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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

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RESPONDENT MICROSOFT CORPORATION'S RESPONSE TO  
AMICUS CURIAE BRIEF OF WASHINGTON EMPLOYMENT  
LAWYERS ASSOCIATION

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## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Amicus Curiae Washington Employment Lawyers Association (“WELA”) asks this Court to dramatically relax a plaintiff’s burden on a retaliation claim under the Washington Law Against Discrimination (“WLAD”), ch. 49.60 RCW. In WELA’s view, the Court of Appeals erred when it held that causation can be shown in a retaliation case only if the plaintiff has evidence (as distinct from speculation) that the decision-maker responsible for an adverse employment action was aware of the employee’s protected activity. WELA Br. at 1. Relying on federal cases from the Eighth and Ninth Circuits, WELA urges that it should be enough for causation if the evidence leaves open a possibility that the decision-maker “suspects” the employee has engaged in protected activity. *Id.* at 17.

WELA’s argument invites the Court to turn its back on settled law holding that a plaintiff can survive summary judgment only by relying on evidence, not speculation. Rather than accept WELA’s invitation to abandon long-established rules governing summary judgment motions, the Court should adhere to the standard for retaliation claims that prevails across the country, including in the Eighth and Ninth Circuits—the very courts WELA cites to support its argument.

This brief addresses WELA’s three primary arguments, as follows:

*First*, despite WELA’s argument to the contrary, principles of liberal construction offer no guidance on the issues before the Court. Those principles apply when the Court must decide the scope and reach of the WLAD. But this case presents no statutory construction issues: Cornwell’s Petition for Review asks the Court simply to define the nature and quantum of evidence on the element of causation necessary for a WLAD retaliation claim to survive summary judgment and get to a jury.

*Second*, WELA ignores cases from across the country holding that proof of causation requires evidence that the decision-maker knew or was aware of the employee’s protected activity. The “knew or suspected” standard it advocates would allow a retaliation case to proceed to trial if the evidence fails to negate speculation that the decision-maker might have had a hunch about the plaintiff’s protected activity. But to Microsoft’s knowledge, no court has allowed a retaliation case to survive summary judgment based on such speculation. In the cases on which WELA relies, *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361 (8th Cir. 1994), and *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107 (9th Cir. 2003), the decision-maker *actually knew* of protected activity directed at the decision-maker, identified an employee as the complainant based on the employee’s prior conduct, and then swiftly retaliated. Here, by contrast, no evidence suggests Microsoft’s decision-makers were aware of *any*

protected activity, the female decision-makers were not the targets of the alleged protected activity, and the adverse action occurred *years* after the alleged protected activity. Cornwell offers only “speculative argument” concerning the decision-makers’ knowledge. *Cornwell v. Microsoft Corp.*, 199 Wn. App. 1015, at \*5 (2017). And under settled Washington law, speculation is not enough to defeat summary judgment.

*Third*, WELA offers no principled basis for its suggestion that the Court should reverse the burden of proof on the causation element. WELA cites no authority supporting its approach, and its analogies misstate governing law and ignore the need for *any* plaintiff facing a summary judgment motion to produce evidence sufficient to sustain a verdict. Finally, Microsoft has never suggested that Cornwell needed to use “magic words” to be protected against retaliation; the deficiency in her proof arises because *nothing* suggests her female managers understood her 2005 “lawsuit” purportedly alleged mistreatment based on her sex.

## II. ARGUMENT

### A. Liberal Construction Principles Have No Bearing Here.

WELA begins by arguing “that the WLAD must be liberally construed because freedom from discrimination is a public policy ‘of the highest priority.’” WELA Br. at 5 (citation omitted). WELA relies primarily on *Zhu v. North Central Education Services District-ESD 171*,

189 Wn.2d 607 (2017). In *Zhu*, a school district failed to hire the plaintiff, allegedly in retaliation for a prior complaint under the WLAD. The district argued that plaintiff had no retaliation claim because the WLAD regulated only employers, not *prospective* employers. The case thus pivoted entirely on the proper construction of WLAD, putting the principle of liberal construction at issue.

