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SUPREME COURT
STATE OF WASHINGTON
2/2/2018 4:21 PM
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No. 94846-1

IN THE SUPREME COURT
STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION, a Delaware corporation,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ISSUES PRESENTED FOR REVIEW..... 3

III. ARGUMENT..... 3

 A. Standard of Review..... 3

 B. Washington should select a legal standard that best serves the remedial purpose of the WLAD..... 4

 C. Washington should adopt the “knew or suspected” standard. 6

 D. In the alternative, Washington should adopt the Second Circuit’s “general corporate knowledge” standard. 11

 E. Microsoft’s authorities are not persuasive on any of the critical points at issue..... 16

IV. CONCLUSION 18

TABLE OF AUTHORITIES

Cases:

<i>Brady v. Autozone Stores, Inc.</i> , 188 Wn.2d 576 (2017)	6
<i>Broadus v. O.K. Indus., Inc.</i> , 238 F.3d 990 (8th Cir. 2001)	12
<i>Burlington N. v. White</i> , 548 U.S. 53 (2006).....	5
<i>Chuang v. Univ. of Cal. Davis, Bd. of Trustees</i> , 225 F.3d 1115 (9th Cir. 2000)	4
<i>Clover v. Total Sys. Serv., Inc.</i> , 176 F.3d 1346 (11th Cir. 1999)	17
<i>Cornwell v. Microsoft Corp.</i> , 199 Wn. App. 1015 (2017)	3
<i>deLisle v. FMC Corp.</i> , 57 Wn. App. 79 (1990)	8
<i>Desert Palace, Inc. v. Costa</i> , 539 U.S. 90 (2003).....	8
<i>Dorcely v. Wyandanch Union Free Sch. Dist.</i> , 665 F. Supp. 2d 178 (E.D.N.Y. 2009)	14
<i>Drinkwitz v. Alliant Techsystems, Inc.</i> , 140 Wn.2d 291 (2000)	6
<i>Gordon v. New York City Board of Education</i> , 232 F.3d 111 (2nd Cir. 2000).....	12, 13
<i>Grimwood v. University of Puget Sound, Inc.</i> , 110 Wn.2d 355 (1988)	19

<i>Heaphy v. Webster Cent. Sch. Dist.</i> , 343 F.3d 1107 (9th Cir. 2003)	14
<i>Hernandez v. Spacelabs Medical Inc.</i> , 343 F.3d 1107 (9th Cir. 2003)	6
<i>Hill v. BCTI Income Fund-I</i> , 144 Wn.2d 172 (2001)	4, 8
<i>Kessler v. Westchester Cty. Dep't of Soc. Servs.</i> , 461 F.3d 199 (2d Cir. 2006).....	13
<i>Mackay v. Acorn Custom Cabinetry, Inc.</i> , 127 Wn.2d 302 (1995)	4, 5
<i>Marquis v. City of Spokane</i> , 130 Wn.2d 97 (1996)	5
<i>Martini v. Boeing Co.</i> , 137 Wn.2d 357 (1999)	5, 6, 19
<i>Meyer v. Univ. of Washington</i> , 105 Wn.2d 847 (1986)	16
<i>Michkowski v. Snohomish Cty.</i> , 185 Wn. App. 1057 (2015)	17
<i>Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.</i> , 189 Wn.2d 516 (2017)	7, 16
<i>Passantino v. Johnson & Johnson Consumer Prods., Inc.</i> , 212 F.3d 493 (9th Cir. 2000)	6
<i>Rogers v. Missouri Pacific R. Co.</i> , 352 U. S. 500 (1957).....	8
<i>Scrivener v. Clark Coll.</i> , 181 Wn.2d 439 (2014)	passim
<i>Sellsted v. Wash. Mut. Sav. Bank</i> , 69 Wn. App. 852 (1993)	8

<i>Simon v. Simmons Food, Inc.</i> , 46 F.3d 386 (8th Cir. 1995)	13
<i>Taylor v. City of Los Angeles DWP</i> , 51 Cal. Rptr. 3d 206 (2006)	13
<i>Wilmot v. Kaiser Aluminum</i> , 118 Wn.2d 46 (1991)	12
<i>Xieng v. Peoples Nat. Bank of Washington</i> , 120 Wn.2d 512 (1993)	5
<i>Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171</i> , 189 Wn.2d 607 (2017)	4, 5

Statutes:

Washington Law Against Discrimination.....	passim
--------------------------------------------	--------

Other Authorities:

WPI 1.03	9
WPI 330.05	15

I. INTRODUCTION

The Court of Appeals applied the wrong legal standard when it affirmed summary judgment in favor of Microsoft. The court required proof that the decision makers had actual knowledge of Cornwell's protected activity. This is a rigid and overly-narrow rule that undermines the remedial purpose of the Washington Law Against Discrimination ("WLAD").

