Court of Appeals No. 74919-6-I

Supreme Court No. 94846-1

IN THE SUPREME COURT
STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION, a Delaware corporation,

Respondent.

PETITION FOR DISCRETIONARY REVIEW

BEAN LAW GROUP
Matthew J. Bean, WSBA No. 23221
2200 Sixth Ave, Suite 835
Seattle, WA 98121
(206) 522-0618
(206) 524-3751 FAX

LAW OFFICE OF ALEX J. HIGGINS
Alex J. Higgins, WSBA No. 20868
2200 Sixth Ave, Suite 835
Seattle, WA 98121
206.340.4856
206.260.8803 FAX

Attorneys for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

The petitioner is Dawn Cornwell, appellant in the Court of Appeals and the plaintiff in the King County Superior Court proceeding. Cornwell asks this Court to accept review of the decision designated in Part II of this motion.

II. CITATION TO THE COURT OF APPEALS DECISION

Cornwell seeks review of the unpublished case No. 74919-6-1, filed by Division One of the Court of Appeals June 5, 2017, and as modified by the Court of Appeals' July 7, 2017 order. This decision is not binding. A copy of the original order is attached hereto as Appendix A and the Order on Motion for Reconsideration as Appendix B.

III. ISSUES PRESENTED FOR REVIEW

Whether the Court should accept review of the Court of Appeals decision because:

a. Pursuant to RAP 13.4(b)(1), the Court of Appeals' decision conflicts with this Court's mandate to liberally construe Washington's s anti-discrimination statute, RCW 49.60.210. The Court of Appeals adopted an overly-narrow "knowledge" requirement rather than adopting either the "general corporate knowledge" standard adopted by the Second Circuit, or the "knew or suspected" standard adopted by the Ninth Circuit. No other

Washington appellate court decision interpreting Washington's Law Against Discrimination ("WLAD") has adopted a standard of proof less liberal than a federal appellate court interpreting Title VII.

b. Pursuant to RAP 13.4(b)(4) the Court of Appeals' decision involves an issue of substantial public interest that should be determined by this Court. This Court has not interpreted what specific knowledge, if any, a manager has to have about the nature of a person's protected activity in order for a plaintiff to prove that his or her protected activity was a substantial factor in the decision to take adverse employment action.

IV. STATEMENT OF THE CASE

A. Factual Background

In 2004, Cornwell worked as a Program Manager at Microsoft. Cornwell felt she was being discriminated against on the basis of sex by her former manager Todd Parsons. CP 214. Cornwell reported all of this to Microsoft Human Resources. She hired an attorney and ultimately, through mediation, she and Microsoft reached a settlement agreement. CP 214. (The settlement agreement is filed under seal at CP 314.) One of the terms of this agreement was that Cornwell would no longer be placed in her former manager's group.

In late 2011, an issue arose between Cornwell and her new manager and Cornwell disclosed the existence of the settlement agreement so that Cornwell would not have to work with a person in her former manager's group. In February 2012, Blake met with Cornwell for her mid-year performance review. Blake told Cornwell that she had specifically followed up with Human Resources about Cornwell's "lawsuit" and was told there was nothing on file. Blake pressed the issue and asked Cornwell if she had signed anything. Cornwell confirmed that she had. CP 216-217. Blake then asked Cornwell what would happen if they merged with Parsons' team. Cornwell responded that she had a copy of the paperwork with the terms and conditions and that if she needed to produce it at a later time, she could. Blake asked if she should discuss further with Human Resources. Cornwell responded that she signed a confidentiality agreement, and that she could not discuss it anymore. *Id.* From these conversations, Blake understood that Microsoft had agreed to change Parsons' review score of Cornwell and that Cornwell could not be assigned to a position that reported to Parsons. CP 54-55; 156.

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

> In our discussion regarding Dawn, I let you know she had told me that she took legal action against MS due to review scores in the past. You had mentioned that you would do

> more investigation as nothing popped out to you, and I suggested you follow up with Todd Parsons,[1] as she mentioned he was the target and as part of the condition of her employment she can't work on his team. I just looked at her profile on Managepoint and noticed that she was on a leave of absence from 9/13/2005 to 2/26/2007. **I hope this helps with your detective work.**

CP 156 (emphasis added).

Jan Dyer, also in Microsoft Human Resources, wrote a second email that requested more information about Cornwell's statement that she "sued MS when she was in Todd Parson's org," and explained that Cornwell's managers "all seem to be tip toeing around this employee 'considering her history.'" CP 155. Blake and Human Resources were hyper-focused on Cornwell's previous legal issues with Microsoft.

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

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

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

> others about this. I do not want a negative perception or reputation. This matter is between Microsoft and me only.

CP 159.

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

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

CP 161.

Microsoft mandates that a performance review of all employees be conducted for their work at the end of Fiscal Year 2012 (that period ended on June 30, 2012). CP 162. Cornwell's peer reviews were outstanding. CP 163-164. Cornwell received reviews from nineteen of her peers—the vast majority of which were very positive. CP 164.

