

74919-6

No. 94846-1

74919-6

No. 74919-6-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DAWN CORNWELL,
Appellant,

v.

MICROSOFT CORPORATION, a Delaware corporation,
Respondent.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF RESPONSE

Cornwell's direct and circumstantial evidence of retaliation creates a triable issue of fact as to whether her protected activity was a substantial factor in the adverse actions taken against her. Rather than narrowly apply the WLAD in a rigid or mechanistic manner, the law should allow a plaintiff to establish the causal link through a combination of direct and circumstantial evidence such that a reasonable fact-finder could find that the plaintiff's protected activity was a substantial factor in the adverse action. The issues of fact raised by the evidence should not be defeated by a decision-maker's bare denial of any knowledge of the protected activity.

First, Cornwell's manager (Blake) knew or suspected that Cornwell had engaged in protected activity based on Blake's undisputed knowledge of Cornwell's "legal action" against Microsoft that involved: (1) her former male manager; (2) her performance evaluations, and (3) an outcome that protected Cornwell from having to report to the male manager or his group. The undisputed evidence also shows that Blake, after learning of the above, undertook "detective work" with Human Resources to find out more about Cornwell's prior "legal action." Blake worked with members of Human Resources and Legal to engineer negative actions against Cornwell.

Microsoft does not present any legitimate, non-retaliatory reason for its adverse employment actions. The only evidence is that despite Cornwell's good performance, Blake rated her well below what other managers believed was justified. From all of the above evidence, a jury may reasonably infer that Cornwell's protected activity was a substantial factor in the adverse employment actions taken by Microsoft.

Additionally, the court should recognize the "general corporate knowledge" principle adopted by the Second Circuit to conclude that Cornwell presents an issue of fact for trial. Microsoft had more than one decision-maker involved and they shared their collective information in taking action. There were extensive communications among Cornwell's managers, Microsoft's Human Resources Department, and Microsoft's Legal Department about Cornwell's prior legal action. A jury can make a reasonable inference from these communications that there was general awareness by Microsoft that Cornwell had engaged in protected activity. This standard upholds the purposes of the WLAD. It merely allows the jury to weigh the totality of the evidence, as opposed to giving all of the weight to a decision maker's denial that she had knowledge of the protected activity.

Defendant has also asserts several alternative grounds for the court to affirm summary judgement. The superior court properly rejected these

arguments. RP 39:17-40:6. Cornwell did not release her claims regarding the poor performance score and review because those actions had not been taken at the time the release was signed. In fact, Microsoft Human Resources took steps to make sure that the performance evaluation was not shared with Cornwell or published in Microsoft's system until *after* Cornwell signed the release. It promised Cornwell that no evaluation would be done at all because she would be let go.

Microsoft's other argument that Cornwell did not engage in protected activity is also without merit. She raised legitimate, good faith concerns about discrimination and retaliation and pursued these concerns through an attorney. Her attorney negotiated a settlement agreement, which specifically referenced her allegations under the WLAD.

Summary judgment was not appropriate, and this case should be remanded for trial on the merits.

II. ARGUMENT IN REPLY

A. Microsoft Misstates Evidence or States Evidence in the Light Most Favorable to Microsoft.

Cornwell's evidence contradicts Microsoft's narrative about Blake's actions. First, Microsoft states that Blake began the rating process by recommending that Cornwell receive a "4" rating, not a "5." Brief of Respondent at 10. This statement is directly refuted by then Microsoft

Senior Director, Jean Wenzel, who testified that Blake and McKinley advocated for a “5” rating from the outset. CP 211-212.¹ When this proposed rating was met with vocal opposition from other managers, Blake and McKinley decided to rate Cornwell “off line.” *Id.* Viewing the evidence in the light most favorable to Cornwell, Blake’s credibility is dubious. *Id.*

Second, Microsoft incorrectly states that at the time she signed her release, Cornwell knew she was trending to a “4” and that the performance scores had been finalized. Brief of Respondent at 13. That is not true. Cornwell was adamant that her performance was solid, as she explained in her deposition. CP 110-111. As for knowing that the performance scores were finalized, while Cornwell understood that such scores were “typically” finalized in July, she was specifically told by Microsoft—prior to signing the release—that she would **not** be getting a performance evaluation. CP 218-219; CP 95 (Cornwell Dep. 145:1-15). In fact, Cornwell signed her severance agreement on September 11, 2012, because Microsoft had conspired to keep the review score from her, fearing she would be upset by the score and refuse to sign the release. CP 186-187; 189-190. The critical fact is not when Microsoft claims it “finalized” the

¹ Carolyn Rhodes, another manager at Microsoft, also disagreed with Blake’s assessment of Cornwell’s performance and told this to Blake. CP 202 (Rhodes Dep. 29:18-25).

review score, but when Microsoft published the performance review—after Cornwell signed her release.

