No. 94846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DAWN CORNWELL,

Petitioner,

v.

MICROSOFT CORPORATION,

Respondent.

BRIEF OF *AMICI CURIAE* THE ASSOCIATION OF WASHINGTON BUSINESS AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

The Association of Washington Business ("AWB") and the Chamber of Commerce of the United States of America ("Chamber") (together, "*Amici*") approach this Court concerned about the Petitioner's effort to limit the ability of Washington employers to obtain summary judgment dismissing retaliation claims that lack supporting evidence. The Petitioner would have this Court ignore well-established case law, both in Washington and in federal courts, regarding a plaintiff's burden in presenting evidence on the causation element for retaliation claims under the Washington Law Against Discrimination ("WLAD").

In practical terms, the Petitioner advocates a new rule that would allow the plaintiff in a retaliation case to avoid summary judgment by showing little more than the fact that, at some point in the distant past, the employee engaged (or believed she engaged) in protected activity under the WLAD and later (in this case, seven *years* later) was subjected to an adverse employment action. Petitioner asks the Court to hold that a plaintiff raises an issue of fact on the causation element of a retaliation claim simply by suggesting that a decision maker may have "suspected that the plaintiff has engaged in protected activity." Pet. Supp. Br. at 6. In the alternative, Petitioner asks the Court to hold that mere "general

corporate knowledge" of the protected conduct can create an issue of fact as to causation, even without proof that *anyone* involved in the adverse action knew of the protected activity. *Id.* at 11.

This has never been the law, in Washington or elsewhere. Instead, courts have consistently (and properly) held that a plaintiff cannot avoid summary judgment in a retaliation case without evidence—as opposed to a hunch or speculation—that a decision maker involved in the adverse action had knowledge that the employee engaged in protected activity. Petitioner gives this Court no reason to believe that meritorious claims have been dismissed as a result of the long-accepted approach to causation on summary judgment. As a result, adopting the new rule Petitioner advocates would impose an unnecessary and unfair burden on Washington employers without furthering any important policy under the WLAD.

For these reasons, *Amici* ask the Court to affirm the decision of the Court of Appeals.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

A. Association of Washington Business

Association of Washington Business ("AWB") is Washington State's Chamber of Commerce and principal representative of the state's business community. AWB is the state's oldest and largest general

business membership federation, representing the interests of approximately 7,000 Washington companies who, in turn, employ over 700,000 employees, approximately one-quarter of the state's workforce. AWB serves as both the state's Chamber of Commerce and the manufacturing and technology association. AWB members are located in all areas of Washington, represent a broad array of industries, and range from sole proprietors and very small employers to the large, recognizable, Washington-based corporations that do business across the country and around the world. While its membership includes major employers, 90 percent of AWB members employ fewer than 100 people, and more than half of AWB's members employ fewer than ten. AWB members include all types of employers that conduct business both in and out of state.

AWB members rely on the consistent application of laws in every jurisdiction—but particularly in Washington. AWB members have a vested interest in the outcome of this matter.

B. The Chamber of Commerce of the United States of America

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size,

in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

III. ISSUES OF CONCERN TO *AMICI CURIAE*

This brief addresses whether the Court of Appeals applied the proper standard in granting a motion for summary judgment based on the Petitioner's failure to raise a genuine issue of fact on the causation element of a WLAD retaliation claim. To prevail on a retaliation claim under the WLAD, a plaintiff must show she engaged in protected activity and then suffered an adverse employment action as a result. Thus, there must be a causal link between the protected activity and the adverse action. Because retaliation is an intentional act, causation logically cannot be proved unless the individuals who decided on the adverse employment action knew of the protected activity.

In attacking the decision of the courts below, the Petitioner asks the Court to relax dramatically a plaintiff's burden of coming forward with evidence, at least on summary judgment. Specifically, Petitioner asks the Court to jettison the current legal standard and "adopt the 'knew or

suspected' standard in determining a causal connection," or, in the alternative, "adopt the 'general corporate knowledge' standard in determining [a] ... causal connection." Pet. Supp. Br. at 3. But the Petitioner's proposed standards would eliminate summary judgment as a meaningful tool in retaliation cases. They would allow cases to proceed to trial based on speculative conspiracy theories rather than actual evidence, direct or circumstantial. This standard, if adopted, would mean that practically every – if not every – claim of retaliation would proceed to trial, regardless of the strength of the evidence supporting it. The resulting litigation costs would have a negative impact on the viability, growth, and survival of businesses operating in Washington.