In early July 2012, Blake performed Cornwell's performance evaluation contrary to Microsoft's policy. First, Blake did not look at Cornwell's self-assessment. CP 182. Second, Blake never met with

Cornwell to finalize the review. CP 166. Third, Blake did not consider the input of other managers. In fact, Blake lied about this. At her deposition, Blake claimed that the "5" rating given to Cornwell – the worst possible review score – was not her idea and instead resulted from the organization's "calibration meeting" where employees were "stack ranked" against each other. CP 179. However, former Microsoft Senior Director Jean Wenzel offered sworn testimony to the contrary. According to Wenzel, Blake and McKinley came into the meeting both being adamant that Ms. Cornwell was a "5" and that there was significant disagreement from other managers about this low score. CP 211-212. Wenzel's testimony was that Blake and McKinley told the other managers that they would determine Cornwell's review score themselves. *Id.*

In September 2012, Cornwell received notification that she was being laid off as part of a reduction in force. CP 218-219. The notification explained that Cornwell would be entitled to a severance and she would have the ability to return to work at Microsoft in any other capacity. Cornwell was concerned about her annual performance evaluation (which Blake had yet to inform her of). She checked with Microsoft Human Resources, who told her that she would not be receiving a performance evaluation that year because she was being laid off. Accepting the word of Human Resources, Cornwell signed the severance

agreement. CP 209. Hours later, Human Resources signed Cornwell's performance review on her behalf. CP 275. Later that day, Blake uploaded the performance evaluation into the management tool. *Id.*; CP 186. Blake testified, "Everything was very carefully orchestrated by Human Resources, and I followed exactly their instructions." CP 187. At that point, the review was "published," allowing any other Microsoft manager to see Cornwell's review score. This was done in violation of Microsoft's performance review process. CP 165-170.

After Cornwell signed her severance agreement, she immediately started looking for re-employment at Microsoft, applying for 170 different positions. CP 219. Cornwell later discovered that the performance evaluation that Human Resources said would not be given, *had in fact been given* (and that she was rated a "5"). This poor performance evaluation was the reason she was having significant difficulty getting rehired at Microsoft. CP 220, 233-4.

After Cornwell learned of the poor performance evaluation, she contacted Microsoft Human Resources about what had happened, and also requested that the performance review be removed from her file. CP 220-221. Microsoft refused to do so. *Id.*

There is no non-retaliatory explanation for Cornwell's rapid decline in what, until then, had been thirteen years of strong performance

reviews. To the contrary, one other manager who participated in the "calibration meeting" knew Cornwell's work very well and concluded that Blake was not treating Cornwell fairly. CP 202 (Rhodes Dep. 29:18-25).

In sum, after investigating Cornwell's prior lawsuit, Blake and McKinley sidestepped the usual process of evaluations by separating Cornwell's review from the "calibration meeting," ignored Cornwell's peer reviews and as well as her own comments, and further violated Microsoft policy by publishing the performance review.

B. Procedural History

Cornwell commenced an action against Microsoft in King County Superior Court on January 6, 2015. Microsoft moved for summary judgment on various grounds. The trial court granted the motion and dismissed Cornwell's case. The trial court held:

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

RP 40:4-12.

On June 5, 2017, the Court of Appeals affirmed the Trial Court's Order Granting Summary Judgment. Relying on *Kahn v. Salerno*, 90 Wn. App. 110, 131, 951 P.2d 321 (1998), the Court of

Appeals rejected the "knew or suspected" standard and held that Cornwell failed to prove that her managers "knew" of the opposition activity even though they "knew" of her "lawsuit."

V. ARGUMENT

A. Summary of Argument

This case involves two interrelated questions: (1) what must a plaintiff establish to establish a "prima facie" case of retaliation under RCW 49.60.210, (2) whether a plaintiff must prove that a manager "knew" of the protected activity, "suspected" protected activity, or merely establish a "causal connection" between the protected activity and the adverse employment action.

The Court of Appeals erred by finding that in order to establish a prima facie case under RCW 49.60.210, the employee must prove that the managers involved in the decision "knew" about the protected activity rather than requiring simply that the protected activity was a "substantial factor" in the adverse employment action.

Even though complete knowledge is not an explicit element of a prima facie case for WLAD retaliation, the Court of Appeals ruled that Cornwell needed to establish that her manger, Blake, *knew* that Cornwell's past legal action against Microsoft specifically arose under the WLAD. The trial court erroneously determined that it was insufficient for Cornwell

to show that Blake knew about Cornwell's legal action against Microsoft, (which was protected activity), eagerly investigated that legal action, and then retaliated against Cornwell.

The Court of Appeals decision should be reversed for two reasons. First, the *employer*, Microsoft, had knowledge of Cornwell's protected activity because Blake and others investigated Cornwell's prior "lawsuit." There were extensive communications with and between Microsoft's Human Resources Department and Legal Department about Cornwell's prior legal action and her pending performance review. The circumstantial evidence shows that the only reasonable conclusion was that the managers suspected the employee engaged in protected activity. Cornwell also offered proof that her managers lied in their depositions about the circumstances that led to the adverse action. Cornwell can prove a "causal connection" between the protected activity and the adverse employment action. A jury may reasonably infer that Blake and others in the Human Resources Department and the Legal Department knew or had reason to suspect that Cornwell had engaged in protected activity.

