

2016 WL 4472930
Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington,
at Seattle.

Katherine Moussouris, et al., Plaintiffs,
v.
Microsoft Corporation, Defendant.

CASE NO. C15-1483JLR
|
Signed 03/07/2016

Attorneys and Law Firms

Adam T. Klein, Cara B. Chomski, Elizabeth V. Stork, Ossai Miazad, Outten & Golden, LLP, Rachel J. Geman, Lieff Cabraser Heimann & Bernstein, New York, NY, Anne B. Shaver, Kelly M. Dermody, Michael Levin-Gesundheit, Yaman Salahi, Lieff Cabraser Heimann & Bernstein, Katrina L. Eiland, Outten & Golden, LLP, San Francisco, CA, Michael C. Subit, Frank Freed Subit & Thomas, Sharon M. Lee, Lieff, Cabraser, Heimann & Bernstein, LLP, Seattle, WA, for Plaintiffs.

Jessica R. Perry, Lynne C. Hermle, Orrick Herrington & Sutcliffe, Menlo Park, CA, Lauri A. Damrell, Orrick, Herrington & Sutcliffe LLP, Sacramento, CA, Wendy Butler Curtis, Orrick Herrington & Sutcliffe, Washington, DC, Mark Steven Parris, Orrick Herrington & Sutcliffe LLP, Seattle, WA, for Defendant.

ORDER

JAMES I. ROBART, United States District Judge

I. INTRODUCTION

*1 This matter comes before the court on Defendant Microsoft Corporation's motion to dismiss, strike, and for a more definite statement. (Mot. (Dkt. # 23).) Microsoft argues that Plaintiffs Katherine Moussouris, Holly Muenchow, and Dana Piermarini's (collectively, "Plaintiffs") complaint suffers from several flaws. Microsoft asks the court to strike the class definition and

the purportedly improper allegations and dismiss all six claims as insufficiently pled; in the alternative, Microsoft seeks a more definite statement for the same reasons. (See *generally* Mot.) Plaintiffs filed an opposition to Microsoft's motion (Resp. (Dkt. # 28)), to which Microsoft replied (Reply (Dkt. # 29)). Having considered the parties' submissions, the appropriate portions of the record, and the relevant law, and considering itself fully advised,¹ the court GRANTS in part and DENIES in part the motion, as described herein.

II. BACKGROUND

This case is a putative class action filed by three current or former Microsoft employees alleging gender-based employment discrimination. (See *generally* FAC (Dkt. # 8).) Plaintiffs' claims on behalf of the class are intentional discrimination and disparate impact discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. §§ 2000e, *et seq.*, and the Washington Law Against Discrimination ("WLAD"), RCW 49.60.010, *et seq.* (FAC ¶¶ 71-100.) Ms. Moussouris and Ms. Piermarini also allege retaliation in violation of Title VII, and Ms. Moussouris adds a claim for retaliation in violation of the WLAD. (*Id.* ¶¶ 101-10.) Ms. Moussouris and Ms. Piermarini bring these retaliation claims on their own behalves, not on behalf of a putative class. (*Id.*)

Plaintiffs largely fault Microsoft's employment evaluation system for Microsoft's alleged gender discrimination. (See *id.* ¶¶ 25-29, 38(c), 44, 73(a), 81, 88(a), 96.) Under the "stack ranking" system, Microsoft forced its managers to assign a score between 1, which is the best score, and 5, which is the worst score, to each of its employees, with a certain percentage of its employees receiving each score. (*Id.* ¶ 26.) In other words, even if a manager felt half of her employees deserved the highest score, the system required her to rank a certain number of them 1, a certain number of them 2, etcetera. (*Id.*) Plaintiffs assert that this system "systematically undervalued female technical employees compared to similarly situated male employees because, among other reasons, it meant that lower ranked employees were inferior and should be paid less and promoted less frequently regardless of their actual contributions to Microsoft." (*Id.*)

Microsoft performed this ranking twice each year and used it to determine midyear and end-of-year promotions.² (*Id.*) Plaintiffs further allege that Microsoft ceased using this stack ranking system in either 2013 or 2014 but has

since then used a “similarly unvalidated, [sic] and unreliable discriminatory performance evaluation procedure that systematically undervalues female technical employees relative to their male peers, and results in lower scores than men in similar positions with no better or worse objective performance.” (*Id.* ¶ 29; *see also id.* ¶ 26.)

*2 Ms. Moussouris worked for Microsoft in its Redmond, Washington office from April 2007 to May 30, 2014, at which point she alleges she was forced to resign. (*Id.* ¶¶ 54.) Microsoft initially hired her as a Security Program Manager. (*Id.* ¶ 44.) On multiple occasions during her tenure, Ms. Moussouris was told she deserved a better score on her performance evaluation but that the forced ranking process caused her score to be less favorable. (*See id.* ¶¶ 45-46.) Ms. Moussouris also alleges that she was paid less than her male peers and she and other women were passed over for promotions in favor of “less qualified and less experienced men.” (*Id.* ¶¶ 47-48; *see also id.* ¶¶ 49-51 (detailing the promotions Ms. Moussouris alleges she deserved but did not receive).)

Furthermore, Ms. Moussouris alleges that the Director of Microsoft’s Trustworthy Computing Group retaliated against her after Ms. Moussouris complained of his sexual harassment. (*Id.* ¶ 52.) According to Ms. Moussouris, in 2013, Ms. Moussouris’s manager began to reduce her role at Microsoft even though her performance never changed. (*Id.* ¶ 53.) As a result, she resigned in May 2014. On May 13, 2014, prior to her resignation, Ms. Moussouris filed a formal discrimination charge with the Equal Employment Opportunity Commission (“EEOC”). (*See* EEOC Charge (Dkt. # 8-1) at 1; FAC ¶ 20 (referencing Ms. Moussouris’s attached EEOC Charge).)³

Ms. Muenchow has worked for Microsoft’s Redmond, Washington office since approximately September 2002. (FAC ¶¶ 8, 55.) Microsoft hired her as a Software Test Engineer and promoted her to Senior I/T Operations Program Manager, a role in which she coordinates product releases to Microsoft clients. (*Id.* ¶ 55.) Ms. Muenchow has progressed from Level 58 to Level 62 during her tenure at Microsoft, and she has seen male colleagues promoted over her that Ms. Muenchow believes were less qualified. (*Id.* ¶ 57.) Like Ms. Moussouris, Microsoft subjected Ms. Muenchow to its performance review process. (*Id.* ¶ 56.) Also like Ms. Moussouris, Ms. Muenchow feels she was paid less than comparable male workers due to Microsoft’s compensation and promotion process. (*Id.* ¶ 58.) Finally, Ms. Muenchow believes that Microsoft disfavors women who take maternity or medical leave. (*Id.* ¶ 59.)