Amici respectfully ask the Court to affirm summary judgment in favor of the Respondent.

IV. STATEMENT OF THE CASE

Amici adopt and join in the Statement of the Case in the "Answer to Petition for Review" and the "Supplemental Brief of Respondent Microsoft Corporation" filed by Microsoft in this matter.

V. ARGUMENT

To recover on a retaliation claim, a plaintiff must show: (1) she was engaged in a protected activity; (2) she suffered an adverse

employment action; and (3) there is a causal link between the two. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 68 (1991); *see also* RCW 49.60.210(1); *Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 742, 332 P.3d 1006 (2014), *rev. denied*, 182 Wn.2d 1006 (2015). In this case, the Court of Appeals faithfully applied those elements when it affirmed the trial court's summary judgment for Microsoft. Petitioner has given this Court no reason to abandon settled law requiring plaintiffs to come forward with evidence—not just speculation—from which a finder of fact could conclude that decision makers knew of, and were motivated by, protected activity in making an adverse employment decision.

To show a causal link, Washington courts have long required the plaintiff to provide evidence that retaliation was a substantial factor in the employer's actions, which in turn requires proof that the decision maker knew about the protected activity. *See Francom v. Costco Wholesale Corp.*, 98 Wn. App. 845, 862 (2000). Recent Washington cases have followed this principle, making clear that a plaintiff at the summary judgment stage can raise an issue of fact as to causation only by "provid[ing] evidence that the individuals he alleges retaliated against him knew of his protected activity." *Marin v. King Cty.*, 194 Wn. App. 795, 818, 378 P.3d 203, 217 (2016), *rev. denied* 186 Wn.2d 1028 (2016); *see*

also Woodbury v. City of Seattle, 198 Wn. App. 1069, 2017 WL 1906110 at *4 (2017); *Tang v. City of Seattle*, 194 Wn. App. 1054, 2016 WL 3800634 at *11 (2016);*Young v. King Cty.*, 195 Wn. App. 1048, 2016 WL 4442571 at *6 (2016); *Michkowski v. Snohomish Cty.*, 185 Wn. App. 1057, 2015 WL 677397 at *5 (2015), *rev. denied*, 184 Wn.2d 1004 (2015).

Washington is not alone. The federal circuit courts that have addressed the issue have held that a retaliation plaintiff cannot survive summary judgment on causation without presenting evidence that the decision maker knew or was aware of the protected activity. *See Stephens v. Erickson*, 569 F.3d 779, 788 (7th Cir. 2009) (affirming summary judgment where plaintiff "produced no evidence that *any* of the [decision makers] knew of his ... lawsuit or his history of discrimination complaints"); *Littleton v. Pilot Travel Centers, LLC*, 568 F.3d 641, 645 (8th Cir. 2009) (affirming summary judgment where decision maker "had no knowledge" of the protected activity); *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (affirming summary judgment given absence of "any evidence in the record supporting [plaintiff's] assertion that" the decision makers "in fact *were* aware of her complaints"); *Raney v. Vinson Guard Service, Inc.,* 120 F.3d 1192, 1197–98 (11th Cir.1997) (affirming summary judgment where

plaintiff offered only a "hunch" that decision maker knew of plaintiff's plan to file EEOC charges).

Indeed, even the cases on which Petitioner relies recognize the need for evidence of the decision maker's knowledge of the allegedly protected activity. For example, Petitioner asks this Court to "adopt the 'general corporate knowledge' standard in determining [a] ... causal connection," Pet. Supp. Br. at 3, as set forth in *Gordon v. New York City Bd. of Educ.*, 232 F.3d 111 (2d Cir. 2000). As the Court of Appeals explained, however, even *Gordon* "requires that someone participating in the adverse action knows about the protected activity when determining if a 'causal connection' exists." *Cornwell v. Microsoft Corp.*, 199 Wn. App. 1015, at *6 (2017). And in *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107 (9th Cir. 2003), the case on which Petitioner principally relies for her "knew or suspected" standard, the Ninth Circuit detailed facts—including termination within days of protected activity adverse to the decision maker —from which a fact finder could reasonably infer a supervisor acted in direct retaliation for the employee's complaint to HR about his conduct.