This Court should reject the stringent "knowledge" requirement that the Court of Appeals required and either adopt the Second Circuit's "general corporate knowledge" standard or the Ninth Circuit's "knew or suspected" standard.

B. Standard of Review

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

C. This Court Should Accept Review of the Court of Appeals Decision to determine what a Plaintiff must establish to make a prima facie case of retaliation under RCW 49.60.210.

Under Washington law, it is unlawful for an employer to "discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by" the WLAD. RCW 49.60.210. This Court has not determined what a plaintiff must show to establish a prima facie case of retaliation under this particular statute. However, in the context of a wrongful discharge in retaliation for making a worker's compensation claim, this Court has determined that a plaintiff must show: (1) he or she exercised the statutory rights to pursue worker's compensation benefits, (2) that he or she was discharged, and (3) there was a causal connection between the exercise of the statutory right and the adverse action. *Wilmot v. Kaiser Alum*, 118 Wn.2d 46, 68, 821 P.2d 18 (1991); *Allison v. Seattle Housing Auth.*, 118 Wn.2d 79, 821 P.2d 34

(1991). This Court should accept review to determine whether Cornwell can establish a "causal connection" between her sex discrimination complaint and the adverse action.

The Court of Appeals held that Plaintiff could not prove a "causal link" between her protected activity and her adverse employment action.[2] Essentially, the Court of Appeals held that because Cornwell could not prove that her manager "knew" about the substance of her "lawsuit," this lack of knowledge broke the causal chain. This analysis is wrong for several reasons. First, the Court of Appeals ignored the compelling evidence that Cornwell's manager retaliated against Cornwell because of her "lawsuit" (which was protected activity) as well as Cornwell's other evidence of corporate knowledge, including (1) that Cornwell's managers had contacted both Human Resources and Microsoft's Legal Department about her "lawsuit" and (2) that Microsoft Legal would be involved in Cornwell's performance evaluation, which is the adverse action that is the subject of this lawsuit. Second, there is sufficient circumstantial evidence to establish that Cornwell's managers at least suspected that Cornwell engaged in protected activity, because on the facts that they were aware of, there is no other reasonable conclusion to make.

[2] The trial court and Court of Appeals both assumed that Plaintiff could establish the first two elements of the prima facie case. For this reason, Cornwell will not argue this point in this petition for review.

1. *This Court may should adopt Second Circuit's "general corporate knowledge" standard.*

This Court has recognized that "employees are at a distinct disadvantage in a retaliation case because they must prove causation without the benefit of the employer's own knowledge of the reason for the discharge." *Allison*, 118 Wn.2d at 96. This Court should adopt the "general corporate knowledge" standard for retaliation cases under RCW 49.60.210, as established by the Second Circuit because it provides the most protection to victims of retaliation. The leading case is *Gordon v. New York City Board of Education*, 232 F.3d 111 (2nd Cir. 2000), which specifically addresses the issue of general corporate knowledge with a factual situation similar to the present case. The *Gordon* court used the same prima facie as this Court did in *Wilmot*.[3] In *Gordon*, the trial court instructed the jury that the plaintiff was required to prove that the defendant's agents knew that the plaintiff had filed a lawsuit at the time of the alleged retaliation.[4] *Id.* at 113-114. The Second Circuit vacated the

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[3] 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.

[4] The *Gordon* jury instruction read, "To satisfy the [knowledge requirement], the plaintiff must show that the Board of Education's agent, who gave plaintiff unfavorable reviews and annual evaluations and removed her from the classroom...knew...that plaintiff had filed that lawsuit at the time when they took these adverse employment actions against her." *Gordon* at 114.

defense verdict because of this faulty instruction, holding that "general corporate knowledge" was all that was required for a plaintiff to establish a prima facie case of retaliation. In a key passage, the court explained, "Neither this nor any other circuit has ever held that, to satisfy the knowledge requirement, anything more is necessary than **general corporate knowledge** that the plaintiff has engaged in a protected activity." *Id.* at 116 (emphasis added); *see also Reed v. A.W. Lawrence & Co., Inc.*, 95 F.3d 1170, 1178 (2nd Cir. 1996) (finding knowledge requirement proved because the corporate entity was aware of plaintiff's complaints); *Alston v. New York City Transit Auth.*, 14 F.Supp.2d 308, 311 (S.D.N.Y. 1998) ("In order to satisfy the second prong of her retaliation claim, plaintiff need **not** show that individual decision-makers within the NYCTA knew that she had filed an EEOC complaint...") (emphasis added). The Eighth Circuit also concurs with this approach. *Broadus v. O.K. Indus., Inc.*, 238 F.3d 990, 991 (8th Cir. 2001) ("Evidence that the supervisor who terminated Charles Broadus had specific knowledge of the protected activity is not an element of his prima facie case. Circumstantial evidence may be used...")

Other courts have used the term "constructive knowledge." In *Simon v. Simmons Food, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995), the Eighth Circuit held that a plaintiff in a federal whistleblower claim the plaintiff

must show that the employer had actual or constructive knowledge of the protected conduct in order to establish a prima facie case of retaliation. "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Id.* at 390. Similarly, in *Taylor v. City of Los Angeles DWP*, 51 CA. Rptr. 3d 206, 220 (2006), the California Court of Appeals found that a retaliation complaint stated a claim even though the plaintiff did not plead that the decision-maker was aware of the protected activity. The claim was established because the employer had actual notice of the protected activity and that the decision-maker had "constructive knowledge" of the protected activity when the manager was informed the plaintiff was a "troublemaker." *Id.* These facts were sufficient to establish a causal link between the protected activity and the defendant's adverse action.

