews, which requires managers to review their employees' self-review feedback and, ultimately, recommend a performance rating "based on these inputs." CP 165-170. Despite this, Microsoft discarded Cornwell's self-assessment and only uploaded a version with Blake's negative assessment, which Cornwell never saw nor had a chance to address. CP 171-175. In sum, Blake performed the evaluation contrary to Microsoft's policy; she had no recollection of even looking at Cornwell's comments. CP 182 (Blake Dep. 138:24-139:17).

Without the benefit of Cornwell's self-assessment or Cornwell's comments to Blake's assessment, Blake participated in a "calibration meeting" with other managers. Blake claims that she initially rated Cornwell as a 4 (with a 5 being the lowest possible score), and as a result of the calibration meeting, Cornwell was rated as a 5. CP 179 (Blake Dep. 88:1-16). However, former Microsoft Senior Director Jean Wenzel contradicts this statement. According to Wenzel, Blake and McKinley came into the meeting both being adamant that Ms. Cornwell was a "5."

[4] Microsoft has been unable to produce the document as it existed in July 2012.

CP 211-212. Several other managers were vocal in disagreeing with this assessment. *Id.* Rather than rate Cornwell during the management meeting, Blake and McKinley took Cornwell's stack ranking "off line," and determined Cornwell's rating by themselves. *Id.*

There is no non-retaliatory explanation for Cornwell's rapid decline in performance after thirteen years of strong performance reviews. To the contrary, one other manager who participated in the calibration meeting knew Cornwell's work very well and concluded that Blake was not treating Cornwell fairly. CP 202 (Rhodes Dep. 29:18-25).

H. After Selecting Cornwell for Layoff, Microsoft Surreptitiously Holds Back the Negative Performance Review Until After Cornwell Signs Her Severance Agreement; Later, Blake Gives Cornwell a Negative Reference When she Reapplies for Work at Microsoft.

On September 5, 2012, Cornwell received several urgent messages from Blake asking her to call Human Resources. Cornwell called Human Resources and spoke with Cerissa Corra. Corra told Cornwell that she was being laid off because "all non-service delivery manager positions were eliminated" and, therefore, she would be eligible for severance. CP 218-219. Cornwell then asked if she would receive her performance review as she was expecting a bonus. Corra told Cornwell that she would

not receive a review.[5] *Id.* In the severance paperwork, the checklist instructed Cornwell to go to the HR tool to print all performance reviews and needed paperwork. When Cornwell did so, she found all of her reviews except for the most recent 2012 review.[6] *Id.* This confirmed in Cornwell's mind that no such review would be done for her last year in light of the layoff. Having determined that no performance review existed, Cornwell signed the severance agreement and faxed it to Microsoft on the morning of September 11, 2012. CP 209. Three hours later, at 1:52 p.m., Corra signed Cornwell's performance evaluation on behalf of Cornwell—which was only possible to do after Cornwell was no longer an employee to sign for herself. CP 275. At 2:37 p.m. the same day, at the instruction of Human Resources, Blake uploaded the performance evaluation into the management tool. *Id.*; CP 186 (Blake Dep. 171:14-20). Blake testified, "Everything was very carefully orchestrated by Human Resources, and I followed exactly their instructions." CP 187 (Blake Dep. 173:9-12). At that point, the review was "published," enabling any other Microsoft manager to see Cornwell's

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[5] In fact, Blake was surreptitiously holding Cornwell's performance review. Human Resources told Blake not to upload the performance review until she was instructed to do so by Human Resources. CP 186-187 (Blake Dep 171:14-21, 173:9-12).

[6] There is ample evidence that the decision not to give Cornwell the performance review was deliberate. Indeed, Blake wrote, "I am more concerned about her reaction to the 5 than her reaction to the RIF." CP 189-190.

review score. Microsoft did this without conducting the performance discussion, also required by the Performance Review process. CP 165-170.

After Cornwell signed her severance agreement, she immediately started looking for re-employment at Microsoft, applying for 170 different positions. Cornwell was able to return to Microsoft as a contract employee through an agency in May 2013. Cornwell received positive feedback from her new manager at Microsoft and was able to go on informational interviews for regular employment positions while onsite at Microsoft. CP 219.

In February 2014, Cornwell applied for a Release Manager role at Microsoft. Cornwell already knew the manager, so she contacted him directly. They set up a phone interview. Before the interview started, Cornwell received an email from the hiring manager saying he could not interview her because of her last review on file. CP 220, 233-234. Cornwell was shocked. She had no idea that she had a negative review in her file. *Id.* In discovery, evidence was uncovered that the hiring manager solicited an opinion from Blake—Blake had responded that Cornwell was performing "well below her level" and that "her performance review did

not come as a surprise to those who worked with her in the past."[7] CP 191-192.

After Cornwell learned of the poor performance evaluation, she contacted Microsoft Human Resources about what had happened, and also requested that the performance review be removed from her file. CP 220-221. On June 6, Cornwell met with Mary Stokes from Human Resources, who stated that the review would not be removed. *Id.* Unable to obtain relief herself, Cornwell retained counsel and filed suit. CP 1-6.