Microsoft hired Ms. Piermarini in September 2006 as a

Solutions Analyst in its Sales Division. (*Id.* ¶¶ 10, 60.) She currently lives in Leesburg, Virginia. (*Id.* ¶ 9.) During her nine years at Microsoft, she progressed from Level 62 to Level 64, and was once denied a promotion after returning from maternity leave despite a strong performance record. (*Id.* ¶¶ 62-63.) Instead, Microsoft promoted a “male member of her team” who did not receive top performance evaluations and did not promote Ms. Piermarini until the following year. (*Id.* ¶¶ 63-64.) Ms. Piermarini believes that Microsoft’s compensation and promotion process favored men over her and that women “progress more slowly and are treated less favorably at Microsoft.” (*Id.* ¶¶ 65-67.)

In addition, like Ms. Moussouris, Ms. Piermarini reported her manager to Microsoft. (*Id.* ¶ 69.) Ms. Piermarini believed her manager was treating her less favorably because of her gender by giving her inferior work opportunities and making sexist comments. (*Id.*) That man remains Ms. Piermarini’s manager, and Ms. Piermarini alleges he has retaliated against her “by soliciting negative and demonstrably false comments about Ms. Piermarini for her 2015 end of the year performance evaluation.” (*Id.* ¶ 70.)

*3 The court now evaluates Microsoft’s motion.

III. ANALYSIS

A. Legal Standards

1. Motion to Strike under Federal Rule of Civil Procedure 12(f)

Federal Rule of Civil Procedure 12(f) provides that the court “may strike from a pleading ... any redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). “A federal court will not exercise its discretion under Rule 12(f) to strike a pleading unless the matters sought to be omitted have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party.” *Oilier v. Sweetwater Union High Sch. Dist.*, 735 F. Supp. 2d 1222, 1223-24 (S.D. Cal. 2010) (citing *Platte Anchor Bolt, Inc. v. IHI, Inc.*, 352 F. Supp. 2d 1048, 1057 (N.D. Cal. 2004)). Furthermore, “motions to strike are rarely granted in the absence of a showing of prejudice to the moving party.” *Freeman v. Alta Bates Summit Med. Ctr. Campus*, No. C 04-2019 SBA, 2004 WL 2326369, at *2 (N.D. Cal. Oct. 12, 2004) (citing 61 Am. Jur. 2d *Pleading* § 505 (1999)). This demanding standard leads district courts in the Ninth Circuit to disfavor motions to strike, which are “often used as a delaying tactic.” *Cal. Dep’t of Toxic Substances Control*

v. *Alco Pac., Inc.*, 217 F. Supp. 2d 1028, 1032-33 (C.D. Cal. 2002); see also *Cruz v. Sky Chefs, Inc.*, No. C-12-03705 DMR, 2013 WL 1892337, at *6 (N.D. Cal. 2013) (collecting cases); *Hovenkotter v. Safeco Corp.*, No. C09-0218JLR, 2009 WL 6698629, at *8-9 (W.D. Wash. Aug. 3, 2009).

2. Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6)

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the court construes the complaint in the light most favorable to the nonmoving party. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 946 (9th Cir. 2005). The court must accept all well-pled facts as true and draw all reasonable inferences in favor of the plaintiff. *Wyler Summit P'ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); see *Telesaurus VPC, LLC v. Power*, 623 F.3d 998, 1003 (9th Cir. 2010). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The court, however, need not accept as true a legal conclusion presented as a factual allegation. *Id.* Finally, dismissal under Rule 12(b)(6) can be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990).

B. Motion to Strike

1. Plaintiffs' Class Definition

Defendants first seek to strike Plaintiffs' class definition. (Mot. at 3-5.) Plaintiffs respond that "[s]triking or dismissing-class claims at the pleading stage is-only appropriate where 'the claim *could not possibly proceed* on a classwide basis,' which is clearly not the case here." (Mot. at 3 (quoting *Willis v. Enter. Drilling Fluids, Inc.*, No. 1:15-cv-00688-JLT, 2015 WL 6689637, at *7 (E.D. Cal. Oct. 28, 2015)) (citing *Sanders v. Apple Inc.*, 672 F. Supp. 2d 978, 990 (N.D. Cal. 2009))); see also *Cholakyan v. Mercedes-Benz USA, LLC*, 796 F. Supp. 2d 1220, 1245 (C.D. Cal. 2011) ("While defendant cites several cases for the proposition that class allegations can be stricken at the pleadings stage, it is in fact rare to do so in advance of a motion for class certification." (internal footnote

omitted))).

***4** The cases upon which Microsoft relies that address a motion to strike class allegations either involve a putative class definition far more facially deficient than the one at issue in this case or address a plaintiff that failed to plead the Rule 23 elements.⁴ See *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1313 (9th Cir. 1977) ("[W]here plaintiffs fail to make even a prima facie showing of Rule 23's prerequisites, as we find here, the burden is on the plaintiff to demonstrate that discovery measures are likely to produce persuasive information substantiating the class action allegations."); *John v. Natl Sec. Fire and Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007) (affirming the district court's dismissal of the class allegations on the pleadings because the plaintiff's did not contend on appeal that their proposed class was ascertainable); *Edwards v. Zenimax Media Inc.*, No. 12-cv-00411-WYD-KLM, 2012 WL 4378219, at *6 (D. Colo. Sept. 25, 2012) (concluding that the plaintiff's proposed class was "overbroad" and "unascertainable," and the class thus facially failed to meet Rule 23's requirements); *In re Vioxx Prods. Liab. Litig.*, No. 09-3713, MDL No. 1657, 2012 WL 2061883, at *5 (E.D. La. June 6, 2012) (striking class allegations where the class was "defined by inherently subjective criteria"); *Earnest v. General Motors Corp.*, 923 F. Supp. 1469, 1473-74 (N.D. Ala. 1996) (striking a class description that included "engines and/or engine control modules ... such as those in the said vehicles of the named Plaintiffs," because the "proposed class [wa]s so broad, amorphous, and vague that it fails to meet the minimum standard of definiteness"); *Peak v. Topeka Hous. Auth., City of Topeka*, 78 F.R.D. 78, 83 (D. Kan. 1978) ("[N]othing in the present complaint indicates that plaintiff or her counsel have any idea of the parameters of the proposed class or the direction discovery should take."). Plaintiffs' burden is merely to "advance[e] a prima facie showing that the class action requirements of [Rule] 23 are satisfied or that discovery is likely to produce substantiation of the class allegations." *Mantolite v. Bolger*, 767 F.2d 1416, 1424 (9th Cir. 1985).