The Court of Appeal's decision to reject the "general corporate knowledge" standard violates the clear mandates from the Legislature and from this Court to give the WLAD a liberal construction to effectuate its remedial purpose – a public policy of the highest order. The "remedial purpose" of the act is furthered by protecting employees who can show a causal link between their protected activity and their discharge.

Take, for example, a situation where an employee complains to Human Resources about sex discrimination. The manager finds out that the employee went to Human Resources to complain about him, but is not told the substance of the complaint. By the reasoning of the Court of Appeals, the employer would be entitled to summary judgment in this case, even if the employee could prove that the protected activity was the cause of the adverse action. Employees who can prove that their protected activity was a substantial factor in the decision to take adverse action against them should be protected under the act regardless of the completeness of the particular decision-maker's knowledge of the employee's protected activity.

2. *In the alternative, this Court should adopt the Ninth Circuit's "knew or suspected" standard.*

The Ninth Circuit has established that that plaintiff need only show sufficient evidence from which a reasonable jury could infer that the decision maker "knew or suspected" the plaintiff's protected activity. *Hernandez v. Spacelabs Medical Inc.*, 232 F.3d 1107, 1113 (2003) *citing*, *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 507 (9th Cir. 2000) *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982)) Accord, *Van Asdale v. International Game Technology*, 577 F.3d 989 (9th Cir. 2009)[interpreting retaliation under Sarbanes-Oxley]

In affirming the Superior Court, the Court of Appeals relied on *Kahn v. Salerno*, 90 Wn. App. 110, 130-31, 951 P.2d 321 (1998), for the proposition that a plaintiff must prove actual knowledge of the protected activity. The knowledge requirement was not at issue in *Kahn;* therefore, that case is not helpful to determine the correct legal standard.

Application of the "knew or suspected" standard would also require reversal of the Court of Appeals decision because of the ample circumstantial evidence that the decision-makers must have suspected Cornwell had engaged in protected activity in her "lawsuit." Washington courts have long held that circumstantial evidence is sufficient to prove motive under the WLAD. *Vasquez v. State*, 94 Wn. App 976 (1999); *Rich v. Bellevue School Dist.*, 122 Wn. App. 1024 (2004) (circumstantial evidence is perfectly adequate because an employer typically does not admit to its illegal motive). Further, Washington courts routinely instruct juries that there is no difference in how a factfinder should treat direct and circumstantial evidence. WPI 1.03.[5]

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[5] **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."

In *Scrivener v. Clark Coll.*, 181 Wn.2d 439, 450, 334 P.3d 541 (2014), this Court reversed the Court of Appeals for rejecting "circumstantial evidence probative of discriminatory intent." The Supreme Court explained the probative value of circumstantial evidence in cases under the WLAD in the following passage:

> 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 jury could reasonably find that Blake and McKinley knew or suspected Cornwell had made a sex discrimination complaint based on the following facts:

- Cornwell told Blake that she had a legal action with Microsoft which concerned a performance review score;
- that subject of the complaint was male manager;
- that the legal action resulted in a confidential settlement;
- that Cornwell was not required work for that manager again;

- that Blake asked Human Resources to investigate the nature of the legal action;
- that Human Resources promised to tell Blake what was learned from the investigation.

The Court of Appeals decision undermines the public policy of the anti-retaliation provisions of the WLAD by making it lawful for employers to retaliate against employees who are suspected of engaging in protected activity, even if the decision-maker does not "know" for certain of the protected activity. In *Hernandez,* the Ninth Circuit reversed summary judgment when the district court found that the plaintiff had failed to show the decision-maker was aware of the protected activity because the circumstantial evidence allowed the jury to infer that the decision-maker suspected the plaintiff had engaged in protected activity. *Id.* at 1113. The "suspected" standard is consistent with the United States Supreme Court's decision in *Heffernan v. City of Paterson*, 578 U.S. __, 136 S.Ct. 1412, 1418 (2016), which held that an employee who had not engaged in protected activity, but was suspected of doing so, was protected from retaliation.

This Court has made clear that our courts should adopt the legal principle that best advances the rights established by the WLAD. *Martini v. Boeing,* 137 Wn.2d 357, 372-73, 971 P.2d 45 (1999). In addition to

reiterating that the WLAD is a public policy of the "highest priority," the *Martini* decision explains that Title VII case law that limits protections should be rejected. *See Martini* at 372-5. In other words, Washington courts may follow federal authority, but only "those theories and rationale which best further the purposes and mandates of our state statute." *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 361-2, 753 P.2d 517 (1988). We are unaware of any cases decided by the Washington Supreme Court which interprets the WLAD in a way to provide lesser protection than Title VII. When applying the "general corporate knowledge" principle from the above authorities to the present case, Microsoft's general corporate knowledge of Cornwell's protected activity establishes the causal connection element of her prima facie case.