All of these cases, including the decision of the Court of Appeals here, recognize that a plaintiff must offer evidence that a decision maker acted knowing of and in response to protected activity. Petitioner does not

suggest these cases reach the wrong result, or that worthy retaliation cases are being dismissed without the benefit of a trial. Instead, Petitioner asks this Court to establish a new standard to accommodate her own conspiracy theory that a Microsoft supervisor colluded with its HR Department to retaliate for alleged protected activity that occurred *seven years* earlier, when the Company and the Petitioner were involved in a confidential matter involving entirely different individuals. No facts in the record support this conspiracy theory, and it provides no reason for this Court to abandon the settled causation test used here and across the country in favor of allowing a trial whenever a plaintiff argues a decision maker may have "suspected" protected activity or whenever there is "corporate knowledge" of protected activity. Washington employers have a right to expect that courts will decide retaliation claims under the WLAD based on specific facts, not "hunches," guesswork, or speculation. Our courts have agreed for decades that summary judgment is appropriate in discrimination cases when the plaintiff can identify no facts supporting his claim other than "conclusions and opinions" even if a "sincere belief." *Grimwood v. Univ. of Puget Sound., Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988). Petitioner offers no rationale to vary from that rule now.

To prove unlawful retaliation, the employee must show a connection between the protected activity and the adverse effect on the terms or conditions of employment. Often, this connection takes the form of timing. For example, an inference of causation may arise if an employee with a clean record is suddenly disciplined immediately after engaging in a protected activity, or if an employee shortly after engaging in protected activity is disciplined for something other employees are not disciplined for. *Cf. Littleton*, 568 F.3d at 645 (affirming summary judgment where adverse action occurred seven months after protected activity; "the alleged retaliatory action was not sufficiently contemporaneous to the protected activity to raise the inference of a causal connection"). In those circumstances, the employer may need to rebut that inference with a non-retaliatory reason for the discipline or the change in working conditions. Once an employer makes this showing, the burden then shifts to the employee to show that the reason offered by the employer is a mere pretext for retaliation. Here, however, Petitioner would have this Court abandon the fundamental requirement of evidence to support a causal connection between the employee's activity and the employer's action.

Adopting Petitioner's approach to causation would, as a practical matter, eliminate the causation element of a retaliation plaintiff's prima facie case. As long as a plaintiff could show "corporate knowledge" or identify a theory under which others might know of her protected activity, an innocent employer would be unable to obtain summary judgment. Instead, the employer would be put to the expense (and distraction) of trial—a particularly disruptive process for small employers—or to reach a settlement with a plaintiff (such as Petitioner here) who can offer nothing more than a conspiracy theory, unsupported by any logical inference.

Businesses and individuals rely on continuity in the law, which allows them to order their affairs based on expectations of stability. Here, Petitioner asks the Court to change time-honored standards for summary judgment on retaliation claims without offering *any* reason to believe the current standards result in the dismissal of meritorious claims. Petitioner's request for a new standard to govern summary judgments on the causation element seeks a gratuitous change that would upset the balance struck not only by courts in Washington but by federal circuits across the country. The effect would be to provide plaintiffs substantive rights beyond the bounds established by the Legislature, to force businesses to incur substantial costs even when they did nothing wrong, and to eviscerate the

utility of summary judgments in retaliation cases—even though "[s]ummary judgment motions are important to the process of resolving disputes." *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396, 402 (1997).

If sustained, Petitioner's new reading of the summary judgment standard for WLAD claims would create unfair risk, uncertainty, and liability for Washington companies who have done nothing wrong.

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VI. CONCLUSION

For the reasons stated above, *Amici* urge this Court to refrain from creating a new obligation for Washington employers under the WLAD by rejecting Petitioner's request to create a new standard for summary judgment in WLAD retaliation claims. *Amici* would ask that the Court affirm the Court of Appeals' decision affirming the superior court's grant of summary judgment in favor of Microsoft.

DATED this 30th day of April 2018.

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