B. The Causal Link is Established Through Circumstantial Evidence: Timing and the Knowledge of Decision-Makers.

Microsoft claims that Cornwell cannot establish a “causal connection” between her protected activity and the adverse actions. Microsoft parses causation by arguing that the law requires a decision-maker to possess specific knowledge of the plaintiff’s exact protected activity. Brief of Respondent at 16. This interpretation of the law is wrong for at least two reasons. First, a jury may infer from circumstantial evidence that the decision-maker knew or suspected the protected activity. Second, the rule of “general corporate knowledge” is another avenue to prove such knowledge (discussed below).

Microsoft proposes an overly rigid requirement that the WLAD does not contain. An illustrative case interpreting both Title VII and the WLAD is *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1113-1114 (9th Cir. 2003). The district court granted summary judgment where the plaintiff was fired after complaining to Human Resources about a supervisor’s sexual harassment of another employee. The district court reasoned that the plaintiff had failed to establish causation because the firing supervisor did not know it was the plaintiff who reported the

harassment. *Hernandez*, 343 F.3d at 1113. The appellate court reversed because the plaintiff provided sufficient evidence from which a reasonable jury could infer that the supervisor “knew or suspected” that the plaintiff had reported the harassment, therefore, establishing a causal connection.

Id. The court explained:

What-did-he-know-and-when-did-he-know-it questions are often difficult to answer, and for that reason are often inappropriate for resolution on summary judgment. It is frequently impossible for a plaintiff in *Hernandez*’s position to discover direct evidence contradicting someone’s contention that he did not know something, and *Hernandez* has no such evidence. But *Hernandez* has introduced substantial circumstantial evidence....He has produced sufficient evidence which, if credited by the jury, would satisfy his burden of establishing a prima facie case. No more is required.

Id. at 1113-1114.

Cornwell has produced sufficient evidence to rebut Blake’s contentions on what she knew or suspected—despite her denial. It is undisputed from the emails that Blake was aware of “legal action.” Based on her eager “detective” work and what she knew about the allegations, it is very likely she suspected a discrimination claim by Cornwell. Recall that Blake knew that Cornwell’s “lawsuit” involved a complaint about her performance evaluation from a male manager, that Cornwell seemed fearful of the manager, and that Cornwell was not supposed to report to that manager or anyone in that manager’s organization. CP 156, 178

(Blake Dep. 58:19-60:8). Microsoft has presented no evidence that Blake thought that Cornwell's "lawsuit" was anything other than what it appeared to be: a discrimination complaint. A reasonable jury could infer that Blake (and McKinley) "knew or suspected" that Cornwell had engaged in protected activity. If Blake's claimed lack of "knowledge" were truly benign, she would not have caused an investigation involving many different managers, Human Resources representatives, and even a company lawyer. The fact that Microsoft does not offer any non-retaliatory reason for the low score further bolsters these inferences. Indeed, Microsoft does not even attempt to argue that Cornwell in fact deserved a "5" review score and negative evaluation in its brief.

The evidence is overwhelming that Cornwell did not deserve a poor review score. She worked hard and received outstanding peer reviews. CP 163-164. Other managers who knew Cornwell's work very well concluded that Blake was not treating Cornwell fairly. CP 202 (Rhodes Dep. 29:18-25). Microsoft fails to adduce any non-retaliatory explanation for Cornwell's rapid decline in performance. Thus, there is compelling and un rebutted testimony establishing a causal link between Blake's knowledge of Cornwell's "legal action" and the poor performance scores. A strong inference of retaliatory animus follows. *Hernandez*, 343 F.3d at 1113 ("A factfinder may infer the ultimate fact of retaliation

without proof of a discriminatory reason if it rejects a proffered nondiscriminatory reason as unbelievable.”).