While federal courts are split on the proper legal standard, the Second Circuit and the Ninth Circuit have enunciated legal standards that best reflect Washington's commitment to being a "pioneer" in the protection of employee rights. Therefore, this Court should require a plaintiff to establish either: (a) that decision makers "knew or suspected" the protected activity; or (b) there was "general corporate knowledge" of the protected activity. To adopt a more restrictive standard, as Microsoft urges, would undermine the WLAD's remedial purposes and its critical public policies.

Additionally, the Court of Appeals' decision implicitly required direct evidence of the decision makers' knowledge. By doing so, the court improperly weighed the evidence, rejecting the circumstantial evidence that is almost always the means of proof a plaintiff presents in a

discrimination case. This Court has repeatedly held that circumstantial evidence is enough to defeat summary judgment under the WLAD.

The circumstantial evidence is strong and creates a reasonable inference that the decision makers knew or suspected Cornwell had engaged in protected activity. For instance, one decision maker learned that Cornwell's prior legal action against Microsoft involved: (a) a performance review; (b) written by a male manager; and (c) that a "settlement agreement" was reached whereby Cornwell would not report to that male manager. Additionally, one decision maker (Blake) specifically asked Microsoft's Human Resources to investigate the basis for Plaintiff's prior legal claims and HR agreed to let her know. Despite the denials that HR did exactly what she had asked, a reasonable jury could easily conclude that the decision maker knew or suspected that Cornwell had complained of gender discrimination by that male manager, which is clearly protected activity.

The Court of Appeals improperly weighed the evidence and made inferences in favor of Microsoft to affirm summary judgment. It made a conclusory fact finding which ignored all of the circumstantial evidence of knowledge: "There is no evidence that Blake knew, or ever learned the nature of the prior litigation outside of what Cornwell had told her."

Cornwell v. Microsoft Corp., 199 Wn. App. 1015 at *2, as amended on denial of reconsideration (July 13, 2017) (unpublished opinion).

In short, the Court of Appeals' decision should be reversed and Cornwell should be permitted to proceed to trial on her retaliation claim.

II. ISSUES PRESENTED FOR REVIEW

- A. Is there sufficient evidence of a causal connection between Cornwell's protected activity and the adverse action against her?
- B. To advance the remedial purposes of the WLAD, should Washington adopt the "knew or suspected" standard in determining a causal connection?
- C. Alternatively, to advance the WLAD's public policy of the highest order, should Washington adopt the "general corporate knowledge" standard in determining such a causal connection?

III. ARGUMENT

A. Standard of Review

The standard of review on summary judgment is *de novo*. Summary judgment is rarely appropriate in employment discrimination cases "because the ultimate 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.”¹

B. Washington should select a legal standard that best serves the remedial purpose of the WLAD.

As this Court has repeatedly reminded the lower courts, the WLAD should be liberally construed to effectuate a public policy of the “highest priority.” *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310-11 (1995); *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179 (2001) (WLAD “embodies a public policy of the highest priority”).

Recently, this Court reiterated this mandate of liberal construction:

When interpreting WLAD, we are particularly mindful that “a plaintiff bringing a discrimination case in Washington assumes the role of a private attorney general, vindicating a policy of the highest priority.” *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). To further this important purpose, both the legislature and Washington courts require that even in a plain language analysis, WLAD's provisions must be given “liberal construction.” *Id.* at 108, 922 P.2d 43 (citing RCW 49.60.020).

Zhu v. N. Cent. Educ. Serv. Dist.-ESD 171, 189 Wn.2d 607, 614 (2017), *reconsideration denied* (Dec. 28, 2017).

In *Zhu*, this Court emphasized the importance of the anti-retaliation provisions of the WLAD, explaining that any weakening of the retaliation laws could thwart the private enforcement of the WLAD. *Id.* at 623. The

¹ *Chuang v. Univ. of Cal. Davis, Bd. of Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000) (internal quotation marks omitted); *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 445 (2014) (summary judgment is “seldom appropriate” under the WLAD).

decision refers to the U.S. Supreme Court’s statement that anti-retaliation provisions should be interpreted “**more broadly**” than provisions prohibiting discrimination). *Id.* (citing *Burlington N. v. White*, 548 U.S. 53, 61-67 (2006)) (emphasis added).