Plaintiffs seek to represent a class "of all female technical employees employed by Microsoft in the United States" during certain time periods. (FAC ¶ 35; see also *id.* ¶¶ 36-43 (alleging additional Rule 23-related facts).) The court finds that this class definition neither facially fails to meet Rule 23's requirements nor reaches a level of implausibility that merits striking the allegation. In the January 29, 2016, telephone hearing, the court expressed its concerns about the proposed class definition and its ability to withstand Rule 23 scrutiny after the Supreme Court's decision in *Wal-Mart v. Dukes*. See 564 U.S. 338 (2011); (Min. Entry (Dkt. # 49).) However, Microsoft makes no showing that Plaintiffs fail to allege facts

sufficient to support each of Rule 23's requirements. (See generally Mot.; see also FAC ¶¶ 35-43); *Grundmeyer v. Allstate Prop. & Cas. Ins. Co.*, No. C15-0464RSL, 2015 WL 9487928, at *1 (W.D. Wash. Sept. 29, 2015) (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1041 (9th Cir. 2010)) ("The question, therefore, is whether the allegations in the [operative] Complaint state 'plausible' grounds for class certification or whether they are so conclusory or formulaic that they should be disregarded.... If the class allegations are legally or factually defective,... dismissal is appropriate."). In sum, this action is not the type of case in which "the claim could not possibly proceed on a classwide basis," and the court declines to strike the class allegations. *Willis*, 2015 WL 6689637, at *7.

Plaintiffs allege that they observed and intuited instances of institutionalized gender discrimination at Microsoft. (See FAC ¶¶ 28, 34, 47-51, 57-59, 62-66.) Plaintiffs deserve the chance to develop the facts surrounding their class definition—and if necessary, the class definition itself—through class discovery. Accordingly, the court denies Microsoft's motion to strike the class definition.

2. Timeliness of Plaintiffs' Title VII Claims

*5 Microsoft also contends that Plaintiffs' Title VII claims include untimely allegations and moves to strike those claims. (Mot. at 5-6.) Title VII requires an employee to file a charge with the EEOC within a certain period of time-of the offending action. See 42 U.S.C. § 2000e-5(e). If the alleged discrimination occurred in a state with its own anti-discrimination agency and enforcement mechanism, referred to in this context as a "deferral state," the charge must be filed within 300 days of the underlying, allegedly unlawful employment practice.⁵ *Id.* § 2000e-5(e)(1). On the other hand, if the alleged discrimination occurred in a state without its own anti-discrimination agency and enforcement mechanism, referred to as a "non-deferral state," the complainant has only 180 days from the action to file a charge with the EEOC. *Id.*

Generally, filing a class action tolls the statute of limitations for all putative class members until class certification is adjudicated. *Crown, Cork, & Seal Co. v. Parker*, 462 U.S. 345, 352-54 (1983) ("Rule 23 both permits and encourages class members to rely on the named plaintiffs to press their claims."). In the employment discrimination context, this rule allows a putative class representative to "represent all class members whose claims were not already time-barred at the time he filed his [EEOC] charge, irrespective of whether the class members had filed charges of their

own."⁶ *Domingo v. New England Fish Co.*, 727 F.2d 1429, 1442 (9th Cir. 1984).

Microsoft acknowledges this law and that Ms. Moussouris filed her EEOC charge on May 12, 2014. (Mot. at 5 (citing FAC ¶ 20).) However, Microsoft contends that because the putative class is nationwide, the 300-day limitation period does not apply to all individuals. (Mot. at 5.) Instead, for putative class members in non-deferral states, Microsoft argues that a 180-day limitation period applies. (*Id.*) In other words, Microsoft argues that claims in non-deferral states are timely if filed 180-or-fewer days before Ms. Moussouris filed her EEOC charge, whereas claims in deferral states are timely if filed 300-or-fewer days before that date. (*Id.*) That interpretation would require the court to bifurcate its application of the statute of limitations depending on the employee's state of residence. According to Microsoft, class members working in non-deferral states could have valid claims beginning on November 15, 2013, whereas class members working in deferral states could have valid claims beginning on July 18, 2013. (*Id.*) Microsoft accordingly seeks to strike the claims of class members in non-deferral states occurring before November 15, 2013. (*Id.*; see also FAC ¶ 35.)

The parties' dispute boils down to a question of law: When a putative class representative files an EEOC charge in a deferral state, what impact does that have on the limitations period for putative class members who were allegedly discriminated against in non-deferral states? The parties' briefing on this subject is limited to approximately two pages from Microsoft (see Mot. at 5-6; Reply at 4-5) and two pages from Plaintiffs (see Resp. at 5-7), and the parties dedicate the majority of their briefing to debating a case from the Eastern District of Michigan (see Mot. at 6 (citing *Dallas v. Alcatel-Lucent USA, Inc.*, No. 09-14596, 2012 WL 424878, at *7-8 (E.D. Mich. Feb. 9, 2012)); Resp. at 6-7 (same); Reply at 4-5 (same)). The court finds *Alcatel-Lucent's* abbreviated discussion at a different stage in the litigation uninformative and the abbreviated briefing insufficient to determine this legal question. See 2012 WL 424878, at *8.