The cases cited by Microsoft for its assertion that a prima facie case under the WLAD requires that the “decision-maker was aware that the plaintiff had engaged in the protected activity” are Ninth Circuit cases not interpreting the WLAD.² Brief of Respondent at 16. These cases are not helpful to Microsoft because they focus on the causal chain and in both cases, legitimate, non-discriminatory reasons were proffered by the employer to justify the adverse actions taken. Here, Microsoft does not offer any overriding evidence to break the causal link.

C. “General Corporate Knowledge” is Consistent with WLAD’s Commitment to Protect Individuals who Complain about Discrimination in Good Faith.

In addition to the reasons stated above, the “general corporate knowledge” principle also leads to the conclusion that a jury trial is warranted in this case. The WLAD is a broad remedial statute evidencing the legislature’s desire to confront many forms of discrimination. *See Bulaich v. AT&T Information Sys.*, 113 Wn.2d 254, 258, 778 P.2d 1031 (1989). Because it is a remedial statute, the purpose of the law is best served by protecting individuals, such as Cornwell, who can establish that

² *Cohen v. Fred Meyer*, 686 F.2d 793 (9th Cir. 1982) and *Gunther v. Washington Cty.*, 623 F.2d 1303 (9th Cir. 1979).

they were terminated “because of” their protected activity. The statute’s purpose section declares discrimination to be a “matter of state concern, that...threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. Ultimately, in resolving a question of statutory construction, Washington courts should adopt an interpretation that best advances the legislative purpose. *In re R.*, 97 Wn.2d 182, 187, 641 P.2d 704 (1982).

Microsoft incorrectly asserts that the “general corporate knowledge” principle would go too far and result in “strict liability.” In truth, the general corporate knowledge concept is limited to cases where there is evidence to support the theory—such as this case. As the Second Circuit aptly explained in a factually similar context:

This case is a good illustration of why corporate knowledge is sufficient for purposes of a prima facie case of retaliation. If that were not true, a simple denial by a corporate officer that the officer ever communicated the plaintiff’s complaint, no matter how reasonable the inference of communication, would prevent the plaintiff from satisfying her prima facie case, despite the fact that the prima facie case requires only a de minimis showing.

Zan Kwan v. Andalex Group LLC, 737 F.3d 834, 844 (2d Cir. 2013).

In this case, Blake and McKinley consulted with multiple individuals in Human Resources and Legal when taking adverse actions

against Cornwell. Both Blake and McKinley advocated a poor “stack ranking” for Cornwell in the management stack ranking process and made the final decision outside of the group. Jan Dyer from Human Resources went to discuss Cornwell’s past “legal action” with the Legal Department at the same time she was involved in reviewing Cornwell’s negative performance evaluation. CP 161. Human Resources then instructed Blake to withhold from Cornwell the poor review score until after she signed the severance agreement. The adverse actions taken against Cornwell were part of a “team effort,” involving several people across different departments at Microsoft. Their collective knowledge is more relevant than trying to parse any one individual’s understanding. Put another way, the knowledge of the Human Resources and Legal Departments is important because of their direct involvement and direction in how to get rid of Cornwell.

The “general corporate knowledge” test merely allows the jury to weigh the totality of the evidence and not simply give all of the weight to Blake’s assertions that she did not know what type of claim Cornwell’s “legal action” was regarding. The jury should weigh all of the competing inferences at trial after hearing from all of the relevant witnesses.

The critical public policies of the WLAD would be advanced by recognizing such a rule of law. Because sophisticated employers like

Microsoft are careful not to announce a retaliatory motive, the law allows motive to be shown through circumstantial evidence.³ Courts have repeatedly stressed that “[c]ircumstantial, indirect and inferential evidence will suffice to discharge the plaintiff’s burden.” *Sellsted v. Wash. Mut. Sav. Bank*, 69 Wn. App. 852, 860, 851 P.2d 716, review denied, 122 Wn.2d 1018, 863 P.2d 1352 (1993). The general corporate knowledge principle enables retaliation plaintiffs to prove knowledge through circumstantial evidence and inference, rather than requiring direct evidence of the decision-maker’s stated knowledge. At trial, Microsoft’s theory that Blake was not aware of the protected activity may prevail, but there is ample evidence for the jury to find that Microsoft’s collective knowledge was a substantial factor in the motivation to take the adverse actions in question.