Restrictive interpretations of discrimination laws have been repeatedly rejected by this Court. The following cases provide examples:

- *Mackay*, 127 Wn.2d at 305-06 (adopting substantial factor test; rejecting “motivating factor” and “sole factor” standards from federal law.)
- *Marquis v. City of Spokane*, 130 Wn.2d 97, 110 (1996) (expanding WLAD to independent contractors, despite federal case law to the contrary).
- *Xieng v. Peoples Nat. Bank of Washington*, 120 Wn.2d 512, 528-29 (1993) (applying statutory amendment retroactively – rejecting federal appellate decisions holding otherwise).
- *Martini v. Boeing Co.*, 137 Wn.2d 357, 376 (1999) (rejecting notion from federal courts that front pay is only recoverable where constructive discharge is established).
- *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 450 (2014) (rejecting the federal “stray remarks” doctrine because it is not consistent with the liberal interpretation of the WLAD).

Indeed, this Court's has declared that Washington has a "long and proud history of being a pioneer" in the protection of employee rights² and that our state will adopt the legal standard that "provides greater protection for workers, . . ." *Brady v. Autozone Stores, Inc.*, 188 Wn.2d 576, 583 (2017). In *Martini*, this Court explains why Title VII case law that limits protection should be rejected. *Martini*, 137 Wn.2d at 372-75 (Title VII does not contain "direction for liberal interpretation, such as is the mandate in Washington's law against discrimination.")

With all of these principles and decisions in mind, Washington should now adopt the standard articulated by the Ninth Circuit (knew or suspected) or, alternatively, the standard articulated by Second Circuit (general corporate knowledge).

C. Washington should adopt the "knew or suspected" standard.

A plaintiff bringing a WLAD retaliation claim should be required to show that a decision maker knew or suspected that the plaintiff had engaged in protected activity. This is the precise language used by the Ninth Circuit in *Hernandez v. Spacelabs Medical Inc.*, 343 F.3d 1107, 1113 (9th Cir. 2003) citing *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000).

² *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 305 (2000) (recognizing "Washington's long and proud history of being a pioneer in the protection of employee rights" and refusing to apply federal law's "window of correction" defense).

Even where a manager denies having such a suspicion, that is not dispositive if a reasonable jury could find otherwise based on the evidence. Washington courts have long held that circumstantial evidence is sufficient under the WLAD. As this Court recently reminded the lower courts, proof of discrimination through circumstantial evidence is the norm: “in discrimination cases it will seldom be otherwise.” *Mikkelsen v. Pub. Util. Dist. No. 1 of Kittitas Cty.*, 189 Wn.2d 516, 526 (2017). That opinion goes on to review the well-established value of such circumstantial evidence under the WLAD:

“[d]irect, ‘smoking gun’ evidence of discriminatory animus is rare, since ‘[t]here will seldom be “eyewitness” testimony as to the employer's mental processes.’” *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179, 23 P.3d 440 (2001) (second alteration in original) (quoting *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983)). Accordingly, courts have repeatedly emphasized that plaintiffs may rely on circumstantial, indirect, and inferential evidence to establish discriminatory action. *Id.* at 180. “Indeed, in discrimination cases it will seldom be otherwise.” *Id.* (quoting *deLisle v. FMC Corp.*, 57 Wn. App. 79, 83, 786 P.2d 839 (1990)).

Id. (alteration in original).

In *Scrivener*, 181 Wn.2d at 450, this Court reversed the Court of Appeals because it improperly rejected “circumstantial evidence probative of discriminatory intent.” The opinion goes on to explained the probative value of circumstantial evidence in cases under the WLAD:

Summary judgment to an employer is seldom appropriate in the WLAD cases because of the difficulty of proving a discriminatory motivation. *See Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 144, 94 P.3d 930 (2004); *Sangster v. Albertson's, Inc.*, 99 Wn. App. 156, 160, 991 P.2d 674 (2000) (“Summary judgment should rarely be granted in employment discrimination cases.”); *see also Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 90, 272 P.3d 865 (2012) (When the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.) . . . “This is a burden of production, not persuasion, and may be proved through direct or circumstantial evidence.” *Id.*

Id. at 445. A sophisticated employer will not broadcast intentional discrimination or retaliation; accordingly, motive is generally proven through circumstantial evidence.³ Courts have thus 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, *review denied*, 122 Wn.2d 1018 (1993).