*6 The court finds Microsoft has not met its burden under Rule 12(f) to demonstrate that Plaintiffs' impugned Title VII allegations are "redundant, immaterial, impertinent, or scandalous." Fed. R. Civ. P. 12(f). Although the motion raises a relevant dispute, the underlying legal question is unsuited for determination on a motion to strike. Accordingly, the court denies Microsoft's motion to strike Plaintiffs' untimely Title VII allegations without prejudice to reraising the same legal question at a different juncture.

3. Timeliness of Plaintiffs' WLAD Claims

Microsoft also seeks to strike Plaintiffs' allegations of discrimination under the WLAD, which date back to July 18, 2010. (See Mot. at 6 (citing FAC ¶ 35).) Microsoft argues that the WLAD's three-year statute of limitations bars allegations beginning before September 16, 2012, which is three years before the original complaint was filed in this case. (Compl. (Dkt. # 1) at 1.) Plaintiffs agree that a three-year statute of limitations applies, but they contest how Microsoft calculates the relevant date. (Resp. at 15.) Plaintiffs argue that Ms. Moussouris tolled the statute of limitations for the entire class when she filed her EEOC charge. (*Id.*) Therefore, Plaintiffs conclude, the three-year period should be calculated in one of two ways: (1) by subtracting three years from the date Ms. Moussouris filed her EEOC charge—May 14, 2014—or (2) by subtracting three years from a date 300 days before Ms. Moussouris filed her EEOC charge. (*Id.*)

Although Plaintiffs advocate the second method of calculation, which would render claims timely if the underlying actions occurred by July 18, 2010, they cite no authority supporting this application of the WLAD's statute of limitations. (*Id.*; see also FAC ¶ 135 (alleging WLAD claims beginning on July 18, 2010).) Plaintiffs' only argument to this effect is that "if a claim arose 300 days prior to the filing of the EEOC charge, it would be timely, both under Title VII and the WLAD. Accordingly, the class period for WLAD claims runs from three years plus 300 days prior to the EEOC charge filing, or July 18, 2010." (Resp. at 15.) This conclusory argument is unpersuasive, and the court cannot, identify a legal basis to add the 300-day EEOC limitations period for deferral states to the three-year WLAD statute of limitations. To do so would effectively combine the 300-day limitations period under Title VII and the three-year statute of limitations under the WLAD, a novel application of law without any legal support. Accordingly, the court concludes that Plaintiffs' class period for its WLAD claims cannot begin earlier than May 14, 2011, which is three years prior to the date Ms. Moussouris filed her EEOC charge. (Mot. at 15 (citing *Chen-Oster v. Goldman Sachs*, 285 F.R.D. 294, 308 (S.D.N.Y. 2012)).)

Microsoft also seeks to strike Plaintiffs' allegations to the extent they include WLAD claims occurring between May 14, 2011, and September 16, 2012. (Mot. at 6.) Plaintiffs calculate the former date by subtracting three years from the date Ms. Moussouris filed her EEOC charge (Resp. at 15), whereas Microsoft calculates the latter date by subtracting three years from the date Plaintiffs filed their initial complaint in this lawsuit (Mot. at 6). The only case law Microsoft cites that directly

supports its calculation appears in its reply, which gave Plaintiffs inadequate opportunity to respond to Microsoft's argument. (Reply at 5 (citing *Milligan v. Thompson*, 953 P.2d 586, 596-97 (Wash. Ct. App. 1998)).) Moreover, the court again lacks sufficient briefing—three paragraphs from Microsoft and one from Plaintiffs—to conclusively determine this legal question at this stage. The court accordingly concludes Microsoft has not demonstrated that the WLAD claims occurring between May 14, 2011, and September 16, 2012 "have no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party," and declines to strike those allegations. *Oilier*, 735 F. Supp. 2d at 1223.

*7 The court strikes Plaintiffs' WLAD claims to the extent they pertain to employment at Microsoft prior to May 14, 2011, because they "could have no possible bearing on the subject of the litigation." *Platte Anchor*, 352 F. Supp. 2d at 1057; (see EEOC Charge at 1.) However, the court declines to strike Plaintiffs' WLAD claims occurring after May 14, 2011, without prejudice to reraising whether the WLAD's statute of limitations should be calculated in the manner Microsoft suggests in its motion.

4. Extraterritorial Application of the WLAD to Non-Washingtonian Putative Class Members

Microsoft also moves to strike Plaintiffs' WLAD claims to the extent they purport to apply outside of the State of Washington. (Mot. at 6-11.) Microsoft argues that the WLAD conflicts with the law of many other states, and employees working outside of Washington lack sufficient contacts with Washington State to constitutionally apply Washington law to their claims. (*Id.*) Plaintiffs respond that the WLAD applies extraterritorially and Microsoft's conflict of laws argument is misleading.

In order for the court to constitutionally apply Washington law to the entire nationwide class, Washington law must (1) not conflict with the law of another jurisdiction with an interest in the case and (2) "have a 'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class, contacts 'creating state interests,' in order to ensure that the choice of [Washington] law is not arbitrary or unfair." *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22 (1985) (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981)); see also *Allstate*, 449 U.S. at 312-13 ("[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally

unfair.”). At least one district court in the Ninth Circuit has granted a motion to strike putative class claims based on a conflict of laws analysis. *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1027-28 (N.D. Cal. 2007).

Besides the information that Ms. Moussouris and Ms. Muenchow lived and worked in Washington and Ms. Piermarini lives in Virginia, the court has before it no allegations regarding the place of residence or place of work of the rest of the nationwide class. (*See* FAC 5-10.) For instance, Microsoft argues that there is a conflict between the WLAD and Idaho’s analogous law, but nothing before the court indicates that Idaho has a connection to this lawsuit. (Mot. at 7-8; *see also id.* at 8 n.5 (listing 17 other states, including Virginia, that purport to share this conflict with Washington law).) Even if Microsoft has employees in all 50 states that would be members of the putative class, Microsoft seems to tacitly concede that some of those states’ laws do not conflict with Washington law. In other words, the court cannot determine at this stage which other jurisdictions have “an interest in the case.” *Phillips*, 472 U.S. at 815-22 (“There can be no injury in applying [a state’s] law if it is not in conflict with that of any other jurisdiction connected to this suit.”); *cf. id.* at 815 (noting that “over 99% of the gas leases and some 97% of the plaintiffs in th[e] case had no apparent connection to the State of Kansas except for th[e] lawsuit”).