I. Trial Court Grants Microsoft's Motion for Summary Judgment.

Microsoft moved for summary judgment on various grounds. CP 9-32. The trial court granted this motion and dismissed Ms. Cornwell's case on January 29, 2016. CP 341-342. The trial court held:

> The question here is whether there was retaliation due to protected activity. Where is that causal link? And what I'm not – your – Ms. Cornwell's complaint is a retaliation claim under the Washington law against discrimination, the WLAD, W-L-A-D, and there isn't evidence that Ms. Blake, who gave her the bad score, knew that there was a complaint under WLAD, and that's why I'm granting the motion for summary judgment.

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[7] Blake's negative reference post-dates the severance agreement. It also conflicts with the testimony that Cornwell was a "4" going into calibration meetings and that the decision was "painful" and required a "sanity check" for Cornwell to land at a "5" ranking in calibration. CP 193.

RP 40:4-12. Cornwell submitted a motion for reconsideration to the court, which was denied on February 23, 2016. CP 323-330; CP 343-344. On March 18, 2016, Cornwell timely appealed the trial court's Order Granting Summary Judgment and Order Denying Motion for Reconsideration. CP 338-344.

V. ARGUMENT

Under Washington law, it is unlawful for an employer to "discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by" the Washington Law Against Discrimination. RCW 49.60.210. To establish a prima facie case of retaliation under the WLAD, a plaintiff must show that (1) she complained of discrimination, (2) she suffered an adverse employment action, and (3) there was a causal connection between the exercise of the statutory right and the adverse action. *Wilmot v. Kaiser Alum*, 118 Wn.2d 46, 821 P.2d 18 (1991); *Allison v. Seattle Housing Auth.*, 118 Wn.2d 79 (1991). Because employers "rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." *Vasquez v. State*, 94 Wn. App. 976, 985 (1999), *review denied*, 138 Wn.2d 1019 (1999).

Even though knowledge is not an explicit element of a prima facie case for WLAD retaliation, the trial court ruled that Cornwell needed to establish that her manger, Blake, knew that Cornwell's past legal action against Microsoft specifically arose under the WLAD. RP 40:4-12. The trial court erroneously determined that it was insufficient for Cornwell to show that Blake knew about Cornwell's legal action against Microsoft, eagerly investigated that legal action, and then retaliated against Cornwell. The trial court erred by failing to make reasonable inferences in favor of the Plaintiff and by viewing the evidence in the light most favorable to the Defendant.

Summary judgment should be reversed for two reasons. First, Microsoft as a corporation had knowledge of Cornwell's protected activity because Blake and others investigated Cornwell's prior "lawsuit." There were extensive communications with and between Microsoft's Human Resources Department and Legal Department about Cornwell's prior legal action. A jury can make a reasonable inference from these communications that Blake and others in the Human Resources Department and the Legal Department knew or had reason to suspect that Cornwell had engaged in protected activity. This court should therefore adopt the "general corporate knowledge" principle for retaliation cases, which has been used by the Second Circuit and other jurisdictions. Under

this principal, the plaintiff is not required to show that the person who took the adverse employment action knew of the protected activity, but that the employer had "general corporate knowledge" of the protected activity.

Second, Cornwell can show that her protected activity was the proximate cause of the negative performance evaluation that Cornwell received from her managers. The evidence in the record demonstrates that Blake knew Cornwell had taken legal action against Microsoft and retaliated against her because of that action—this establishes a causal connection between Cornwell's protected activity and Microsoft's adverse actions.

A. Standard of Review.

Appeals from orders granting summary judgment are reviewed de novo, with the Court of Appeals engaging in the same inquiry as the trial court. *Marquis v. City of Spokane*, 130 Wn.2d 97, 104-5, 922 P.2d 43 (1996). Summary judgment is appropriate only where there are no issues of material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 105 (citing *Fahn v. Cowlitz Co.*, 93 Wn.2d 368, 373, 610 P.2d 857 (1980).

Summary judgment should rarely be granted in employment discrimination cases "because the evidence will generally contain reasonable but competing inferences of both discrimination and

nondiscrimination that must be resolved by the jury." *Davis v. West One Auto Group*, 140 Wn. App. 449, 456, 166 P.3d 807 (2007); *see also Johnson v. Dept. of Social & Health Services*, 80 Wn. App. 212, 226, 907 P.2d 1223 (1996). The ultimate factual question "is one that can only be resolved through a searching inquiry—one that is most appropriately conducted by a fact-finder, upon a full record." *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). A sophisticated employer does not announce its intent to discriminate or retaliate, and the ultimate issue is one of intent; therefore, courts have regularly "emphasized the importance of zealously guarding an employee's right to a full trial." *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004); *Lindsey v. SLT Los Angeles, LLC*, 447 F.3d 1138, 1154 (9th Cir. 2006).

B. Ms. Cornwell Engaged in Protected Activity and Suffered an Adverse Employment Action.

Cornwell can easily establish the first two elements of a prima facie case for retaliation under the WLAD: she complained of discrimination and suffered an adverse employment action. Indeed, the trial court was not persuaded by Microsoft's arguments to the contrary. RP at 39:17-40:4.