In fact, as the U.S. Supreme Court has noted, the reason for treating circumstantial and direct evidence alike is both clear and deep rooted: “Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), *citing Rogers v. Missouri Pacific R. Co.*, 352 U. S. 500, 508, n. 17 (1957).

³ *Hill v. BCTI Income Fund-I*, 144 Wn.2d 172, 179-80 (2001), *citing deLisle v. FMC Corp.*, 57 Wn. App. 79, 83 (1990).

Indeed, Washington courts routinely instruct juries that direct and circumstantial evidence are not different and that one is not more valuable than the other. WPI 1.03.⁴

The Court of Appeals erred in insisting that Cornwell produce direct evidence of actual knowledge by the Microsoft decision-makers. Moreover, under the knew or suspected standard, there is ample evidence upon which a jury could reasonably conclude such knowledge or suspicion existed. The ostensible decision makers in Cornwell's case are two managers—Blake and McKinley. The evidence of their knowledge/suspicion of Cornwell's protected activity is this:

- Blake concedes that Cornwell said she had a legal action with Microsoft, which Blake called a “lawsuit”;⁵
- That “lawsuit” concerned a performance review score;⁶
- The subject of Cornwell's complaint was a male manager;⁷
- The “lawsuit” resulted in a confidential settlement agreement with Microsoft;⁸

⁴ **WPI 1.03:** “The evidence that has been presented to you may be either direct or circumstantial. The term ‘direct evidence’ refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term ‘circumstantial evidence’ refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. ... The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.”

⁵ CP 48 (Blake Dep. 54:3-8)

⁶ CP 55 (Blake Dep. 66:11-14)

⁷ CP 55 (Blake Dep. 66:11-14)

- Per that settlement agreement, Cornwell was not required work for that manager again;⁹
- That the “lawsuit” had an emotional toll on Cornwell and that Cornwell seemed fearful of reporting to this male manager;¹⁰
- Blake then asked Human Resources to “investigate” the nature of the lawsuit and report back to her;¹¹
- Human Resources promised to pass on what it learned;¹²
- No further documentation exists to support Blake’s denial that HR ever told her what its investigation revealed about that lawsuit.

A jury could reasonably infer that Blake knew or suspected that Cornwell had engaged in protected activity—that she had made a gender discrimination claim against her former male manager. While Microsoft argues that a different inference should be drawn from these facts, it is free to argue that inference at trial, however the jury should decide which inference is more reasonable based on a full hearing.

In short, plaintiffs in retaliation cases should be permitted to prove “knowledge” or “suspicion” of the protected activity through

⁸ CP 60 (Blake Dep. 124:11-23)

⁹ CP 58 (Blake Dep. 58:20-23)

¹⁰ CP 52 (Blake Dep. 62:3-6)

¹¹ CP 156 (Email from Blake to Dyer and McKinley)

¹² CP 161 (Email from Dyer to McKinley)

circumstantial evidence. That is fundamentally no different than the precedent which allows a plaintiff to prove discriminatory motive through circumstantial evidence. A sophisticated manager and corporation is not likely to admit to knowledge when faced with a retaliation claim. Just as the employer is not apt to announce retaliation as his or her motive, decision makers are also not likely to admit they were aware of the plaintiff's protected activity.

D. In the alternative, Washington should adopt the Second Circuit's "general corporate knowledge" standard.

Alternatively, this Court should adopt the general corporate knowledge standard because it advances the critical public policy embodied in the WLAD. This is consistent with Washington case law which has held that only the employer's knowledge is an essential element of a retaliation claim:

As to the third element of the prima facie case, some courts hold that a plaintiff may establish the required case by showing that the worker filed a workers' compensation claim, that the employer had knowledge of the claim, and that the employee was discharged. *Love*, at 573 (citing *Axel v. Duffy-Mott Co.*, 47 N.Y.2d 1, 10, 389 N.E.2d 1075, 1079, 416 N.Y.S.2d 554, 558-59 (1979)). If the plaintiff meets this standard, a rebuttable presumption is created in favor of the employee which precludes the court from granting a motion for nonsuit or dismissal at the end of plaintiff's case.

We agree in general with this approach. Proof of the employer's motivation may be difficult for the employee to

obtain. “Ordinarily the prima facie case must, in the nature of things, be shown by circumstantial evidence, since the employer is not apt to announce retaliation as his motive.” 1 L. Larson, *Unjust Dismissal* § 6.05[5], at 6-51 (1988); see *Axel*, at 6; *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 704, 403 S.E.2d 717, 721 (1991).