*8 The court is likewise unable to conclude that Plaintiffs fail to allege sufficient classwide connections to Washington. *Id.* at 821-22. Plaintiffs assert that Microsoft’s “uniform, unvalidated, and unreliable procedures for evaluating employee performance ... systematically undervalue[d] female technical employees.” (FAC ¶ 25; *see also id.* ¶ 29.) Microsoft argues that this ranking system depends on locality, and the court notes that Plaintiffs fail to link that system, except in conclusory fashion, to the purported disparate impact on female technical employees. (Mot at 10; *see, e.g.,* FAC ¶¶ 26, 28); *see also infra* § III.C.2. However, if the employee evaluation procedure is a policy originating in Microsoft’s Washington headquarters and has the impact Plaintiffs posit, it may very well be a strong connection between each putative class member’s claims and the state of Washington. (Resp. at 17.)

The court finds that, as is the case with the majority of the motion to strike, Microsoft asks the court to make a premature determination. *See* Fed. R. Civ. P. 12(f). Although important questions exist regarding the extraterritorial application the WLAD, the slew of cases Microsoft cites address those questions at a later stage in the litigation, when the court is in a better position to

analyze them. (*See, e.g.,* Mot. at 9-10); *cf In re Graphics Processing*, 527 F. Supp. 2d at 1028 (“This order, however, sees merit in disposing of this issue at an early stage of the litigation, particularly where the issue of whether the different state’s laws will not change significantly as this action progresses.”). Accordingly, the court denies Microsoft’s motion to strike Plaintiffs’ WLAD allegations as applied extraterritorially without prejudice to reraising the argument on a factual record.

C. Motion to Dismiss

1. Plaintiffs’ Disparate Treatment Claims

Microsoft moves to dismiss Plaintiffs’ claims under Title VII and the WLAD for disparate treatment. (Mot. at 12-13.) Specifically, Microsoft argues that Plaintiffs allege only that Microsoft’s policies and practices created disparate impacts of which Microsoft was aware, but that awareness of and inaction in response to a disparate impact does not support a claim for disparate treatment. (*Id.*) Plaintiffs respond that their allegations support each element of a prima facie case of gender discrimination, which more than suffices to state a claim. (Resp. at 20-21 (citing *Sheppard v. David Evans & Assocs.*, 694 F.3d 1045, 1050 n.2 (9th Cir. 2012)).)

When a plaintiff lacks direct evidence of discrimination, she can nevertheless establish a prima facie case of gender discrimination by satisfying the four-part *McDonnell Douglas* test. *Vasquez v. Cty. Of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003). The four elements of the *McDonnell Douglas* test, are that the plaintiffs (1) belong to a protected class, (2) were was performing according to their employer’s legitimate expectations, (3) suffered an adverse employment action, and (4) other employees with similar qualifications were treated more favorably. *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir. 1998) (citing *McDonnell Douglas Corp.*, 411 U.S. 792, 802 (1973)). At the pleading stage, Plaintiffs are “not required to allege specific facts supporting each element of the prima facie showing,” but must only “include in [their] complaint facts that indicate a plausible claim for gender discrimination.” *Julien v. Vallejo City Unified Sch.*, No. C-12-02366 EDL, 2012 WL 5349504, at *6 (N.D. Cal. Oct. 29, 2012); *see also Borja-Valdez v. City & Cty. of S.F.*, No. 3:14-cv-04168-CRB, 2015 WL 5522287, at *4 (N.D. Cal. Sept. 18, 2015) (quoting *Edwards v. Marin Park, Inc.*, 356 F.3d 1058, 1062 (9th Cir. 2004)) (“The prima facie case under *McDonnell Douglas*, however, ‘is an evidentiary standard, not a pleading requirement.’”).

Plaintiffs clearly allege that they are women, which makes them a member of a protected class, and that they

performed well during their employ at Microsoft. (FAC ¶¶ 5,7, 9, 45-46, 57, 61.) Nonetheless, Plaintiffs allege that their performance evaluations, pay, and promotions suffered in comparison to similarly situated males at Microsoft. (*Id.* ¶¶ 22-25, 27, 29, 31, 34, 47-48, 50-51, 57, 61-65.) Each Plaintiff alleges at least one instance of an adverse employment action and that similarly situated men were treated more favorably. (*See id.* ¶¶ 44, 47, 49-50, 53-54, 57-59, 62-66.) These allegations state a prima facie case for intentional discrimination, and nothing more is required at this stage. *See Sheppard*, 694 F.3d at 1050 & n.2 (reasoning that a plaintiff proceeding under the *McDonnell Douglas* framework need not plead a prima facie case of discrimination, but that where a plaintiff does, “the plaintiff’s complaint will be sufficient to survive a motion to dismiss”). Plaintiffs also allege with some factual specificity that they have observed similar treatment of other women at Microsoft. (*See* FAC ¶¶ 51, 57, 59, 67.) These allegations are sufficient for pleading purposes to support Plaintiffs’ class claim.

***9** Based on the foregoing analysis, the court denies Microsoft’s motion to dismiss Plaintiffs’ disparate treatment claims.

2. Plaintiffs’ Disparate Impact Claims

Microsoft also moves to dismiss Plaintiffs’ Title VII and WLAD disparate impact claims.⁷ (Mot. at 15.) After substantial unpersuasive argument based on cases decided at the summary judgment stage or after fact finding (*see id.* at 13-15), Microsoft levels its principal contention: Plaintiffs fail to plausibly link Microsoft’s “stack-ranking” employee review policy with the alleged disparate impact on gender (*Id.* at 15 (“Plaintiffs have alleged no facts tending to show that Microsoft’s performance review system, or some part of it, *caused* a relevant and statistically significant disparity between men and women.”)). Microsoft therefore concludes that Plaintiffs have failed to allege facts that plausibly imply a causal link between Microsoft’s policy and the alleged disparate impact on female employees, which is one of the elements of Plaintiffs’ prima facie burden. (*Id.* at 15-17.)