1. Cornwell made reasonable, good-faith discrimination complaints under the WLAD.

Cornwell made several good faith complaints about discrimination and retaliation, which constitute protected activity under the WLAD. On a retaliation claim, a plaintiff does not need to demonstrate that the conduct she opposed rose to the level of actionable discrimination. *See Burlington Northern & Santa Fe Ry Co. v. White*, 548 U.S. 53, 126 S.Ct 2405 (2006) (holding that the scope of the Title VII retaliation provision is broader than its discrimination provision). Under the WLAD, an employee is protected when expressing a good faith and reasonable belief that discrimination has occurred. *Estevez v. Faculty Club of Univ. of Wash.*, 129 Wn. App. 774, 798 (2005) (plaintiff need only prove that her complaints went to conduct that was "arguably" a violation of law); *Kahn v. Salerno*, 90 Wn. App. 110, 130 (1998) (plaintiff's "opposition must be to conduct that is at least arguably a violation of the law").[8] The good-faith standard also applies in Title VII cases. *See Love v. Re/Max of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) ("Every circuit that has considered the issue, however, has concluded that opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated."); *Robbins v. Jefferson County Sch. Dist.*, 186 F.3d 1253, 1258 (10th Cir. 1999) ("[A]

[8] In its motion for summary judgment, Microsoft cited a 1994 Division III case for the proposition that the "good faith belief" standard does not apply. CP 26. This decision, *Coville v. Cobarc Servc., Inc.*, 73 Wn. App. 433 (1994), is contrary to the great weight of federal and state case law, as cited in this brief.

plaintiff does not have to prove the validity of the grievance she was allegedly punished for lodging; 'opposition activity is protected when it is based on a mistaken good faith belief that Title VII has been violated.'"); *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1457 (7th Cir. 1994) ("[O]ur cases hold that an employee may engage in statutorily protected expression under section 2000e-3(a) even if the challenged practice does not actually violate Title VII.").

Cornwell's protected activities consisted of: (a) raising good faith complaints about discrimination and retaliation when she worked in Todd Parsons' group; (b) pursuing such claims through an attorney who negotiated a settlement in mediation; and (c) raising valid concerns that Blake was retaliating against her by presently asking about Cornwell's "lawsuit" against Microsoft. Cornwell's previous gender discrimination and retaliation claims were ultimately resolved through mediation with Microsoft. CP 224-231. The mediation letter from Cornwell's counsel is a summary of Cornwell's good faith belief that she was the victim of illegal discrimination and retaliation under the WLAD.[9] Additionally, on

[9] The merits of Cornwell's complaint was supported by *Miller v. Department of Corrections*, 115 P.3d 77 (Cal. 2005), holding that a supervisor's unwarranted, favorable treatment of a subordinate employee with whom the supervisor had consensual affairs may create a hostile work environment. *See also* 29 C.F.R. §1604.11(g) ("Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.").

April 19, 2013, Cornwell expressed a concern that Blake was retaliating against her, which was set forth in her email. CP 157-160. These actions constitute protected activity.

2. Cornwell suffered an adverse employment action.

For a retaliation claim, an adverse employment action is any action taken by the employer that is reasonably likely to deter employees from engaging in protected activity. *Boyd v. DSHS*, 187 Wn. App. 1, 13, 349 P.3d 864 (2015) ("The employee must show that a reasonable employee would have found the challenged action materially adverse, meaning that it would have dissuaded a reasonable worker from making or supporting a charge of discrimination."); *see also Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000) (adverse employment actions include "lateral transfers, unfavorable job references, and changes in work schedules."); *Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (holding dissemination of unfavorable job reference is an adverse employment action).

After Cornwell was selected for layoff in 2012, she signed a severance agreement and release of prior claims. Hours after Cornwell faxed the release to Microsoft, Human Resources instructed Blake to upload Cornwell's negative performance evaluation into the Microsoft system. In addition to the negative performance review, Blake gave

Cornwell a negative reference when she re-applied for work at Microsoft. The negative review and reference prevented Cornwell from getting either of two positions in 2014 for which she was qualified. CP 233-234; CP 191-192. These negative actions caused Cornwell to lose actual employment opportunities. Therefore, it is beyond question that she experienced adverse employment actions.

C. The Trial Court Erred in Granting Summary Judgment Because Cornwell Introduced Sufficient Evidence of Causation for a Prima Facie Case of Retaliation.

Cornwell met the causation element of a retaliation claim by producing evidence that she suffered an adverse employment action "because of" her protected activity. The third element of WLAD retaliation—a causal connection between the exercise of the statutory right and the adverse action—is met by establishing that the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee suffered an adverse action. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991).

The Superior Court erroneously concluded that Cornwell could not, as a matter of law, establish any causal connection because Blake denied knowing the exact basis for Cornwell's "lawsuit." RP 40:7-12. In so holding, the court erred because a reasonable juror could find a causal connection based on (1) Microsoft's general corporate knowledge of

Cornwell's protected activity and Blake's discussions with numerous individuals about the earlier claims asserted by Cornwell, and (2) the evidence that Cornwell's protected activity was a proximate cause of her adverse employment action, given Blake's hyper-focus on Cornwell's "lawsuit."