VI. CONCLUSION

This Court should accept review for the reasons indicated in Part V, and reverse summary judgment.

DATED: this 10th day of August, 2017.

BEAN LAW GROUP

/s/ Matthew J. Bean
Matthew J. Bean, WSBA No. 23221

LAW OFFICES OF ALEX J. HIGGINS

Alex J. Higgins, WSBA No. 20868

Attorneys for Appellant

BEAN LAW GROUP

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Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAWN CORNWELL, Appellant, v. MICROSOFT CORPORATION, a Delaware Corporation, Respondent.	)	No. 74919-6-I DIVISION ONE UNPUBLISHED OPINION FILED: June 5, 2017

MANN, J. — The Washington Law Against Discrimination (WLAD), ch. 49.60 RCW, extends broad protection from retaliation to any person who has reported discriminatory conduct, as defined by the statute. In order to establish a prima facie case for retaliation, a plaintiff must show that (1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her protected activity and the other person's adverse action.

Patricia Cornwell filed an action for retaliation under the WLAD after she was terminated by Microsoft in 2012. Cornwell appeals the trial court's decision granting summary judgment after finding that Cornwell failed to present a prima facie showing of

causation between her protected activities and her ultimate termination. We agree with the trial court and affirm.

I

A. Employment and Termination

Cornwell was hired by Microsoft as a customer service representative in March 1997. Cornwell worked in various roles, and was promoted several times, eventually earning the position of program manager in 2011. Cornwell's employment with Microsoft was terminated in September 2012, as part of a larger reduction in force (RIF), where three other employees in her group were also laid off.

In 2004, Cornwell was working as a readiness program manager and reporting to Lisa Chiang. Prior to her 2004 performance review with Chiang, Cornwell reached out to Chiang's manager, Todd Parsons. Cornwell expressed concern to Parsons that her performance rating might suffer because Chiang was dating one of Cornwell's male peers and was demonstrating favoritism.[1] Parsons reported the complaint to Microsoft's human resources (HR) and approximately a month later, Chiang was removed from having direct reports and assigned to a new role.

In 2005, Cornwell began reporting directly to Parsons. Once again feeling concerned that she would not be evaluated fairly, Cornwell sent an anonymous client survey to people she had worked with asking them to complete it. After receiving positive feedback, Cornwell copied the results to Parsons. After Parsons gave Cornwell

[1] Microsoft maintained a conflicts of interest policy prohibiting supervisors from being in a romantic relationship with a subordinate.

a negative performance review, Cornwell refused to sign it and informed Parsons that she would be involving HR.

Cornwell eventually retained an attorney and either threatened or filed litigation.[2] In a letter to Microsoft, Cornwell's attorneys described Parsons' behavior as being retaliation for Cornwell's original complaint about Chiang, which they described as being based on "discrimination/sexual favoritism." Cornwell and Microsoft ultimately negotiated a settlement. The settlement agreement included a confidentiality provision, barring the parties from discussing the matters involved. Following the settlement, Cornwell transferred to a different department and continued working, receiving promotions in 2008 and 2010. After reorganization, Cornwell became a program manager in 2011.

Mary Ann Blake began supervising Cornwell in November 2011. Blake's manager at the time was Nicole McKinley. In December 2011, Blake asked Cornwell to mentor with one of her friends. After seeing that Blake's friend reported to Parsons, Cornwell declined and explained that she would help find a different mentor. After further requests from Blake, Cornwell explained that "I did not feel comfortable because her friend reported to Todd Parsons, against whom I previously had a lawsuit." Cornwell told Blake that she could not discuss the details with her.

[2] The record before us includes a prelitigation demand letter and evidence of a settlement. The record does not confirm whether litigation was ever filed. We will refer to the 2005 events as the "2005 legal action."

In February 2012, Cornwell and Blake met for Cornwell's "mid-year" review.[3] Cornwell describes the meeting as follows:

> In the review meeting she started the conversation saying "I followed up with HR about your lawsuit." She then said, "nothing is on file for you." I responded with "that is great!" She then said, "I mean did you sign anything?" I explained that I signed, my attorney signed, Todd [Parsons] signed, and Microsoft's attorneys signed. She said, "Oh! You had an attorney? I said, "Yes. That is what a lawsuit is, but I do not know why we are discussing this because it has nothing to do with my job, you, or anyone else, and I have been trying to put this behind me for years." She said, "What happens if we merge with Todd's team?" I said, "I have a copy of the paperwork with the terms and conditions, and if I need to produce that at a later time then I can." She then asked, "Do you want me to go back to HR and tell them that?" I said "No. I don't need you to do anything. I feel like you are overstepping your boundaries, and again this has nothing to do with my current role. I signed a confidentiality agreement and cannot discuss this with you." I then asked for the conversation to change, which it did. I was shocked that this was a primary subject of discussing at a performance meeting, and the conversation made me very uncomfortable.

Blake then provided Cornwell her performance feedback, including informing her that she was trending toward a rank of "4" (the lowest being a "5"). Cornwell claims she was shocked, and after further discussion, asked Blake to rewrite the evaluation before the next round.