Microsoft makes the unpersuasive and confusing argument that “general corporate knowledge” should not be adopted because the prima facie case in federal courts is different from the prima facie case in Washington court. Whether “knowledge” is an express part of the federal prima facie case is of no legal consequence. The question is whether there is sufficient proof of the causal link and how that may be proved. The

³ *Hill v. BCTI Income Fund-I*, 144 Wn. 2d 172, 179, 23 P.3d 440 (2001), citing *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990).

prima facie case was never intended to be “rigid, mechanized, or ritualistic.” *Grimwood v. University of Puget Sound*, 110 Wn.2d 355, 363, 753 P.2d 517 (1988) (citing *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014-1015 (1st Cir. 1979)).

Microsoft cites *Mulhall v. Ashcroft*, 287 F.3d 543, 552 (6th Cir. 2002) to argue that the Title VII “knowledge element” requires actual knowledge of the decision-makers. However, in *Mulhall*, the court affirmed summary judgment on a retaliation claim because there was no “direct or circumstantial” evidence to rebut denials of knowledge. *Id.* at 545. The court went on to describe many cases where knowledge could be inferred by circumstantial evidence. *Id.* at 552-553. In Cornwell’s situation, a jury could infer knowledge from the ample circumstantial evidence. This includes Blake’s admitted knowledge regarding the substance of Cornwell’s “legal action,” along with the knowledge of the many individuals involved in the creation and dissemination of Cornwell’s poor performance score.

D. Microsoft’s Argument That the Decision-Maker Must Know the Exact Nature of a Discrimination Complaint Is Contrary to the WLAD and Not Supported by Law.

Microsoft argues that a plaintiff’s complaints or legal action opposing discrimination are not protected from retaliation unless the decision-maker specifically knows the issue is discrimination. Knowledge

about “legal issues” or a “lawsuit” is not sufficient to establish a causal link for retaliation. To support this assertion, Microsoft’s cites many cases—which do not interpret the WLAD—that are neither on point nor persuasive.

Microsoft cites *Fox v. Eagle Distributing Co.*, 510 F.3d 587, 589-590 (6th Cir. 2007), where the plaintiff was terminated after telling a customer that he had filed a “ten million dollar lawsuit” against the company and about how upper management was “out to get him.” In response, the company terminated him due to the customer complaint about the conversation. The Sixth Circuit held that his statements to the customer were the undisputed reason for the termination, and such conversation was not protected activity. *Id.* at 591. The court did not analyze whether the underlying discrimination claim against the company was the real reason for the termination. Instead, its analysis was limited to whether the plaintiff’s conversation with the customer was protected activity. *Id.* Apparently, the plaintiff did not present any circumstantial evidence to support the view that the real reason for the dismissal was the underlying lawsuit, and the court did not analyze that theory.⁴

⁴ Such an argument would turn on whether terminating an employee for telling a customer that it was suing the employer for “ten million dollars” was a “legitimate, non-discriminatory reason.”

Microsoft argues that a plaintiff cannot establish a causal link when a decision-maker has knowledge of a “lawsuit,” without knowing it is a discrimination lawsuit. We will address each case cited to support this assertion. The first citation is a federal district court opinion in *Stephens v. City of Topeka, Kan.*, 33 F. Supp. 2d 947 (D. Kan. 1999), where the plaintiff was terminated shortly after the employer learned he had filed a lawsuit against a different employer years earlier. However, the decision-makers had already recommended he be terminated and decided his performance was unsatisfactory before they knew about any lawsuit. *Id.* at 952. Additionally, the plaintiff failed to present evidence that any individual working for defendant knew anything about the nature of the prior lawsuit until after he was terminated. *Id.* at 965. In contrast, Cornwell can establish (1) that Microsoft had general corporate knowledge of her protected activity, (2) that Microsoft had general corporate knowledge that Blake was retaliating against Cornwell because of her lawsuit, and (3) that on a more likely than not basis, Blake “knew or suspected” based on the information she had that Cornwell’s “lawsuit” was a sex discrimination complaint.