“To establish a prima facie case of disparate impact under Title VII, the plaintiffs must: (1) show a significant disparate impact on a protected class or-group;(2) identify the specific employment practices or selection criteria at issue; and (3) show a causal relationship between the challenged practices or criteria and the disparate impact.” *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1190 (9th Cir. 2002); *see also Watson v. Fort Worth Bank and Tr.*, 487 U.S. 977, 994-95 (1988) (“Once the employment

practice at issue has been identified, causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”). However, at the pleading stage, “[t]he burden of establishing a prima facie case is not onerous.... The plaintiff must only make allegations sufficient to raise an inference or presumption of discrimination.” *Gilley v. JPMorgan Chase Bank, N.A.*, No. 12CV1774 AJB (JMA), 2012 WL 10424926, at *3 (S.D. Cal. Oct. 12, 2012) (citing *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254(1981)).

The court agrees that Plaintiffs fail to allege any facts from which the court can plausibly infer that the allegedly offending employment practice causes the alleged disparate impact.⁸ Plaintiffs’ description of the stack ranking system makes clear why the forced curve might lower an employee’s final score from the score the employee’s manager felt the employee deserved before applying the curve. (*See id.* ¶¶ 26, 45-46.) However, nowhere does the operative complaint plausibly allege why this system might “systematically undervalue [] female” employees or why the impact would be limited to “technical” employees. (*Id.* ¶ 26.) For example, the complaint asserts that the “stack ranking process ... meant that lower ranked employees were inferior and should be paid less and promoted less frequently regardless of their actual contributions to Microsoft.” (*Id.*) However, that allegation never identifies any reason that the stack ranking process would systematically rank women lower than men, nor can the court plausibly infer as much. (*Id.*)

***10** Plaintiffs’ only allegations that would close this logical gap are conclusory. For example, Plaintiffs allege that “Microsoft uses uniform, unvalidated, and unreliable procedures for evaluating employee performance that systematically undervalue female technical employees relative to their similarly situated male peers.” (*Id.* ¶; *see id.* ¶ 28 (“Upon information and belief, female technical employees tended to receive lower scores than their male peers, despite having had equal or better performance during the same performance period.”); *see also id.* ¶¶ 26, 44-46, 56-58, 81, 83-84, 96-99 (providing further conclusory allegations regarding causation).) This allegation and the others like it, however, merely assert as fact the causation element of Plaintiffs’ prima facie case.

In order for the court to plausibly infer that Plaintiffs can demonstrate disparate impact liability, Plaintiffs must allege something more than the conclusory assertion that the facially neutral policy they oppose in fact causes the disparate impact they challenge. *See Iqbal*, 556 U.S. at 678. Without requiring such a nonconclusory factual

allegation, a disparate impact plaintiff could survive the pleading stage by alleging a facially neutral policy and a disparate impact and asserting that the former causes the latter. This conclusion would contravene the Supreme Court's recent jurisprudence regarding pleading standards, which requires scrutiny for plausibility. See *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 556, 570).

The court accordingly grants Microsoft's motion to dismiss Plaintiffs' disparate impact claims under Title VII and the WLAD.⁹ Plaintiffs' nonconclusory allegations do not give rise to a plausible inference that one or more of Microsoft's policies caused a disparate impact upon women. Neither party has made any argument regarding leave to amend, however, which the court is to freely grant. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (citing Fed. R. Civ. P. 15(a)). Accordingly, the court grants Plaintiffs 30 days to amend their complaint to remedy the deficiencies identified in this subsection.

3. Ms. Moussouris's Retaliation Claims

Finally, Microsoft argues that Ms. Moussouris fails to state a claim for retaliation under Title VII and the WLAD. (Mot. at 18-22.) "The requirements for establishing a retaliation claim under Title VII and WLAD are essentially the same. Under Title VII and WLAD, to establish a prima facie case for retaliation a plaintiff must show: '(1) involvement in protected activity opposing an unlawful employment practice, (2) an adverse employment action, and (3) a causal link between the protected activity and the adverse action.' " *Gillum v. Safeway, Inc.*, No. C13-2047BJR, 2015 WL 1538453, at *7 (W.D. Wash. Apr. 7, 2015) (quoting *Freitag v. Ayers*, 468 F.3d 528, 541 (9th Cir. 2006)). The only relevant difference between the claims is that Ms. Moussouris's WLAD claim lacks an exhaustion requirement. *Gonzalez v. Nat'l R.R. Passenger Corp.*, 316 Fed.Appx. 744, 746 (9th Cir. 2010).

The court concludes that Ms. Moussouris alleges a pattern of behavior that plausibly gives rise to a claim under the applicable framework. Ms. Moussouris's manager allegedly "systematically undermined Ms. Moussouris by reducing the scope of her role, even though her performance never changed." (FAC ¶ 53.) Ms. Moussouris further alleges that her manager repeatedly took away her responsibilities and assigned them to "a less qualified and less experienced man," while assigning Ms. Moussouris "low-level tasks that he never asked men at [her] level to do." (*Id.*) Eventually, Ms. Moussouris alleges she was "forced to resign" as a result of this unfair

treatment. (*Id.* ¶ 54.)

*11 These allegations evince multiple adverse employment actions because it is plausible they would have "dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 60 (2006) (internal quotations omitted); see also *Ray v. Henderson*, 217 F.3d 1234, 1240-43 (9th Cir. 2000) (espousing a broad approach to the definition of an "adverse employment action," which includes "lateral transfers, unfavorable job references, and changes in work schedules"); *Perez v. U.S. Postal Serv.*, No. C12-0315RSM, 2014 WL 3925317, at *6 (W.D. Wash. Aug. 12, 2014). Ms. Moussouris's alleged complaints "about this unfair treatment," to which Microsoft did not respond, constitute protected activity.¹⁰ (FAC ¶ 52.) Finally, the court can plausibly infer from the pattern of behavior and timeline that Ms. Moussouris alleges that her complaints caused the alleged adverse employment actions against her.¹¹