On April 13, 2012, Cornwell and Blake met again in a one-on-one meeting to discuss Cornwell's performance. During that meeting, Blake again informed Cornwell that she was trending towards a "4" rank. Cornwell expressed concern that she was being unfairly reviewed. Following the meeting, Cornwell sent Blake a lengthy e-mail challenging Blake's assessment of her work, challenging Blake's statement that she was trending toward a "4," and expressing her dissatisfaction with Blake as a manager.

[3] In February, managers met with their employees for mid-year check-in meetings to discuss performance. Although actual scores are not included in the mid-year review, managers often tell employees they were trending to a certain performance score.

The e-mail also expressed surprise that Blake had "followed up with HR about my lawsuit."

Blake copied Cornwell's e-mail to McKinley and an HR representative. Blake expressed concern that Cornwell was "trying to build a case as to why she isn't a 4, paint a picture of me being confused, emotional and ineffective and acting like this came out of left field; rather than focusing on how we can work together." Blake asked for assistance from HR "because she makes me very nervous." Blake also reminded HR that Cornwell had told her that she had previously taken legal action against Microsoft "due to review scores in the past." There is no evidence Blake or McKinley had any further discussions with anyone at Microsoft concerning the prior legal action, or ever learned the nature of the previous litigation.

The parties dispute the events that occurred over the next two months. According to Blake, in June 2012, she began meeting with her management team with the initial recommendation that Cornwell be rated as a "4." After consultation with the other managers, and with the approval of McKinley, they decided to give Cornwell a final score of "5." Cornwell, however, provided a declaration from a former Microsoft senior director, Jean Wenzel, who was present at the managers meeting. According to Wenzel, Blake and McKinley discussed assessing Cornwell as a "5" during the initial review process. After the discussion was tabled, Blake and McKinley took the matter "off line" meaning the conversation would be continued without the others involved.[4]

[4] Microsoft's brief asserts "it is undisputed that multiple meetings occurred and the decision to rate Cornwell as a "5" was both difficult for the management team and was discussed by and communicated to all managers."

Cornwell's ranking was finalized as a "5" in August 2012. McKinley then approved the decision to include Cornwell in a reduction in force (RIF) involving three other employees in McKinley's organization. Because the RIF was a group layoff, Microsoft's HR team coordinated the notification to employees and all communications regarding the process of terminating employment. Microsoft informed Cornwell it was eliminating her position on September 5, 2012.

Microsoft had no written policy addressing final performance evaluation meetings for terminated employees. Cornwell's annual performance review meeting was instead replaced by the RIF meeting. HR told Blake not to inform Cornwell of her "5" ranking. After learning of her termination, Cornwell asked if she would be receiving her 2012 performance evaluation. She was told she would not receive a review. Before signing severance paperwork, Cornwell accessed the online HR files and determined all of her performance reviews except 2012 were available.

Microsoft terminated Cornwell's employment on September 5, 2012, and provided Cornwell with its standard severance agreement and release. On that same day, HR signed Cornwell's 2012 performance evaluation on behalf of Cornwell, because Cornwell was no longer an employee. HR then instructed Blake to upload the performance evaluation into the management tool. Once the review was "published," any other Microsoft manager would be able to see Cornwell's final review score.

Cornwell returned to Microsoft as a contract employee through an agency in May 2013. In February 2014, Cornwell applied for a Release Manager role at Microsoft. Cornwell already knew the manager, so she contacted him directly. They set up a phone interview. Before the interview started, Cornwell received an e-mail from the

hiring manager saying he could not interview her because of her last review on file. After Cornwell learned of the poor performance evaluation, she contacted Microsoft HR and requested the review be removed from her file. HR declined to remove the review.

In January 2015, Cornwell filed a complaint for damages claiming retaliation under RCW 49.60.210.

After discovery, including depositions, on December 30, 2015, Microsoft moved for summary judgment. On January 29, 2016, the trial court granted Microsoft's motion and dismissed all claims with prejudice. In its oral ruling, the court stated:

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

After Cornwell's motion for reconsideration was denied, Cornwell filed a timely appeal.

II

A. Standard of Review

We review summary judgment orders de novo. Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is appropriate only when no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. Keck, 184 Wn.2d at 370. When making this determination, we consider all the facts and make all reasonable, factual inferences in the light most favorable to the nonmoving party. Young v. Key Pharms., Inc., 112 Wn.2d 216, 226, 770 P.2d 182 (1989).

Mere allegations or conclusory statements of facts unsupported by evidence are not sufficient to establish a genuine issue. Baldwin v. Sisters of Providence in Wash., Inc., 112 Wn.2d 127, 132, 769 P.2d 298 (1989). Nor may the nonmoving party rely on "speculation" or "argumentative assertions that unresolved factual issues remain." Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). "On summary judgment review, we may affirm the trial court's decision on any basis within the record." Davidson Serles & Assocs. v. City of Kirkland, 159 Wn. App. 616, 624, 246 P.3d 822 (2011).

B. The Washington Law Against Discrimination

The WLAD was enacted to "eliminate and prevent discrimination in Washington." Currier v. Northland Servs., 182 Wn. App. 733, 741, 332 P.3d 1006 (2014); RCW 59.60.010. In relevant part, the WLAD declares as a civil right:

> The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right. This right shall include, but not be limited to:
>
> (a) The right to obtain and hold employment without discrimination.