Microsoft’s citation to *Tyler v. Univ. of AR Bd. of Trustees*, 2010 WL 143704 (E.D. Ark. Jan. 8, 2010) does not support their assertion because the decision was based on the strength of the employer’s non-

retaliatory justifications for the actions. The defendant had a long list of non-retaliatory reasons for the decision, and the plaintiff did not even have the inference of retaliation created by close temporal proximity between the protected activity and the adverse action. In the opinion, immediately before the language referred to by Microsoft, the court explained:

Without temporal proximity establishing a causal connection, Tyler must present evidence that his earlier lawsuit or involvement in some other protected activity was a motivating factor in the Council of Deans' decision not to hire him as Director of Recruitment for Diversity.

Id. at 5. The plaintiff's prima facie case did not fail because of a lack of knowledge, but because there was no evidence or inferences of retaliation that the knowledge of the lawsuit motivated the decision makers. *Id.*

The next case cited by Microsoft is unpublished opinion by a federal district court in another distant state, *Tabor v. Thomas Built Buses, Inc.*, 2010 WL 148431 (M.D.N.C. Jan. 12, 2010). Even the decision notes that proof of the decision maker's knowledge of the protected activity may be established by "inference." The court granted summary judgment because of the lack of "evidence which would permit an inference based on anything other than conjecture." *Id.* at 7. As explained in this brief, Cornwell has sufficient evidence to establish a prima facie case through circumstantial evidence and reasonable inferences.

Microsoft cites many cases from other circuits to support its claim that knowledge by the decision-maker is required for causation. However, in several of these cases, the plaintiff's claim was dismissed because of the complete absence of any circumstantial evidence of retaliation. For instance, Microsoft inaccurately characterizes *Grizzle v. Travelers Health Network*, 14 F.3d 261, 268 (5th Cir. 1994), as standing for the proposition that without knowledge of the protected activity by the decision maker, a jury cannot find retaliation based on "impermissible speculation of retaliation." Brief of Respondent, p. 24. In that decision, the court actually found that the plaintiff had a total lack of the kind of "direct evidence" necessary to prove "but for" causation (which is not the legal standard under the WLAD). *Id.* at 267-268. The Fifth Circuit mainly relied on the overwhelming evidence that no retaliation had occurred: (1) the managers did not have a "hostile reaction to any of her alleged complaints;" (2) she received a raise and promotion shortly after her complaint; and (3) a "mountain" of evidence showed poor performance, including an admission by "Grizzle herself" of such poor performance. *Id.* at 267-68.⁵

⁵ Microsoft cites to *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185 (9th Cir. 2003), where the retaliation claim was dismissed because the employee could not show direct or circumstantial evidence that the principals knew anything about her complaints at a difference school. In *Raad*, the court *did not* establish a bright-line rule that lack of knowledge is fatal. Rather, the court also considered whether there was

Microsoft's additional authorities involve cases where there was no genuine issue of material fact about what the decision-maker and other corporate managers knew or suspected. *See Robinson v. Potter*, 453 F.3d 990 (9th Cir. 2006); *Stephens v. Erickson*, 569 F.3d 779 (7th Cir. 2009); *Pomales v. Celulares Telefonica, Inc.*, 447 F.3d 79 (1st Cir. 2006). These cases are easily distinguishable, because those cases involved situations where it was undisputed that the decision-makers had no knowledge whatsoever of any protected activity. In Cornwell's situation, Blake and the other individuals involved in the adverse action had knowledge of the "lawsuit" that was protected activity, thereby establishing a causal chain between the protected activity and the adverse employment action.

The cases cited by Microsoft only show that a plaintiff must provide sufficient evidence connecting the protected activity and the adverse action. In Cornwell's case, there is such evidence. The causal connection is established by the direct and circumstantial evidence of Blake and the other managers' knowledge of the nature of Cornwell's

sufficient circumstantial evidence of retaliation based on all of the circumstances. The same is true in *Littleton v. Pilot Travelers Centers, LLC*, 568 F.3d 641 (9th Cir. 2009), where the court concluded that there was no inference of retaliation because: (1) the lapse of time between the alleged retaliatory conduct and the protected activity; and (2) the plaintiff lacked any circumstantial evidence casting into doubt the company's stated justification for the actions. The knowledge of the decision-makers was only part of the analysis that the "sequence of events raises no inferences" that the discipline was instigated for retaliatory purposes. *Id.* at 645. In Cornwell's case, the sequence of events raises strong inferences of retaliation.

previous “legal action,” Microsoft’s institutional knowledge of Cornwell’s sex discrimination claim, the investigation taken by Cornwell’s managers into her past “lawsuit,” the timing of the drop in her performance scores, the lack of a non-retaliatory explanation for the adverse action, and the concerted effort to hide the performance score from Cornwell. This evidence creates “what did she know, and when did she know it” questions of fact, and therefore, Cornwell has established a genuine issue of material fact in this regard. *Hernandez*, 343 F.3d at 1113-1114.