1. The Trial Court Erred by Focusing on Blake's Specific Knowledge when Cornwell's Managers, Human Resources, and Microsoft's Legal Counsel Were Involved in the Decision to Give Cornwell her Bad Performance Review.

The trial court erred by limiting its inquiry to what Cornwell could prove *Blake* knew, without making reasonable inferences based on the totality of the evidence. The totality of the evidence establishes that Microsoft had general corporate knowledge of Cornwell's protected activity. The Second Circuit has held that general corporate knowledge of protected activity is sufficient evidence for retaliation in the context of discrimination—even if the individual manager denies specific knowledge.[10] The leading case is *Gordon v. New York City Board of Education*, 232 F.3d 111 (2d Cir. 2000), which specifically addresses the issue of general corporate knowledge with a factual situation similar to the

[10] This position is consistent with the Washington State Supreme Court's decision in *Wilmot* that the causal connection may be established if the "employer" (as opposed to the "decision-maker") knows of the protected activity. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 821 P.2d 18 (1991).

present case. In *Gordon*, the plaintiff brought a lawsuit for discrimination in which the employer prevailed. Later, her performance evaluations worsened and she was reassigned to a less desirable post. Ms. Gordon filed another lawsuit alleging that the employer retaliated against her because of her first lawsuit. *Gordon*, 232 F.3d at113. At trial, the managers who took the allegedly retaliatory actions uniformly testified that they did not know about Ms. Gordon's earlier discrimination lawsuit. The trial court instructed the jury that the plaintiff was required to prove that the defendant's agents knew that the plaintiff had filed a lawsuit at the time of the alleged retaliation.[11] *Id.* at 113-114. The Second Circuit vacated the defense verdict because of this faulty instruction, holding that "general corporate knowledge" was all that was required. In a key passage, the court explained: "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than **general corporate knowledge** that the plaintiff has engaged in a protected activity." *Id.* at 116 (emphasis added); *see also Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1996) (finding knowledge requirement proved because the corporate entity was

[11] The *Gordon* jury instruction read, "To satisfy the [knowledge requirement], the plaintiff must show that the Board of Education's agent, who gave plaintiff unfavorable reviews and annual evaluations and removed her from the classroom...knew...that plaintiff had filed that lawsuit at the time when they took these adverse employment actions against her." *Gordon*, 232 F.3d at114.

aware of plaintiff's complaints); *Alston v. New York City Transit Auth.*, 14 F. Supp. 2d 308, 311 (S.D.N.Y. 1998) ("In order to satisfy the second prong of her retaliation claim, plaintiff need not show that individual decision-makers within the NYCTA knew that she had filed an EEOC complaint.") The Eighth Circuit also concurs with this approach. *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 991 (8th Cir. 2001) ("Evidence that the supervisor who terminated Charles Broadus had specific knowledge of the protected activity is not an element of his prima facie case. Circumstantial evidence may be used . . .").

Other courts have used the term "constructive knowledge." In *Simon v. Simmons Food, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995), the Eighth Circuit held that a plaintiff in a federal whistleblower claim must show that the employer had actual or constructive knowledge of the protected conduct in order to establish a prima facie case of retaliation. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Id.* at 390 (citing *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir.1980), *cert. denied,* 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed.2d 237 (1981)). Similarly, in *Taylor v. City of Los Angeles Dept. of Water and Power*, 144 Cal. App. 4th 1216, 1236, 51 Cal. Rptr. 3d 206,

220 (2006), the California Court of Appeals found that a retaliation complaint stated a claim even though the plaintiff did not plead that the decision-maker was aware of the protected activity. The claim was established because the employer had actual notice of the protected activity and that the decision-maker had "constructive knowledge" of the protected activity when the manager was informed the plaintiff was a "troublemaker." *Id.* These facts were sufficient to establish a causal link between the protected activity and the defendant's adverse action.

The Washington Supreme Court has made clear that our courts should adopt the legal principle that best advances the rights established by the WLAD. *Martini v. Boeing*, 137 Wn.2d 357, 372-73, 971 P.2d 45 (1999). In addition to reiterating that the WLAD is a public policy of the "highest priority," *Martini* explains that Title VII case law that limits protections should be rejected. *See Martini*, 137 Wn.2d at 372-75. In other words, Washington courts may follow federal authority, but only "those theories and rationale which best further the purposes and mandates of our state statute." *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 361-2, 753 P.2d 517 (1988). We are unaware of any cases decided by the Washington Supreme Court which interprets the WLAD in a way to provide lesser protection than Title VII. When applying the "general corporate knowledge" principle from the above authorities to the

present case, Microsoft's general corporate knowledge of Cornwell's protected activity establishes the causal connection element of her prima facie case.