Wilmot v. Kaiser Aluminum, 118 Wn.2d 46, 69 (1991) (emphasis added).

Importantly, this Court used the word “employer” rather than “decision-maker.”

The Second Circuit enunciated the “general corporate knowledge” standard in *Gordon v. New York City Board of Education*, 232 F.3d 111 (2nd Cir. 2000). The *Gordon* court uses the same elements and language as this Court did in *Wilmot*.¹³ Specifically, the Second Circuit 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 *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

¹³ A plaintiff claiming retaliation must prove: (1) participation in a protected activity; (2) that the defendant knew of the protected activity; (3) adverse employment action; and (4) a causal connection between plaintiff’s protected activity and the adverse employment action. *Gordon* at 113.

activity is not an element of his prima facie case. Circumstantial evidence may be used...”¹⁴

The Court of Appeals attempts to minimize the importance of *Gordon* by observing that the decision maker in that case had some knowledge of the protected activity. We need not examine those facts under a microscope because subsequent decisions by the Second Circuit make crystal clear what is meant by general corporate knowledge. For example, in *Kessler v. Westchester Cty. Dep't of Soc. Servs.*, the employer argued that the decision maker was completely “unaware” of the protected activity. 461 F.3d 199, 210-11 (2d Cir. 2006). The court flatly rejected that as a basis for summary judgment. *Id.* The court went on to explain that on summary judgment, the fact that the employer had formal notice was critical. *Id.* The court also explained that circumstantial evidence suggested a causal connection—despite the decision maker’s denial of knowledge. *Id.* In other words, an employer is not entitled to summary judgment based on its conclusory and self-serving assertion that the

¹⁴ Other courts have applied a similar “constructive knowledge” standard. *Simon v. Simmons Food, Inc.*, 46 F.3d 386, 389 (8th Cir. 1995) (holding 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); *Taylor v. City of Los Angeles DWP*, 51 Cal. Rptr. 3d 206, 220 (2006) (The claim was established because the employer had actual notice of the protected activity and the decision-maker had “constructive knowledge” of the protected activity when the manager was informed the plaintiff was a “troublemaker.”)

decision maker did not know of the protected activity. The employer's knowledge is what matters.

Microsoft incorrectly argues that general corporate knowledge would create “strict liability” on retaliation claims once an employee engages in protected activity. Within the Second Circuit’s jurisdiction, numerous cases still result in summary judgment in favor of the employer in retaliation cases – especially where a plaintiff cannot rebut the employer’s legitimate, non-retaliatory reason for its actions. *See e.g., Heaphy v. Webster Cent. Sch. Dist.*, 761 F. Supp. 2d 89, 95 (W.D.N.Y. 2011), *aff’d*, 452 F. App’x 73 (2d Cir. 2012) (Plaintiff’s evidence of pretext was “insufficient to rebut the District’s legitimate, nondiscriminatory reasons for its actions.”); *Dorcely v. Wyandanch Union Free Sch. Dist.*, 665 F. Supp. 2d 178, 217 (E.D.N.Y. 2009) (Plaintiff cannot “point to evidence that would be sufficient to permit a rational factfinder to conclude that Defendants’ explanation is merely a pretext for impermissible retaliation.”) Notably, Microsoft did not move for summary judgment on the grounds that it had legitimate, non-retaliatory reasons for actions against Cornwell, which it was entitled to do. In fact, Microsoft did not even assert any non-retaliatory reasons for the adverse actions taken against Cornwell. Any “strict liability” argument is a straw man created by Microsoft.

Moreover, the general corporate knowledge principle is particularly apt under the facts of this case. The manager (Blake) was not acting alone as a “rogue.” She carefully coordinated her actions with Human Resources and the Legal Department at Microsoft. Further, Microsoft’s own witnesses admit that Microsoft Legal had “eyes on” Cornwell’s performance review. CP 161. Further, Human Resources participated by lying to Cornwell that she would not receive any performance evaluation because she was being laid off; in reality, HR had instructed management to merely delay in uploading the review until *after* Cornwell signed her severance agreement. As Blake herself testified, all of this was “carefully orchestrated” by Microsoft’s Human Resources Department. CP 187 (Blake Dep. 173:9-12). The adverse action against Cornwell was engineered by the general corporate apparatus. Therefore, general corporate knowledge is particularly applicable to these facts.