E. The Trial Court Properly Refused to Grant Summary Judgment on Microsoft’s Other Theories.

At the summary judgment hearing, the trial court based its decision on the causation issue, rejecting Microsoft’s other theories. RP 39:17-40:13. The trial court was correct in rejecting these alternative arguments.

1. Cornwell did not release her retaliation claim because the adverse action—publishing the performance review—was only done after Microsoft received Cornwell’s signed severance agreement.

Microsoft argues that Cornwell waived her claim for poor performance evaluation because Microsoft made the decision to give her a poor performance evaluation before she signed her severance agreement. However, this evaluation was not communicated to her and, in fact, Microsoft promised not to create any performance review. CP 219. Before Cornwell signed the release, she specifically double-checked on

Microsoft's promise to make sure she had not received any performance evaluation. Once she confirmed that, she signed the release. *Id.* Cornwell submitted the signed release on the morning of September 11, 2012, and thereafter, the performance evaluation was uploaded by Microsoft. *See* CP 209; CP 275. Clearly, Microsoft carefully withheld the review until after she had signed the release agreement.

It is the publication of the performance review that is the adverse action, not the uncommunicated decision to take the action. *Pascoe v. Mentor Graphics Corp.*, 199 F.Supp.2d 1034, 1053-54 (D. Oregon 2001) (a negative performance evaluation is not an adverse employment action when it is not in the plaintiff's personnel file because it could not have been seen or acted upon by anyone). An actionable event does not occur until the negative performance evaluation is actually placed in the personnel file for others to see. *Id.* For employees at Microsoft, this occurs when a review is uploaded onto the company intranet. Therefore, Cornwell's negative review constituted an adverse action when it was uploaded.⁶

⁶ An adverse employment action is any action by an employer that is "reasonably likely to deter employees from engaging in protected activity," such as "lateral transfers, unfavorable job references, and changes in work schedules." *Ray v. Henderson*, 217 F.3d 1234, 1243 (9th Cir. 2000); *see also Hashimoto v. Dalton*, 118 F.3d 671, 676 (9th Cir. 1997) (holding dissemination of unfavorable job reference an adverse employment action even though the plaintiff would not have received the prospective job).

Microsoft offers no authority that an adverse action occurs on the date the employer secretly plans the adverse action. To hold that the date of the adverse action is the date that the employer planned to take the adverse action would invite employers to aver that a decision was made much earlier than the actual adverse action.

Microsoft's brief also fails to address Cornwell's evidence that she was not rehired at Microsoft in 2014 because of the negative performance evaluation. Employees cannot waive statutory claims relating to future discrimination/retaliation claims. *Hamilton v. General Electric Co.*, 556 F.3d 428, 435 (6th Cir. 2009). In other words, Cornwell's claim for the negative review did not exist at the time she signed the release. The evaluation had not been given to her or uploaded into the system. Thus, it was a non-existent claim (rather than an "unknown claim"). None of Cornwell's claims arise from adverse employment actions occurring prior to her severance.

2. Cornwell engaged in protected activity in 2005 when she made a disparate treatment claim on the basis of sex.

Cornwell engaged in statutorily protected activity multiple times: (a) she raised valid concerns about discrimination and retaliation when she worked in Todd Parsons' group; (b) she pursued such concerns through an attorney who negotiated a settlement in mediation; and (c) she raised valid

concerns about Blake's retaliation through Blake's persistent focus on Cornwell's "lawsuit" against Microsoft.

a. Cornwell's complaint about favoritism was a reasonable, good-faith complaint under the WLAD.