In Cornwell's case, Microsoft had general corporate knowledge of her protected activity, and Blake consulted with that multiple individuals in Human Resources and the legal department when taking the actions against Cornwell. This was a corporate decision, not an individual one. The most pertinent facts are as follows:

- Cornwell asserted discrimination claims and negotiated a resolution with Microsoft through its legal department.
- Blake became aware of this prior legal action and the settlement agreement.
- Blake interrogated Cornwell about the settlement.
- Blake investigated the prior "lawsuit" by communicating with her manager about it. [12]

[12] The trial court did not agree with Microsoft's argument that the timing of the adverse action was not evidence of causation. Microsoft offers a strained interpretation of the facts—that Cornwell's protected activity in 2005 could not have caused an adverse action in 2012, which conveniently ignored that Blake only learned of the "lawsuit" in December 2011. In this case, when Blake learned of the protected activity, she almost immediately started to investigate Cornwell and to raise the issue with Human Resources and upper management. The proximity in time between Cornwell's protected activity and Microsoft's adverse action is sufficient, in itself, to establish causation. *See Passantino v. Johnson & Johnson Consumer Prods.*, 212 F.3d 493, 507 (9th Cir. 2000) ("evidence based on timing can be sufficient to let the issue go to the jury, even in the face of alternative reasons proffered by the defendant.").

- Blake's manager escalated the inquiry to Human Resources.
- Human Resources escalated the inquiry to the legal department—the group that had mediated the claims with Cornwell.
- Blake's manager had a strong professional relationship with Cornwell's prior manager Todd Parsons.
- Both Blake and McKinley[13] advocated a poor "stack ranking" for Cornwell in the management stack ranking process and indicated that they would take her ranking "off line"—meaning outside of the group decision-making process.
- The legal department was involved in reviewing the negative performance evaluation.
- Human Resources instructed Blake not to disclose to Cornwell her poor review score.
- Blake only uploaded the review after she received the go-ahead from Human Resources.

Blake was not acting alone as a rogue decision maker. She was acting at the direction and in consultation with the corporate apparatus. The decision makers consisted of two managers (Mary Anne Blake and

[13] As discussed *supra* at p. 12-13, Blake's testimony contradicted the testimony of another manager who participated in the stack ranking. Not only does this create an issue of material fact on whether Microsoft had a "legitimate, non-discriminatory reason" for taking the adverse employment action, but it also calls into question Blake's credibility as a whole.

Nicole McKinley); in addition to the managers, there was at least one attorney from Microsoft Legal;[14] four Human Resources employees (Jan Dyer, Mary Stokes,[15] Darryl Roberts,[16] Cerissa Cora[17]); and another person whose name Blake could not remember.[18] Blake's own words are extremely insightful and bear repeating:

> *Everything was very carefully orchestrated by Human Resources, and I followed exactly their instructions.*

CP 187 (Blake Dep. 173:11-12).

The "general corporate knowledge" principle is precisely for a case such as this. Microsoft would have this court reject that principle and instead require plaintiffs to show specific knowledge by a manager beyond a showing that she knew of a lawsuit and retaliated on that basis. If all reasonable inferences had been drawn in Cornwell's favor, the trial court should have determined that a jury could find by a preponderance of evidence that Microsoft had sufficient knowledge of the protected activity when it took the adverse actions against Cornwell. Alternatively, a reasonable jury could infer from the evidence that Cornwell's performance review score was managed at a corporate level and that all of the

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[14] *See* CP 161 (Dyer to have meeting with Microsoft Legal).

[15] *See* CP 156 (Stokes included in email about prior legal action "due to review scores").

[16] *See* CP 155 (Roberts advised Dyer to go to Microsoft Legal).

[17] CP 218-219 (Corra falsely told Cornwell she would not get a performance review).

[18] CP 187 (Blake Dep. 173:11-21).

individuals and departments involved in Cornwell's evaluation were acting on behalf of Microsoft.

2. Cornwell's Protected Activity Was the Proximate Cause of the Adverse Action She Experienced.

Cornwell's WLAD complaint was the proximate cause of the adverse action she received. Blake was clearly troubled by the fact that Cornwell had pursued a "lawsuit" and that the resulting settlement contained a provision that prevented her from reporting to Todd Parsons' group. Even if Blake did "bury her head in the sand" to avoid specific knowledge that the lawsuit involved claims of sex discrimination, her professed lack of knowledge should not be a defense. If Cornwell's protected activity were a proximate cause of the retaliation by Microsoft, then liability should attach under the WLAD. Proximate case is "a cause which in a natural and continuous sequence, unbroken by a new, independent cause, produces the event, and without which that event would not have occurred." *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 935, 653 P.2d 280 (1982). This concept is applicable to the WLAD in determining the damages suffered by a plaintiff. *Martini v. Boeing Co.*, 137 Wn.2d 357, 378, 971 P.2d 45, 55 (1999). That same principle should apply to a liability analysis as well.

Notably, WPI 330.05 does not specifically require that the putative decision-maker have specific knowledge of the protected activity. For retaliation, the plaintiff has the burden of proving: (1) the plaintiff "was opposing what she reasonably believed to be discrimination on the basis of gender;" and (2) "That a substantial factor in the decision to [take the adverse employment action] was the plaintiff's opposition to what she reasonably believed to be discrimination or retaliation."[19]

Under the case law and the WPI jury instruction, a jury could find Microsoft liable under the facts of this case. Even if Blake did not specifically know that Cornwell had complained about discrimination under the WLAD, she acted as a result of (and therefore because of) Cornwell's protected activity. The ultimate question at trial is whether Cornwell's prior protected activity was a "substantial factor" in the adverse action against Cornwell. A reasonable jury could find that it was.