By contrast, the issues here revolve around the evidence required for a plaintiff to survive summary judgment on a WLAD retaliation claim—an issue that has *nothing* to do with the proper reading of the statute or principles of liberal construction. Indeed, without referring to statutory construction principles, this Court has held that a WLAD plaintiff—like the plaintiff on any other claim— must present more than mere speculation to survive dismissal on summary judgment. For example, this Court last year affirmed a summary judgment dismissing a plaintiff’s age discrimination claims because the plaintiff failed to present sufficient evidence to establish that age was a substantial factor in the adverse action taken against the plaintiff. *See Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 536 (2017); *see also Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 365 (1988), *abrogated on other grounds by Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516 (2017) (affirming summary judgment on plaintiff’s sex and

age discrimination claims because plaintiff's "conclusory opinions" were insufficient evidence to survive summary judgment).

As *Mikkelsen* shows, the mandate to construe the WLAD liberally cannot save a claim lacking evidence sufficient to support a verdict in the plaintiff's favor on every element. If a WLAD plaintiff "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," a court should grant summary judgment. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66 (1992) (quoting *Young v. Key Pharma., Inc.*, 112 Wn.2d 216, 225 (1989)) (affirming summary judgment on discrimination claim because plaintiff failed to establish an element of claim). The Court should decline to indulge WELA's effort to bootstrap statutory construction principles to save a claim unsupported by sufficient evidence.

**B. The Cases Using "Knew or Suspected" Language Are in Accord with Microsoft's Approach, Not WELA's.**

WELA concedes that a plaintiff must show some "quantum of *knowledge* of protected activity ... to prevail on a retaliation claim." WELA Br. at 11 (emphasis added). This, of course, is exactly Microsoft's point. But WELA asks the Court to define the requisite knowledge using what it calls a "knew or suspected" standard and to hold that an employer is liable for retaliation in violation of the WLAD "if the plaintiff proves

that the decision-makers knew *or suspected* that she engaged in activity protected by the WLAD, and if that activity was a substantial factor in the decision to take an adverse employment action against the plaintiff.” *Id.* at 6-7 (emphasis added).<sup>1</sup> WELA asserts this requires reversal of the Court of Appeals because it says that Court required proof that the decision-maker “knew with certainty” of the protected activity. *Id.* at 5.

But WELA’s argument depends on a mischaracterization of the Court of Appeals decision and a misreading of the very cases on which WELA relies. Microsoft has never argued (and the Court of Appeals did not hold) that a decision-maker must know “with certainty” of a plaintiff’s protected activity. Further, in the few cases using the phrase “knew or suspected” to describe the decision-maker’s state of mind, the decision-maker knew about protected activity targeting the decision-maker and, based on recent experience, believed he knew which employee had engaged in it—a state of mind just short of certain knowledge. Those cases offer no support to the standard WELA advocates, which would allow a case to survive summary judgment based on an unsupported

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<sup>1</sup> In the Court of Appeals, Cornwell chiefly advocated a “general corporate knowledge” standard supposedly followed in the Second Circuit. *See* App. Br. at 25-36. In her Petition for Review to this Court, Cornwell likewise emphasized the “general corporate knowledge” standard for retaliation cases, advancing the “reasonably suspected” standard only as an “alternative.” *See* PFR at 1-2, 13-16. WELA, however, offers no support for Cornwell’s primary argument, “tak[ing] no position” on her proposed “general corporate knowledge” standard. *See* WELA Br. at 3, n.1. For the reasons set forth in Microsoft’s Supplemental Brief, this Court should reject “general corporate knowledge” as sufficient to avoid summary judgment in Washington retaliation cases. *See* Supp. Br. at 11-12.

hypothesis that the decision-maker might have had an inkling as to what an employee may have complained about. Finally, no matter what label the Court applies to the required state of mind, a plaintiff must present evidence to support her theory. Here, Cornwell offers only speculation, which cannot support a verdict in her favor—as the Court of Appeals held.

**1. The Cases Do Not Support the “Knew or Suspected” Standard That WELA Proposes.**

WELA agrees with Microsoft that a WLAD retaliation claim requires proof of three elements: (1) protected activity; (2) adverse employment action; and (3) a causal link between the two. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68 (1991). Here, Cornwell claims she engaged in protected activity in 2005, when she complained her female manager was favoring a male co-employee with whom her manager had a relationship.<sup>2</sup> And Cornwell alleges she received a negative performance review in 2012, i.e., adverse employment action. She admits that no direct evidence suggests a causal connection between these events, separated by seven years and involving different managers. Despite that, she argues a jury should be allowed to conjecture as to what her managers may have known and considered in 2012. Courts across the country, however, reject similar arguments.