Cornwell's complaint about discrimination and retaliation when working in Todd Parsons' group and her pursuit of these complaints with her attorney constitute protected activity. The court is directed to the settlement agreement itself, which is filed under seal, as additional factual support. CP 397-398.

Microsoft argues, incorrectly, that an employee only engages in protected activity if the complaint is directed at conduct that is proven to be illegal under the statute. In truth, 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). Appellant's opening brief, pp. 20-23, also contains numerous citations to this principle. Indeed, every circuit that has considered the issue "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). Microsoft's argument flies in the face of the great weight of authorities and should be rejected.⁷

In pursuing her discrimination claim, Cornwell presented solid evidence of gender bias and retaliation, which were ultimately resolved through mediation. CP 224-231. Cornwell's discrimination theory was made in good faith and was supported by case law, such as *Miller v. Department of Corrections*, 115 P.3d 77 (Cal. 2005), which held that a supervisor's unwarranted favorable treatment of a subordinate employees, with whom the supervisor had consensual affairs, may create a hostile work environment.

Microsoft cites *Reiber v. City of Pullman*, 2013 WL 3984442, at *10 (E.D. Wash. Aug. 1, 2013), an unpublished federal district court opinion, for the proposition that "reporting a suspected affair between co-workers is not protected activity" under the WLAD. However, in *Reiber*, the plaintiff did not allege that he suffered an adverse employment action as a consequence of the paramour activity, and there was no evidence that plaintiff had opposed the affair because he believed he was being

⁷ See also *Sarno v. Douglas Elliman-Gibbons & Ives*, 183 F.3d 155, 159 (2d Cir. 1999) ("a plaintiff need not establish that the conduct he opposed was actually a violation of the statute so long as he can establish that he possessed a good faith, reasonable belief that the underlying challenged actions of the employer violated that law."); *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.").

discriminated against. In fact, the plaintiff testified that he was “not bothered by the alleged affair” and that his only objective was to correct untoward perceptions about the relationship. *Id.*

The court need not determine whether Washington law does or does not protect an employee from “paramour preference” discrimination as the California courts have done. Cornwell need only establish a good faith belief that the law was violated. A person who suffers an adverse employment action because her manager is sleeping with her coworker is no less tainted by the permutation of sex in the work environment than a person who obtains those same benefits by submitting to sexual demands. Employees faced with this situation should be able to bring this to their employers’ attention without fear of retaliation.

b. Cornwell engaged in protected activity in 2012 by raising valid concerns about Blake’s retaliation.

It is not disputed that Blake pressed Cornwell about the specifics of her legal action against Microsoft. When she was not satisfied with Cornwell’s answers, she undertook her own investigation. Blake was clearly eager to find out more about this “lawsuit” by Cornwell and exchanged emails about the “detective work” being done to discover more about Cornwell’s legal claims. CP 156. As a result, Cornwell expressed a good faith concern that Blake was actively pursuing information because

she viewed her “lawsuit” as a negative factor, which was set forth in her April 20 email. CP 157-160. In the context of this case, liberal construction requires that Cornwell’s complaint constitute protected activity.

III. CONCLUSION

Cornwell’s direct and circumstantial evidence of retaliation creates issues of fact as to whether her protected activity was a substantial factor in the adverse actions taken against her. From the evidence presented, a reasonable fact-finder could find that her protected activity was a substantial factor in the adverse action. The issue should not be conclusively resolved by one decision-maker’s bare denial of any knowledge of the protected activity. A jury may conclude from the evidence that Blake suspected the obvious: that Cornwell’s “legal action” was a discrimination claim against her prior manager. The evidence strongly suggests that Blake worked with members of Human Resources and Legal to engineer negative actions against Cornwell, thus retaliating against Cornwell in violation of the WLAD. As a remedial statute, the WLAD should be interpreted to protect Cornwell in this situation.

It is significant that Microsoft does not present any legitimate, non-retaliatory reason for its adverse employment actions. For all of the reasons stated in this brief and in Appellant’s opening brief, summary

judgment was not appropriate and this case should be remanded for a trial on the merits.

DATED: this 17th day of August, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17th, 2016, I caused to be served a true and correct copy of the **REPLY BRIEF OF APPELLANT** to the following party at this address:

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

Signed this 17th day of August, 2016 in Seattle, WA.

BEAN LAW GROUP



Lauren Guicheteau

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