RWC 49.60.030(1)(a).

"The WLAD also extends broad protection to 'any person' engaging in statutorily protected activity from retaliation by an employer or 'other person.'" Currier, 182 Wn. App. at 742. RCW 49.60.210(1) provides:

> It is an unfair practice for any employer . . . to discharge, expel, or otherwise discriminate against any person because he or she has opposed any practices forbidden by this chapter, or because he or she

> has filed a charge, testified, or assisted in any proceeding under this chapter.

To establish a prima facie case for retaliation, a plaintiff must show that "(1) he or she engaged in statutorily protected activity, (2) he or she suffered an adverse employment action, and (3) there was a causal link between his or her protected activity and the other person's adverse action." Currier, 182 Wn. App. at 742; Delahunty v. Cahoon, 66 Wn. App. 829, 839, 832 P.2d 1378 (1992). If the plaintiff establishes a prima facie case, then the burden shifts to the defendant who "may rebut the claim by presenting evidence of a legitimate nondiscriminatory reason for the adverse action." Currier, 182 Wn. App. at 743. If the defendant meets its burden, then the plaintiff must present evidence that the reason is pretextual. Currier, 182 Wn. App. at 743.

C. Causation

It is undisputed that the second element of Cornwell's retaliation claim was met: Cornwell was terminated and was denied future employment by Microsoft. The first and third element are in dispute. But because we hold, as did the trial court, that Cornwell failed to provide sufficient evidence to support the causation element of her prima facie case for retaliation, we need not decide whether Cornwell's 2005 legal action was "protected activity" under WLAD.

In order to prove causation, the plaintiff must present sufficient evidence to show the protected activity was a cause of the adverse employment action. Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 70, 821 P.2d 18 (1991). The plaintiff need not show that retaliation was the only or "but for" cause of the adverse employment action, instead the plaintiff must show that the exercise of a statutory right protected by

WLAD was "a significant or substantial factor" in the adverse action. Allison v. Housing Auth., 118 Wn.2d 79, 85-96, 821 P.2d 34 (1991); Wilmot, 118 Wn.2d at 71.

"Because employers rarely will reveal they are motivated by retaliation, plaintiffs ordinarily must resort to circumstantial evidence to demonstrate retaliatory purpose." Vasquez v. State, 94 Wn. App. 976, 985, 974 P.2d 348 (1999). "Proximity in time between the adverse action and the protected activity, coupled with evidence of satisfactory work performance and supervisory evaluations suggests an improper motive." Kahn v. Salerno, 90 Wn. App. 110, 130-31, 951 P.2d 321 (1998).

It is essential when finding a causal link that the parties provide "evidence that the employer was aware that the plaintiff had engaged in the protected activity." Cohen v. Fred Meyer, Inc., 686 F.2d 793, 796 (9th Cir. 1982).[5] "[I]f the employee establishes he or she participated in an opposition activity, the employer knew of the opposition activity, and he or she was discharged, then a rebuttable presumption is created in favor of the employee that precludes us from dismissing the employee's case." Kahn, 90 Wn. App. at 131 (emphasis added).[6]

III

Cornwell's primary argument on appeal is that "Microsoft as a corporation had knowledge of Cornwell's protected activity because Blake and others investigated Cornwell's prior 'lawsuit.'" Cornwell urges this court to adopt the "general corporate knowledge" principle for retaliation cases. According to Cornwell, under this principle,

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[5] See also Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1354 (11th Cir. 1999) (quoting Goldsmith v. City of Atmore, 996 F.2d 1155 (11th Cir. 1993)) (at a minimum, a plaintiff must generally establish the employer was actually aware of the protected expression at the time it took adverse employment action).

[6] See also Wilmot, 118 Wn.2d at 69; Graves v. Dep't of Game, 76 Wn. App. 705, 712, 887 P.2d 424 (1994); Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

"the plaintiff is not required to show that the person who took the adverse employment action knew of the protected activity, but that the employer had 'general corporate knowledge' of the protected activity." Here, because someone in Microsoft's HR or LCA department may have known about Cornwell's 2005 legal action, this general corporate knowledge would be imputed to Blake and support a reasonable inference that Blake knew or suspected that Cornwell had engaged in protected activity.

For this argument, Cornwell relies primarily on Gordon v. New York City Bd. Of Educ., 232 F.3d 111 (2d Cir. 2000).[7] Gordon, however, does not fully stand for the principle urged by Cornwell. In Gordon, the court listed four elements for establishing a prima facie case of retaliation under Title VII: "(1) [plaintiff] was engaged in an activity protected under Title VII; (2) the employer was aware of plaintiff's participation in the protected activity; (3) the employer took adverse action against plaintiff; and (4) a causal connection existed between the plaintiff's protected activity and the adverse action taken by the employer." 232 F.3d at 116. In determining whether the "employer was aware" the court held, "[n]either 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." Gordon, 232 F.3d at 116 (emphasis added).