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<sup>2</sup> Microsoft denies this complaint of paramour favoritism was in fact protected activity. The Court of Appeals did not reach the issue. *See Cornwell v. Microsoft Corp.*, 199 Wn. App. 1015, at \*5 (2017).

Causation in a retaliation claim necessarily entails proof of what the decision-maker knew, since retaliation “can only come about by the performance of an intentional act.” *E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co.*, 106 Wn.2d 901, 906 (1986). To prove causation, a plaintiff therefore must show the decision-maker acted with the intent to punish the plaintiff for doing something the law protects. The decision-maker’s awareness of the protected activity necessarily figures into this element: If the decision-maker lacked knowledge that the plaintiff engaged in protected activity, the decision-maker could not form the requisite intent to retaliate for that activity. Courts all over the country—including courts in Washington—recognize this proposition, requiring proof that the individual decision-maker “had knowledge,” “knew,” or was “aware” of the protected activity. *See* Microsoft Supp. Br. at 8-9 (citing cases from Washington courts and five federal circuits).

WELA appears to accept these general principles. But it faults the Court of Appeals for “holding that Cornwell could not establish causation because she could not establish that the decision-makers, Blake and McKinley, knew *with certainty* that her ‘lawsuit’ was based on claims of sex discrimination as opposed to a reason unprotected by the WLAD.” WELA Br. at 5 (emphasis added). This is a straw man. Microsoft has never argued, and the Court of Appeals did not hold, that decision-makers

must know “with certainty” of protected activity for a plaintiff to survive summary judgment. If a decision-maker learns of protected activity and sends a message by firing an employee believed to be involved in that activity, that satisfies knowledge and causation—even if the decision-maker harbors doubts as to whether the protected activity actually occurred. In these cases, the decision-maker has enough awareness of the protected activity to support the conclusion that her animus led to the adverse employment action, and the WLAD would provide a remedy.

The two cases on which WELA relies are consistent with these principles. In *Reich v. Hoy Shoe Co.*, 32 F.3d 361, 363 (8th Cir. 1994), an employee filed a complaint with the Occupational Safety and Health Administration (“OSHA”), which prompted an investigation of the workplace. During OSHA’s on-site visit, the compliance officer told the company President that the investigation resulted from an employee complaint. Upset, the President wanted to know who had complained so he could “take care of the problem.” *Id.* at 364. The OSHA officer would not reveal the employee’s identity because he had the impression the President “would harass the complaining employee” if he knew who it was. *Id.* at 367. The President told the compliance officer that he thought the responsible employee was a woman who had complained to the company about similar issues. *Id.* at 363-64. Three days after the on-site

inspection, that employee reported to work late and was terminated, ostensibly for excessive tardiness. *Id.* at 363. At the same time, her manager—the President’s son—told her that “if you don’t think [the President] knows what is going on in this factory, you’re crazy,” an obvious reference to the complaint and investigation. *Id.* at 363-64.

Addressing those facts, the Eighth Circuit held the Department of Labor could establish a causal connection between protected activity and adverse action by showing that “a particular employee engaged in protected activity...; that the employer was aware that *some* employee had filed or made such a complaint; that the employer *suspected* that employee of having made the complaint; and that the employer took retaliatory action based on its suspicion.” *Id.* at 367 (emphasis added). The court’s determination rested on the fact that the employer actually knew of the protected activity and was aware of specific circumstances, i.e., prior complaints on similar issues, that made the decision-maker believe the adversely affected employee was responsible.

A similar fact pattern drove the decision in *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1111 (9th Cir. 2003), the other case on which WELA relies. Hernandez filed a sexual harassment complaint against his manager, based on the manager’s harassment of a co-worker. A Human Resources Manager notified Hernandez’s manager

that a complaint had been filed and began an investigation. Although the manager knew *someone* had filed a complaint, i.e., engaged in protected activity, the HR Manager did not identify Hernandez as the responsible employee. The evidence showed, however, that the manager had seen Hernandez consoling the harassed employee and warned Hernandez to stay away from her; that Hernandez told his immediate supervisor and co-workers that he had made a complaint against the manager; and that three weeks later the manager terminated Hernandez. *Hernandez*, 343 F.3d at 1110-11. The evidence was enough for a jury to conclude that, “once [the manager] learned that someone had made a harassment complaint ... , he knew or suspected that this person was Hernandez and decided to retaliate against him.” *Id.* at 1113-14.