Consider, for example, a scenario where an employee believes that her manager failed to promote her due to her sex and calls an employment lawyer. The manager overhears the call making an appointment. The manager interrogates the employee about the call and the employee only states that it was a "confidential" matter concerning her employment. The

[19] This quote has been modified to select the options within the pattern jury instruction that are applicable to Cornwell's case. The complete pattern jury instruction is included in the appendix to this brief at A-5.

manager immediately fires the woman. The manager did not specifically know whether the call to the lawyer was about unlawful discrimination or some other issue. Nonetheless, the manager should not be allowed to retaliate against the employee where the employee was, in fact, engaging in protected activity.

The proximate cause analysis argued above also furthers the purpose of the WLAD's prohibition against retaliation—to protect employees who complain in good faith about discrimination. The policy considerations in this analysis puts the risk of liability on the employer, who took retaliatory action based on its knowledge of possible protected activity, rather than making employees risk termination without recourse for engaging in protected activity.

During the summary judgment argument below, Microsoft argued that Cornwell's "lawsuit" *could have* been a car accident as opposed to protected activity. RP at 14:5-8. Microsoft presented no evidence that Blake actually suspected it was a car accident or some other non-protected activity. Indeed, Blake knew that Cornwell "lawsuit" involved a complaint about her performance evaluation and that as a result of her legal action Cornwell was no longer required to report to anyone in Todd Parson's organization. CP 156, 178 (Blake Dep. 60:2-8). From these facts, a jury could reasonably infer that Blake suspected the legal issue

was more likely than not a discrimination complaint or some other protected activity.

VI. ATTORNEY FEES

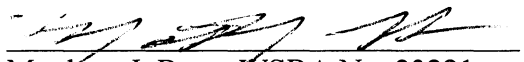
Ms. Cornwell requests reasonable attorney fees, to be fixed by the Superior Court, if she prevails both in this appeal and if she prevails at trial upon remand pursuant to RCW 49.60.030.

VII. CONCLUSION

Cornwell respectfully requests this Court reverse the trial court and reverse the entry of summary judgment granted to Microsoft on Cornwell's retaliation claims under the WLAD.

DATED: this 16th day of June, 2016.

BEAN LAW GROUP



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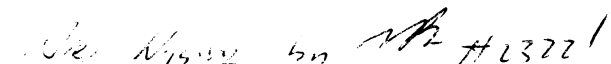

Alex J. Higgins, WSBA No. 20868

Attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2016, I caused to be served a true and correct copy of the **Brief of Appellant** to the following party at this address:

GREG HENDERSHOTT MELISSA MORDY DAVIS WRIGHT TREMAINE 777 108TH AVE NE, SUITE 2300 BELLEVUE, WA 98004	LEGAL MESSENGER & ELECTRONIC MAIL
THE COURT OF APPEALS, DIV. I ONE UNION SQUARE 600 UNIVERSITY STREET SEATTLE, WA 98101-4170	HAND DELIVERY

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of June, 2016 in Seattle, WA.

BEAN LAW GROUP

Lauren Guicheteau

APPENDIX

RCW 49.60.030

Freedom from discrimination—Declaration of civil rights.

(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:

(a) The right to obtain and hold employment without discrimination;

(b) The right to the full enjoyment of any of the accommodations, advantages, facilities, or privileges of any place of public resort, accommodation, assemblage, or amusement;

(c) The right to engage in real estate transactions without discrimination, including discrimination against families with children;

(d) The right to engage in credit transactions without discrimination;

(e) The right to engage in insurance transactions or transactions with health maintenance organizations without discrimination: PROVIDED, That a practice which is not unlawful under RCW **48.30.300**, **48.44.220**, or **48.46.370** does not constitute an unfair practice for the purposes of this subparagraph;

(f) The right to engage in commerce free from any discriminatory boycotts or blacklists. Discriminatory boycotts or blacklists for purposes of this section shall be defined as the formation or execution of any express or implied agreement, understanding, policy or contractual arrangement for economic benefit between any persons which is not specifically authorized by the laws of the United States and which is required or imposed, either directly or indirectly, overtly or covertly, by a foreign government or foreign person in order to restrict, condition, prohibit, or interfere with or in order to exclude any person or persons from any business relationship on the basis of race, color, creed, religion, sex, honorably discharged veteran or military status, sexual orientation, the presence of any sensory, mental, or physical disability, or the use of a trained dog guide or service animal by a person with a disability, or national origin or lawful business relationship: PROVIDED HOWEVER, That nothing herein contained shall prohibit the use of boycotts as authorized by law pertaining to labor disputes and unfair labor practices; and

(g) The right of a mother to breastfeed her child in any place of public resort, accommodation, assemblage, or amusement.

(2) Any person deeming himself or herself injured by any act in violation of this chapter shall have a civil action in a court of competent jurisdiction to enjoin further violations, or to recover the actual damages sustained by the person, or both, together with the cost of suit including reasonable attorneys' fees or any other appropriate remedy authorized by this chapter or the United States Civil Rights Act of 1964 as amended, or the Federal Fair Housing Amendments Act of 1988 (42 U.S.C. Sec. 3601 et seq.).