Microsoft further argues that even if Ms. Moussouris has alleged the elements of a prima facie retaliation claim, her EEOC charge fails to exhaust her constructive discharge allegations and she therefore has not effectively pled an adverse employment action. (Mot. at 20.) The court is unpersuaded. First of all, Ms. Moussouris has pled—and includes in her EEOC charge—that her supervisor took several other actions that are independently sufficient to constitute adverse employment actions. (See, e.g., FAC ¶ 53; EEOC Charge ¶¶ 20); see also *Freeman v. Oakland Unified Sch. Dist.*, 291 F.3d 632, 636 (9th Cir. 2002) (citing *B.K.B. v. Miami Police Dep't* 276 F.3d 1091, 1100 (9th Cir. 2002)) (reiterating that district courts are to "construe the language of EEOC charges with utmost liberality"). In other words, Ms. Moussouris need not rely on constructive discharge at this stage to constitute an adverse employment action. In addition, Ms. Moussouris resigned from her job approximately two weeks after filing her EEOC charge, and the actions described in her EEOC charge are "like or reasonably related to" the allegations of retaliation in her complaint. See *Leong v. Potter*, 347 F.3d 1117, 1122 (9th Cir. 2003) (citing *Sosa v. Hiraoka*, 920 F.2d 1451, 1456 (9th Cir. 1990)); (EEOC Charge ¶¶ 16-20 (detailing allegations of retaliation that mirror, often verbatim, the allegations in the complaint).) In sum, Ms. Moussouris's EEOC charge clearly evinces a retaliation claim, and that charge is not defective simply because Ms. Moussouris allegedly endured another adverse employment action several weeks after filing the charge. (EEOC Charge ¶¶ 16-20; FAC ¶ 54.)

*12 Microsoft moves to dismiss Ms. Moussouris's WLAD retaliation claim on an independent basis, arguing

that Ms. Moussouris’s forced resignation allegation cannot “survive” because “[u]nder Washington law, ‘a resignation is presumed to be voluntary.’ ” (Mot. at 21 (quoting *Washington v. Boeing*, 19 P.3d 1041, 1049 (Wash. Ct. App. 2000)).) However, the court in *Washington* made its determination on a motion for summary judgment, and the plaintiffs specific claim was constructive discharge.¹² 19 P.3d at 1049 (requiring “evidence” on summary judgment to rebut the presumption that a resignation is voluntary); *see, e.g., Sneed v. Barna*, 912 P.2d 1035, 1038 (Wash. Ct. App. 1996) (applying the presumption that a “resignation is ... voluntary” at the summary judgment stage to the plaintiffs claim that “her transfer was in reality a demotion and constituted a constructive discharge in violation of her contract”). In contrast, Microsoft has filed a Rule 12(b)(6) motion to dismiss Ms. Moussouris’s WLAD retaliation claim, and constructive discharge is but one possible adverse employment action she alleged in support of that claim. (Mot. at 21.) It is therefore unclear from Microsoft’s argument whether or how the presumption of voluntary resignation applies at this stage to Ms. Moussouris’s claim.

Irrespective of whether the presumption applies in this case, Ms. Moussouris’s allegations create a plausible inference that she suffered at least one adverse employment action while working for Microsoft. (See FAC ¶¶ 53-54 (chronicling the diminishment of Ms. Moussouris’s job duties after she complained about protected activity).) Accordingly, the court denies Microsoft’s motion to dismiss Ms. Moussouris’s retaliation claims under Title VII and the WLAD.¹³

D. Motion for a More Definite Statement

As an alternative to other relief analyzed herein, Microsoft asks the court to require a more definite statement from Plaintiffs regarding “the alleged class, time periods at issue for the claims, and the allegations to support the discrimination and retaliation claims.” (Mot. at 22-23 (citing Fed. R. Civ. P. 12(e)).) In this order, the court strikes part of Plaintiffs’ pleadings and dismisses two of Plaintiffs’ claims. *See supra* §§ III.B.3., III.C.2. Plaintiffs’ other claims and allegations are not “so vague

or ambiguous that [Microsoft] cannot reasonably prepare a response.” Fed. R. Civ. P. 12(e). The court accordingly denies Microsoft’s motion for a more definite statement.

E. Class Certification Schedule

Pursuant to the telephone conference held on January 29, 2016, which vacated the class discovery and class certification schedule, the court directs the parties to submit an agreed class discovery and class certification schedule within 15 days of the entry of this order. (See Min. Entry (vacating the scheduling order regarding class certification (Dkt. 19)).) If the parties cannot agree on an appropriate schedule, each side may instead propose a schedule and submit a supporting brief of no more than two (2) pages. After the parties submit their input, the court will determine an appropriate schedule.¹⁴

IV. CONCLUSION

***13** The court GRANTS in part and DENIES in part Microsoft’s motion (Dkt. # 23). Specifically, the court STRIKES Plaintiffs’ WLAD claims to the extent they pertain to employment at Microsoft prior to May 14, 2011, DISMISSES Plaintiffs’ Title VII and WLAD disparate impact claims, and DENIES Microsoft’s motion in all other respects. The court GRANTS Plaintiffs 30 days to amend their complaint to remedy the pleading deficiencies identified herein and DIRECTS the parties to file a proposed class discovery and certification schedule—jointly or separately—within 15 days of the entry of this order.

Dated this 7th day of March, 2016.

All Citations

Slip Copy, 2016 WL 4472930

Footnotes

¹ Both parties have requested oral argument. (Mot. at 1; Resp. at 1.) However, as the court indicated to the parties at the January 29, 2016, discovery hearing, it has concluded oral argument is not necessary to rule on Microsoft’s motion. *See* Local Rules W.D. Wash. LCR 7(b)(4).

² Plaintiffs assert that several practices contributed to discrimination in compensation and promotion, but the operative complaint provides minimal factual detail about those practices besides a description of the stack ranking system and that system’s relationship to compensation and promotion. (See FAC ¶¶ 30-34.)