In each case, the court used the phrase “knew or suspected” as shorthand to describe circumstances in which the evidence left little doubt that the decision-maker at least acted with a strong belief—even if not knowledge “with certainty”—of the employee’s involvement in protected activity targeting the decision-maker. But nothing in *Reich* or *Hernandez* supports the proposition that a plaintiff can avoid summary judgment by arguing merely the evidence leaves open a hypothesis that the decision-maker had a hunch of the plaintiff’s involvement in protected activity.

The “knowledge” standard Microsoft advocates better fits the facts in *Reich* and *Hernandez*: the decision-makers knew of protected activity, and they knew of specific circumstances leaving little doubt that the affected employees were the complainants. Although imperfect, their knowledge was enough to be the predicate of a causation finding. Consistent with these cases, the Court should clarify that a plaintiff must show some level of decision-maker knowledge of protected activity to survive summary judgment and must support that showing with evidence, not just speculative argument. The Court should decline to adopt a “knew or suspected” standard as WELA frames it, as that invites speculation.

**2. Even if the Court Adopts WELA’s Standard, Cornwell Has Not Presented Sufficient Evidence to Survive Summary Judgment.**

In the end, the *label* the Court decides to apply to the decision-maker’s state of mind has less significance than the requirement that a plaintiff come forward with sufficient evidence of state of mind to support findings of intent and causation. Here, the Court of Appeals did *not* suggest that its decision turned on the standard: it did not hold that Cornwell had evidence sufficient to show only that decision-makers had a “suspicion” of her protected activity rather than “certain knowledge” (or “strong belief” or some other formulation). Instead, after reviewing Cornwell’s evidence, the court held that Cornwell had nothing more than

“speculative argument” concerning the decision-makers’ state of mind, which “is insufficient to defeat a motion for summary judgment.” *Cornwell*, 199 Wn. App. 1015, at \*6-7. No change in the standard could transform *Cornwell*’s “speculative argument” into probative evidence. No matter how one characterizes the required proof, *Cornwell* falls short.

The evidentiary distinctions between *Reich* and *Hernandez*, on the one hand, and this case, on the other, show the difference between sufficient probative evidence and “speculative argument”:

***Decision-Maker Interest.*** Retaliation cases commonly involve a decision-maker who takes adverse action to get back at an employee for complaints directed at (or at least directly affecting) the decision-maker. In *Reich*, the decision-maker was the President of a small company who was livid because of an OSHA inspection prompted by the terminated employee’s complaint, which the employee made after first complaining to management. And *Hernandez* involved a decision-maker accused of improper conduct, who got back at Hernandez for meddling in the manager’s sexual harassment of a female co-worker. Both decision-makers were targeted by (and acutely aware of) the protected activity, and they had a motivation to seek out and identify the responsible employee.

Here, the two female managers responsible for *Cornwell*’s adverse performance review in 2012, Blake and McKinley, had no personal stake

in the activities that led to the 2005 protected activity. Cornwell has never explained why a 2005 gender-related complaint would have prompted either woman to retaliate against her in 2012, even had they known of it.

***Knowledge of Protected Activity.*** In both *Reich* and *Hernandez*, the decision-maker actually knew of protected activity. In *Reich*, the OSHA inspector came to the plant and was confronted by the President, who demanded to know who was responsible and then decided to fire the complainant three days later. And in *Hernandez*, the HR Manager visited Hernandez's manager to tell him an investigation was under way, not long before the manager fired Hernandez.

By contrast, nothing in this record suggests either Blake or McKinley knew ***anyone*** had been involved in protected activity in 2005, much less that Cornwell had initiated it.

***Temporal Separation.*** In *Reich*, the complaining employee was fired three days after the company President became aware of protected activity. In *Hernandez*, the complaining employee was fired three weeks after his manager became aware of the harassment complaint.