(3) Except for any unfair practice committed by an employer against an employee or a prospective employee, or any unfair practice in a real estate transaction which is the basis for relief specified in the amendments to RCW **49.60.225** contained in chapter 69, Laws of 1993, any unfair practice prohibited by this chapter which is committed in the course of trade or commerce as defined in the Consumer Protection Act, chapter **19.86** RCW, is, for the purpose of applying that chapter, a matter affecting the public interest, is not reasonable in relation to the development and preservation of business, and is an unfair or deceptive act in trade or commerce.

[**2009 c 164 § 1; 2007 c 187 § 3; 2006 c 4 § 3; 1997 c 271 § 2; 1995 c 135 § 3.** Prior: **1993 c 510 § 3; 1993 c 69 § 1; 1984 c 32 § 2; 1979 c 127 § 2; 1977 ex.s. c 192 § 1; 1974 ex.s. c 32 § 1; 1973 1st ex.s. c 214 § 3; 1973 c 141 § 3; 1969 ex.s. c 167 § 2; 1957 c 37 § 3; 1949 c 183 § 2;** Rem. Supp. 1949 § 7614-21.]

NOTES:

Intent—1995 c 135: See note following RCW **29A.08.760**.

Severability—1993 c 510: See note following RCW 49.60.010.

Severability—1993 c 69: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1993 c 69 § 17.]

Severability—1969 ex.s. c 167: See note following RCW 49.60.010.

Severability—1957 c 37: See note following RCW 49.60.010.

Severability—1949 c 183: See note following RCW 49.60.010.

RCW 49.60.210

Unfair practices—Discrimination against person opposing unfair practice—Retaliation against whistleblower.

(1) It is an unfair practice for any employer, employment agency, labor union, or other person to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she has filed a charge, testified, or assisted in any proceeding under this chapter.

(2) It is an unfair practice for a government agency or government manager or supervisor to retaliate against a whistleblower as defined in chapter 42.40 RCW.

(3) It is an unfair practice for any employer, employment agency, labor union, government agency, government manager, or government supervisor to discharge, expel, discriminate, or otherwise retaliate against an individual assisting with an office of fraud and accountability investigation under RCW 74.04.012, unless the individual has willfully disregarded the truth in providing information to the office.

[2011 1st sp.s. c 42 § 25; 1992 c 118 § 4; 1985 c 185 § 18; 1957 c 37 § 12. Prior: 1949 c 183 § 7, part; Rem. Supp. 1949 § 7614-26, part.]

NOTES:

Findings—Intent—Effective date—2011 1st sp.s. c 42: See notes following RCW 74.08A.260.

Finding—2011 1st sp.s. c 42: See note following RCW 74.04.004.

U.S. GOVERNMENT INFORMATION GPO

§ 1604.11 Sexual harassment.

(a) Harassment on the basis of sex is a violation of section 703 of title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) [Reserved]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

[1] The principles involved here continue to apply to race, color, religion or national origin.

APPENDIX A TO § 1604.11—BACKGROUND INFORMATION

The Commission has rescinded § 1604.11(c) of the Guidelines on Sexual Harassment, which set forth the standard of employer liability for harassment by supervisors. That section is no longer valid, in light of the Supreme Court decisions in *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742 (1998), and *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998). The Commission has issued a policy document that examines the Faragher and Ellerth decisions and provides detailed guidance on the issue of vicarious liability for harassment by supervisors. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors (6/18/99), EEOC Compliance Manual (BNA), N:4075 [Binder 3]; also available through EEOC's web site, at *www.eeoc.gov.*, or by calling the EEOC Publications Distribution Center, at 1-800-669-3362 (voice), 1-800-800-3302 (TTY).

(Title VII, Pub. L. 88-352, 78 Stat. 253 (42 U.S.C. 2000e *et seq.*))

[45 FR 74677, Nov. 10, 1980, as amended at 64 FR 58334, Oct. 29, 1999]

APPENDIX TO PART 1604—QUESTIONS AND ANSWERS ON THE PREGNANCY DISCRIMINATION ACT, PUBLIC LAW 95-555, 92 STAT. 2076 (1978)

INTRODUCTION

On October 31, 1978, President Carter signed into law the *Pregnancy Discrimination Act* (Pub. L. 95-955). The Act is an amendment to title VII of the Civil Rights Act of 1964 which prohibits, among other things, discrimination in employment on the basis of sex. The *Pregnancy Discrimination Act*

Washington Civil Jury Instructions

WPI330.05Employment Discrimination—Retaliation

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil

6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 330.05 (6th ed.)

Washington Practice Series TM
Washington Pattern Jury Instructions--Civil
Database updated June 2013
Washington State Supreme Court Committee on Jury Instructions
Part XVI. Employment
Chapter 330. Employment Discrimination

WPI 330.05 Employment Discrimination—Retaliation

It is unlawful for an employer to retaliate against a person for

[opposing what the person reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [sexual orientation] [honorably discharged veteran status] [military status] [marital status] [national origin] [race] [gender]] [and] [or]

[providing information to or participating in a proceeding to determine whether discrimination or retaliation occurred].