General corporate knowledge may not result in any change to the jury instructions in this case. Notably, the Washington pattern instruction on retaliation makes no mention of knowledge as a requirement in proving the causal connection. WPI 330.05. The ultimate question at trial is whether Cornwell’s prior protected activity was a “substantial factor” in the adverse action against Cornwell. Under this instruction, Microsoft is free to argue to the jury that no causal connection existed because Blake

did not know of the protected activity. Cornwell can argue from the circumstantial evidence, including the corporation's general knowledge of the protected activity, that her protected activity was a substantial factor in the adverse action. The jury instructions are broad enough to allow each side to argue its theory of the case for the jury to decide. As this Court has recently stated: “[w]hen the record contains reasonable but competing inferences of both discrimination and nondiscrimination, the trier of fact must determine the true motivation.” *Scrivener*, 181 Wn.2d at 445; *see also Mikkelsen*, 189 Wn.2d at 536 (When facing competing inferences, “it is the jury’s task to choose between such inferences – not the courts.”) (internal quotation marks omitted).

E. Microsoft’s authorities are not persuasive on any of the critical points at issue.

Microsoft relies on *Meyer v. Univ. of Washington* for the proposition that Blake’s possible suspicions are insufficient to survive summary judgment. Resp’t Brief at 16 (citing *Meyer v. Univ. of Washington*, 105 Wn.2d 847 (1986)). This case is distinguishable because it is a First Amendment case that was decided on an entirely different issue—whether the speech was even protected. *Meyer* at 852.

Microsoft also relies on an unpublished Court of Appeals’ decision, which adds nothing to the analysis. Resp’t Brief at 16, citing

Michkowski v. Snohomish Cty., 185 Wn. App. 1057 at *5 (2015) (unpublished opinion). In *Michkowski*, the plaintiff had no evidence, direct or circumstantial, that the decision makers had any inkling of his protected activity. On the other hand, the employer offered evidence that showed the only person who definitely had knowledge of the protected activity was recused from decision-making. *Id.* Additionally, the employer had ample non-retaliatory reasons for the action. *Id.* at *1-2.

Finally, Microsoft relies on *Clover v. Total Sys. Serv., Inc.*, 176 F.3d 1346, 1355 (11th Cir. 1999). Resp't Brief at 17. In *Clover*, the court held that plaintiff presented nothing but speculative evidence that the decision maker had knowledge of the protected activity; specifically, the decision maker's mere friendship with the investigated party and the decision maker had spoken to someone in HR with knowledge of the protected activity. *Id.* at 1355. But there was nothing to suggest that conversation had anything to do with the protected activity. *Clover* at 1354. Even if *Clover* presents a legal standard that this Court wished to follow, it is easily distinguishable. Blake spoke to HR directly about her desire to find out more about the "lawsuit"—the protected activity. Blake knew that the lawsuit was about performance scores and, as a result of a settlement, a male manager to whom Cornwell would no longer report. In

addition, Blake never actually testified that she did not suspect it was a discrimination complaint.

The general corporate knowledge doctrine prevents a sophisticated and deceptive employer from evading liability for retaliation. Otherwise, a corporation can have an absolute defense by a decision-maker's bald assertion of lack of knowledge of the protected activity. A jury must consider the credibility of that denial when weighed against the circumstantial evidence. Just as denial of discriminatory animus is insufficient by itself to warrant summary judgment, a denial of knowledge of the protected activity by a decision-maker is insufficient to warrant summary judgment when the Plaintiff puts forth circumstantial evidence. Otherwise, a plaintiff would have no way of disproving a manager's denial of knowledge, no matter how implausible. A corporation should not be able to create an absolute bar to liability by claiming that a manager was not told about the exact nature of an employee's complaint, thereby denying that the manager knew that the employee had engaged in protected activity. This case presents an opportunity for this Court to close that loophole.

IV. CONCLUSION

The purpose of the WLAD is furthered only if employees are adequately protected for making good faith complaints about

discrimination in the workplace. This Court has consistently adopted the legal principle that best advances the rights established by the WLAD. *Martini v. Boeing*, 137 Wn.2d at 372-73. For the last 30 years, this Court has been guided by its precedent to follow federal authorities, 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, 361-62 (1988).

Cornwell has presented sufficient evidence to establish a causal link between her protected activity and her adverse employment action. Summary judgment should be reversed and a trial should be permitted.

DATED: this 2nd day of February, 2018.

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February 02, 2018 - 4:21 PM

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