- 3 “If a complaint is accompanied by attached documents, the court is not limited by the allegations contained in the complaint. These documents are part of the complaint and may be considered in determining whether the plaintiff can prove any set of facts in support of the claim.” *Durning v. First Bos. Corp.*, 815 F.2d 1265, 1267 (9th Cir. 1987) (internal citations omitted) (citing *Amfac Mortg. Corp. v. Ariz. Mall of Tempe, Inc.*, 583 F.2d 426, 429-30 (9th Cir. 1978)).
- 4 Of the cases Microsoft cites in support of striking Plaintiffs’ class definition, a small fraction address a motion to strike class allegations from the pleadings. (See Mot. at 3-5; Reply at 1-4.) Instead, most of the authority Microsoft cites makes more fact-bound determinations, such as ruling on a motion for class certification. (See *id.*) Given the distinct standards applicable to a motion for class certification, which Plaintiffs have not yet filed, and a motion to strike pleadings, which is before the court, the court rejects as unpersuasive those cases that Microsoft cites that deal with class certification.
- 5 Formally, the statute requires that a complainant actually initiate proceedings with the state or local agency. 42 U.S.C. § 2000e-5(e)(1). However, this requirement is satisfied when the EEOC refers the complaint to the state agency on the aggrieved person’s behalf—an action the EEOC is required by regulation to take. See *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 923 n.2 (9th Cir. 1982); 29 C.F.R. § 1601.13(a)(4). Accordingly, by filing with the EEOC, the aggrieved party effectively files with the relevant state agency and therefore satisfies the statutory requirement. See *Williams*, 665 F.2d at 923 n.2; 42 U.S.C. § 2000e-5(e)(1).
- 6 Courts call this doctrine “piggybacking” or the “single filing rule.” See, e.g., *E.E.O.C. v. Cal. Psychiatric Transitions, Inc.*, 644 F. Supp. 2d 1249, 1265 (E.D. Cal. 2009) (“A charge will be adequate to support piggybacking under the single filing rule if it contains sufficient information to notify prospective defendants of their potential liability and permit the EEOC to attempt informal conciliation of the claims before a lawsuit is filed.”).
- 7 Both parties cite to *Oliver v. Pacific Northwest Bell Telephone Co.*, 724 P.2d 1003, 1005-06 (Wash. 1986), as demonstrating the overlap between disparate impact claims under Title VII and the WLAD, which was patterned after Title VII. (Mot. at 13; Resp. at 19 n. 18, 20.) The court’s analysis and dismissal therefore applies to Plaintiffs’ disparate impact claims under both statutes.
- 8 Plaintiffs allege a disparate impact caused not just by Microsoft’s method of performing performance evaluations, but also “with respect to ... pay, promotions, and other terms and conditions of employment.” (FAC ¶; see also Resp. at 12 (“Plaintiffs challenge three Microsoft practices—performance evaluation (including stack ranking), compensation setting, and promotion”).) Plaintiffs assert that the performance evaluation system contributed to these other discriminatory practices. (See FAC ¶¶ 27, 31, 34.) Although Plaintiffs make specific factual allegations about the performance evaluation system, their allegations pertaining to Microsoft’s compensation and promotion practices consist largely of legal conclusions and are devoid of factual detail. See *Iqbal*, 556 U.S. at 678. For instance, Plaintiffs allege that Microsoft’s compensation practices were “uniform, unvalidated, and unreliable” and its promotion practices were “common, unvalidated, unreliable,... discriminatory,” and subjective. (*Id.* 30, 32-34.) Assuming the accuracy of Plaintiffs’ nonconclusory allegations and granting Plaintiffs all reasonable inferences, Plaintiffs have “not made the kind of factual allegations that ‘nudg[e] their claims across the line from conceivable to plausible’ ” as to these practices. *Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 997 (9th Cir. 2014) (alterations in original) (quoting *Tombly*, 550 U.S. at 570); see also *supra* n.2. The court therefore focuses its analysis of Plaintiffs’ disparate impact claim on Microsoft’s performance evaluation method, the only “specific employment practice[]” about which Plaintiffs allege meaningful factual detail. *Hemmings*, 285 F.3d at 1190; (see also FAC ¶¶ 26-29, 31, 34, 45-46.)
- 9 Because the court concludes that both disparate impact claims are insufficiently pled, it declines to consider whether Plaintiffs’ disparate impact claim under WLAD fails because it is based on discretionary decision making. (See Mot. at 17-18.)
- 10 Microsoft inaccurately characterizes Ms. Moussouris’s complaint as reliant “upon the legal conclusion that she complained about ‘unfair treatment’ sometime in 2013.” (Mot. at 19.) To the contrary, the complaint discusses “this” unfair treatment—a clear reference to the preceding allegations, which assert that Ms. Moussouris’s manager undermined Ms. Moussouris’s role and unjustifiably redistributed work in a manner that favored “less qualified and less experienced men.” (FAC ¶ 53; see also EEOC Charge ¶¶ 18 (adding that Ms. Moussouris’s manager rewrote her job description, explicitly revoking her prior duties, and that she complained about this behavior to “the Senior Director” and “an HR Generalist”), 20 (indicating that one date on which Ms. Moussouris made such a complaint was January 28, 2014).) These allegations make it plausible that Ms. Moussouris took protected behavior, as required to support a retaliation claim under Title VII and the WLAD. *Gillum*, 2015 WL 1538453, at *7.
- 11 The court declines to individually address the various cases Microsoft cites, many of which were decided at the summary judgment stage. (See, e.g., Mot. at 20 (citing *Raad v. Fairbanks N. Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003) (affirming summary judgment on the plaintiffs retaliation claim)) (“And, again, Moussouris has not presented any evidence that the manager who allegedly changed her assignment was aware of her alleged internal complaint.”).) The Federal Rules of Civil

Procedure bar Ms. Moussouris from presenting any evidence in response to a motion to dismiss for failure to state a claim. *See* Fed. R. Civ. P. 12(d). Accordingly, to the extent Microsoft's authority is specific to a later stage in the litigation, the court finds it inapposite.

- 12 The same general characterization applies to the other cases Microsoft cites in support of this argument (*see* Mot. at 21-22), and the court finds those cases unpersuasive for the same reasons.
- 13 Because the court bases this conclusion on Ms. Moussouris's allegations of retaliation occurring in 2013 and 2014, the court expresses no opinion on the relevancy, sufficiency, or timeliness of her allegation that she was retaliated against after complaining about sexual harassment in 2008. (See FAC ¶ 52; EEOC Charge ¶ 19; Mot. at 18-19; Resp. at 21 n.20, 23 n.21.)
- 14 This order obviates the requirement that Plaintiffs move for a class determination within 180 days of filing the complaint. *See* Local Rules W.D. Wash. LCR 23(i)(3). Plaintiffs' deadline to move for class certification will be based on the schedule the court sets. Additionally, the court does not favor bifurcated discovery in a putative class action and expects the parties to proceed with discovery on class issues and other topics relevant to the litigation.