To establish a claim of unlawful retaliation by (name of employer), (name of plaintiff) has the burden of proving each of the following propositions:

(1) That (name of plaintiff) [was opposing what [he] [she] reasonably believed to be discrimination on the basis of [age] [creed] [disability] [religion] [marital status] [national origin] [race] [gender] [honorably discharged veteran status] [military status]] [or] [was [providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred]; and

(2) That a substantial factor in the decision to [discipline] [demote] [deny the promotion] [terminate] was the plaintiff's [opposition to what [he] [she] reasonably believed to be discrimination or retaliation] [or] [[providing information to] [participating in] a proceeding to determine whether discrimination or retaliation had occurred].

If you find from your consideration of all of the evidence that each of these propositions has been proved, then your verdict should be for (name of plaintiff) [on this claim]. On the other hand, if any one of these propositions has not been proved, your verdict should be for (name of defendant) [on this claim].

(Name of plaintiff) does not have to prove that [his] [her] [opposition] [participation in the proceeding] [was] [were] the only factor or the main factor in (name of defendant's) decision, nor does (name of plaintiff) have to prove that [he] [she] would not have been [disciplined] [demoted] [denied the promotion] [terminated] but for [his] [her] [opposition] [participation].

NOTE ON USE

Use the bracketed phrases as appropriate. It may be appropriate to substitute other allegedly retaliatory acts in proposition (2).

Use this instruction instead of WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof, or WPI 330.02, Employment Discrimination—Disparate Impact—Business Necessity—Definition.

This instruction is not designed for use in a statutory "whistleblower" case pursuant to RCW Chapter 42.40.

For a discussion of honorably discharged veteran status and military status, see the Comment to WPI 330.01, Employment Discrimination—Disparate Treatment—Burden of Proof.

COMMENT

The instruction was revised in 2010 to incorporate statutory amendments that added protected status protection to sexual orientation, honorably discharged veteran status, and military status.

The elements of a retaliation claim are based upon RCW 49.60.210(1), Delahunty v. Cahoon, 66 Wn.App. 829, 832 P.2d 1378 (1992); Allison v. Housing Housing Authority of City of Seattle, 118 Wn.2d 79, 821 P.2d 34 (1991); Schonauer v. DCR Entertainment, Inc., 79 Wn.App. 808, 905 P.2d 392 (1995); Milligan v. Thompson, 110 Wn.App. 628, 42 P.3d 418 (2002); Francom v. Costco Wholesale Corp., 98 Wn.App. 845, 991 P.2d 1182 (2000).

"A discharge will support an award of damages when (1) the employee engaged in a statutorily protected [opposition] activity, (2)

an adverse employment action was taken, and (3) the statutorily protected activity was a substantial factor in the employer's adverse employment decision." Schonauer v. DCR Entm't, Inc., 79 Wn.App. at 827 (citing *Allison* and *Delahunty*). See also Coville v. Cobarc Services, Inc., 73 Wn.App. 433, 869 P.2d 1103 (1994) (adding the term "opposition"); Davis v. West One Automotive Group, 140 Wn.App. 449, 166 P.3d 807 (2007).

Substantial factor. An individual asserting a claim under this provision must prove a retaliatory motive was a "substantial factor" in the challenged decision, but need not prove it was the only factor or a "determining factor." Allison v. Housing Auth., supra. This element can be met by establishing that "the employee participated in an opposition activity, the employer knew of the opposition activity, and the employee was discharged." Graves v. Department of Game, 76 Wn.App. 705, 712, 887 P.2d 424 (1994) (citing Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 69, 821 P.2d 18 (1991), and *Allison*). Complaints about the conduct of a supervisor that do not allege discrimination are insufficient to impute knowledge of protected opposition to employer. Graves v. Dep't of Game, supra.

Protected activity. The employee must oppose "practices forbidden by this chapter," i.e., the law against discrimination, and opposition to a practice not forbidden by the statute is not protected activity. Coville v. Cobarc Servs., Inc., 73 Wn.App. at 440. RCW 49.60.210(2) makes it unlawful for a government agency or government manager or supervisor to retaliate against a "whistleblower" as defined in RCW Chapter 42.40, however, unless the retaliation is for complaining of discrimination. The elements of a statutory "whistleblower" claim differ from those under RCW 49.60.210(1), and a different instruction should be used.

In Ellis v. City of Seattle, 142 Wn.2d 450, 13 P.3d 1065 (2000), the court held that to establish a RCW Chapter 49.60 claim of retaliation, the employee need only show he/she reasonably believed there was discrimination and complained about it, and need not prove actual discrimination.

Adverse employment action. Adverse employment actions may include: failure to promote, Davis v. Department of Labor and Industries, 94 Wn.2d 119, 615 P.2d 1279 (1980); reduction of pay, Kirby v. City of Tacoma, 124 Wn.App. 454, 98 P.3d 827 (2004); and demotion or transfer, Robel v. Roundup Corp., 148 Wn.2d 35, 59 P.3d 611 (2002).

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