Here, the adverse employment action occurred seven ***years*** after the allegedly protected activity. Microsoft cannot find, and Cornwell has never cited, any case sustaining a retaliation claim where the time lag between the protected activity and the adverse action was so long. Indeed,

the Eighth Circuit—which decided *Reich*—has held that a retaliation claim fails as a matter of law when the temporal separation between the protected activity and the alleged adverse action exceeds two months. *See, e.g., Kipp v. Missouri Highway & Transp. Comm’n.*, 280 F.3d 893, 897 (8th Cir. 2002) (two month interval between the protected activity and the adverse action “so dilutes any inference of causation that we are constrained to hold as a matter of law that the temporal connection could not justify a finding in [plaintiff’s] favor on the matter of causal link”).<sup>3</sup>

As this comparison shows, the Department of Labor in *Reich* and the plaintiff in *Hernandez* had much more than “speculative argument” to support an inference that the decision-maker knew of (or believed or was aware of) the affected employee’s protected activity. The decision-maker’s awareness of the employee’s conduct preceding the protected activity; the decision-maker’s involvement in the subject of the protected activity, providing a motivation to learn the complainant’s identity; and

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<sup>3</sup> The lack of temporal proximity itself defeats the inference of causation, providing an independent basis for summary judgment. Neither the trial court nor the Court of Appeals reached that issue, which would remain available to Microsoft as a basis for summary judgment on remand, should this Court reverse. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862 (2000) (finding ‘no proximity in time suggesting a nexus’ due to fifteen month gap between protected activity and adverse action); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (“Action taken (as here) 20 months later suggests, by itself, no causality at all.”); *Hollowell v. Kaiser Found. Health Plan of the Nw.*, 705 Fed. Appx. 501, 504 (9th Cir. 2017) (plaintiff’s “reliance on temporal proximity to show causation fails” because adverse actions “occurred four or more months after the filing of the internal complaint”); *Ellorin v. Applied Finishing, Inc.*, 996 F. Supp. 2d 1070, 1091 (W.D. Wash. 2014) (gap of eight months does not “establish causation for a retaliation claim based on the temporal proximity alone”).

the temporal proximity between the protected activity and the adverse action all supported the inference of the decision-maker's knowledge.

None of that exists here. Blake and McKinley were aware only that Cornwell had a "lawsuit" of an unspecified nature against Microsoft years before; the "lawsuit" was settled; the settlement terms were confidential; and the settlement limited Cornwell's ability to continue working with a former manager who was male.<sup>4</sup> While Blake asked Human Resources for more information about the "lawsuit," she never received "a substantive response." WELA Br. at 18. This skimpy record would not permit a jury to conclude that the preponderance of the evidence showed Blake and McKinley were aware of (or suspected) Cornwell's alleged protected activity, and acted because of it. The Court of Appeals correctly concluded that Cornwell offered nothing but "speculative argument." *Cornwell*, 199 Wn. App. 1015, at \*6-7.

For this reason, no matter what standard the Court adopts, it should affirm the summary judgment. In so doing, the Court should emphasize that a plaintiff in a retaliation case must offer sufficient direct or

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<sup>4</sup> WELA—like *Cornwell*—suggests that an inference of protected activity can be drawn from the mere fact that Cornwell's prior complaint was directed against a male manager. WELA Br. at 19. But not every a workplace dispute between a female employee and a male manager can be presumed to relate to gender discrimination, any more than every dispute between an employee and manager of two different races could be presumed to relate to race discrimination. *See, e.g., Coulton v. Univ. of Pennsylvania*, 237 Fed. Appx. 741, 747 (3d Cir. 2007) (fact that supervisor is of a different race than plaintiff "is insufficient to permit an inference of discrimination").

circumstantial evidence of the decision-maker's state of mind to support a jury finding in the plaintiff's favor on causation. Put another way, whatever "quantum of knowledge" the Court requires, WELA Br. at 11, it must be established by evidence sufficient to support a jury verdict finding it more likely than not that the prior protected activity caused the adverse action. *See Hiatt*, 120 Wn.2d at 66. Cornwell falls short.

**C. WELA's Argument Concerning "Generalized Notice" Has No Bearing Here.**

Knowing the record lacks sufficient evidence of knowledge (or any other relevant state of mind) of protected activity on the part of Blake and McKinley, WELA asks the Court to turn the tables and put the evidentiary burden on defendants to disprove knowledge. WELA urges that a "decision-maker's knowledge of conduct that *can* implicate protected activity should establish as a matter of law that the decision-maker 'knew or suspected' that the employee in fact engaged in protected activity, unless or until the decision-maker knows for certain that the employee's conduct was not protected activity." WELA Br. at 14 (emphasis added).