However, when the court considered the "causal connection" element, it held, "[t]he lack of knowledge on the part of particular individual agents is admissible as some

[7] The WLAD was patterned after Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2. Decisions interpreting Title VII are persuasive authority for interpreting the WLAD. Oliver v. Pac. Northwest Bell Tel. Co., 106 Wn.2d 675, 678, 724 P.2d 1003 (1986); Estevez v. Faculty Club of Univ. of Washington, 129 Wn. App. 774, 793, 120 P.3d 579 (2005).

evidence of a lack of a causal connection, countering plaintiff's circumstantial evidence of proximity or disparate treatment." Gordon, 232 F.3d at 117. Holding retaliation can be found "even if the agent denies direct knowledge of a plaintiff's protected activities, for example, so long as the jury finds that the circumstances evidence knowledge of the protected activities or the jury concludes that an agent is acting explicitly or implicit upon the orders of a superior who has the requisite knowledge." Gordon, 232 F.3d at 117 (emphasis added). Thus, the Second Circuit's approach in Gordon still requires that someone participating in the adverse action knows about the protected activity when determining if a "causal connection" exists.

No Washington case has relied on Cornwell's "general corporate knowledge" principle in a WLAD case, nor has the Ninth Circuit Court of Appeals in a Title VII case. For example, in Raad v. Fairbanks North Star Borough School Dist., 323 F.3d 1185 (9th Cir. 2003), the Ninth Circuit examined the knowledge necessary to demonstrate causation.[8] In Raad, the plaintiff, Raad, filed a complaint for unlawful discrimination in September 1992 after being unable to secure a permanent teaching position. In August 1993, after again being rejected for a permanent position, Raad demanded to see the school district superintendent and threatened to take action against the district. Raad, 323 F.3d at 1190-91. Subsequent to the August 13, 1993, event, Raad was turned down for teaching positions four more times by school principals. Raad claimed these four hiring decisions were retaliation for her August 13, 1993 activity. Raad, 323 F.3d at 1197. The Ninth Circuit held that the plaintiff failed to make the prima facie showing of

[8] In the Ninth Circuit, the plaintiff in a retaliation case under Title VII, must put forth evidence sufficient to show that "(1) she engaged in a protected activity, (2) she suffered an adverse employment action, and (3) there was a causal link between her activity and the employment decision." Raad, 323 F.3d at 1197.

causation because there was no evidence that the decision makers had knowledge of her August actions. As the court explained:

> In order to prevail, Raad must present evidence from which a reasonable trier of fact could conclude that the school principals who refused to hire her were aware that she had engaged in protected activity. Raad argues that her complaints regarding Kerr-Carpenter's 1992 hiring decisions were known to Moore and Gallentine, as well as to most principals, who were typically informed when discrimination complaints were made. However, Raad fails to point to any evidence in the record supporting her assertion that Layral and Thibodeau, the particular principals who made the allegedly retaliatory hiring decisions, in fact were aware of her complaints. Without any such evidence, there is no genuine issue of material fact.

Raad, 323 F.3d at 1197 (internal citation omitted).

We decline Cornwell's invitation to adopt the "general corporate knowledge" principle for retaliation cases. In accordance with existing law, Cornwell needed to provide evidence that Blake or McKinley had knowledge that she had engaged in protected activity prior to Cornwell's termination.

Cornwell argues alternatively that summary judgment was not appropriate because a jury could "reasonably infer that Blake suspected the legal issue was more likely than not a discrimination complaint or some other protected activity." But Cornwell offers no evidence supporting her claim Blake's knowledge of her past litigation was a substantial factor in her termination. Cornwell offers only that she informed Blake in late 2011 and early 2012 that she had been involved in litigation involving Parsons but that she could not discuss the details. There is no evidence that Blake knew, or ever learned the nature of the prior litigation outside of what Cornwell had told her. While Blake reached out to HR for additional information, she was informed by HR that it had no information.

The evidence, viewed in the light most favorable to Cornwell, demonstrates only that Blake knew of a prior legal action involving Parsons. There is no evidence Blake or McKinley knew that Cornwell's seven-year-old legal action involved protected activities. Cornwell's speculative argument is insufficient to defeat a motion for summary judgment. Cornwell failed to make the prima facie showing that Blake or McKinley had knowledge that she had engaged in a protected activity, or that the exercise of a protected activity was "a significant or substantial factor" in her termination. Summary judgment was appropriate.

Affirmed.

WE CONCUR:

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DAWN CORNWELL, Appellant, v. MICROSOFT CORPORATION, a Delaware Corporation, Respondent.	No. 74919-6-I DIVISION ONE ORDER DENYING MOTION FOR RECONSIDERATION AND AMENDING OPINION

The panel has reviewed appellant Dawn Cornwell's motion for reconsideration and has determined that the opinion filed June 5, 2017 should be amended to correct a clerical error. It is therefore,

ORDERED that the opinion be amended as follows:

DELETE the first sentence of the second paragraph on page 1:

> Patricia Cornwell filed an action for retaliation under the WLAD after she was terminated by Microsoft in 2012.

REPLACE the above sentence with the following:

> Dawn Cornwell filed an action for retaliation under the WLAD after she was terminated by Microsoft in 2012.

And it is further

ORDERED that the motion for reconsideration is denied.

Done this 13th day of July 2017.

FOR THE PANEL:

Mann, J.

BEAN LAW GROUP

August 10, 2017 - 1:43 PM

Filing Petition for Review

Transmittal Information

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