Although hundreds (probably thousands) of reported decisions address the elements of a retaliation case under WLAD and Title VII (and related federal statutes), WELA cites no authority advocating anything resembling this topsy-turvy standard. WELA has shown no practical need

or doctrinal foundation for expanding Washington law beyond the frontiers of existing jurisprudence.

In arguing to the contrary, WELA once again erects a straw man, suggesting that Microsoft (and the Court of Appeals) required Cornwell to use “magic words” when talking with Blake to make clear that she made her complaint “*on the basis of my [protected class].*” WELA Br. at 14. But Microsoft has *never* argued that Cornwell had to use magic words. Indeed, while this Court does not decide hypothetical cases, one may fairly assume that if Cornwell had used even the “general language” WELA suggests, i.e., if she had said her 2005 complaint related to “harassment,” “discrimination,” or “unequal treatment,” the record and the arguments here would be entirely different. But Cornwell chose *not* to use words remotely suggesting that her “lawsuit” purportedly alleged mistreatment based on her sex; instead, she offered no characterization at all.

Further, the cases on which WELA relies for this argument have no bearing here. As WELA points out, courts in disability and medical leave cases have held that an employee need not use “magic words” to request an accommodation or protected leave. But in these cases, the issue is whether an employee has given the employer sufficient information to trigger the employer’s legal duty to engage in the interactive process or take further action. Employers have no comparable duty in the retaliation

context: an employer is not required to engage in an interactive process with an employee who has engaged in protected activity. The duty of inquiry in the accommodation or protected leave context offers no guidance as to the standards governing adjudication of a retaliation claim.

In any event, a “generalized” statement is not sufficient even in the disability and leave contexts. To trigger an employer’s duty to engage in the interactive process in a disability accommodation case, an employee must provide enough information to put the employer on notice of the employee’s disability. *See Goodman v. Boeing Co.*, 127 Wn.2d 401, 408 (1995); *Barnett v. U.S. Air, Inc.*, 228 F.3d 1105, 1112 (9th Cir. 2000) (*en banc*), *vacated on other grounds by U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002). Under the FMLA, the employee must notify her employer of the need for leave and the qualifying reason; only then does the employer have a responsibility to determine whether the law covers the requested leave. *Bachelder v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1130 (9th Cir. 2001). WELA also refers to *Street v. Weyerhaeuser Co.*, 189 Wn.2d 187 (2017), where this Court held that no “magic words” are necessary to prove medical causation in an occupational disease claim under the Industrial Insurance Act, as long as “the medical testimony *shows* the causal connection.” *Id.* at 197 (quoting *Sacred Heart Med. Ctr. v. Carrado*, 92 Wn.2d 631, 632-33 (1979)). But *Street* supports Microsoft,

not WELA, as it requires medical testimony sufficient to support a recovery; nothing in *Street* counsels a relaxation of the burden on summary judgment in WLAD retaliation claims.<sup>5</sup>

This Court should reject WELA’s attempt to impute knowledge to a decision-maker based on neutral statements. Saying “I had a lawsuit” suggests little and proves nothing. The Court should decline to charge a decision-maker with knowledge of protected activity *as a matter of law* based on such a statement.

### III. CONCLUSION

This Court should hold that a plaintiff cannot show causation in a WLAD retaliation case without presenting evidence from which a jury could find that the decision-maker knew (or believed or was aware) the plaintiff engaged in protected activity—and that the requisite knowledge resulted in retaliatory action. The Court should also affirm summary judgment because, no matter what the standard, Cornwell failed to provide sufficient evidence to raise a genuine issue of fact as to causation.

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<sup>5</sup> Venturing even further afield, WELA analogizes to causes of action for which the law imposes liability for acting in “reckless disregard” of the truth. *See Duc Tan v. Le*, 177 Wn.2d 649, 669 (2013). But the law gives plaintiffs the right to sue for retaliation where a decision maker exacts retribution against an employee engaging in protected activity. Given that, it makes no sense to speak in terms of “reckless” retaliation or retribution, which is why Washington law requires proof of an *intentional* act to establish retaliation. *E-Z Loader Boat Trailers*, 106 Wn.2d at 906. The Court should reject WELA’s efforts to import defamation concepts into the unrelated arena of retaliation claims.

RESPECTFULLY SUBMITTED this 29th day of May, 2018.

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I hereby certify that on May 29, 2018, I caused to be served a true and correct copy of the Respondent's Response to Amicus Curiae Brief of Washington Employment Lawyers Association to the following parties at the following addresses:

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