

OFFICE OF ADMINISTRATIVE HEARINGS
OF THE STATE OF WASHINGTON

In Re: AMAZON DIGITAL
SERVICES, LLC,

Appellant.

Notice of Infraction No. PL-02-20

OAH Docket No. 01-2020-LI-01277

No. 2022-016-PL

DIRECTOR'S ORDER

RCW 49.76.070; RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Amended Protective Order served on September 28, 2020, and the Initial Order issued on November 21, 2021, having considered the petitions for administrative review filed by Leslie Tullis and the Department of Labor & Industries (Department), and the briefing submitted to the Director's Office, and having considered the record developed at the Office of Administrative Hearings, issues this Director's Order.

The parties are the Department, Amazon Digital Services, LLC (Amazon), and Leslie Tullis.

Amazon is ordered to pay two penalties of \$500.00 each for violations of RCW 49.76.040(7) and RCW 49.76.120. Amazon is further ordered to reinstate Leslie Tullis to her position of employment at the time of termination, as authorized by RCW 49.76.080(2) and WAC 296-135-140(2)(c).

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. On September 26, 2019, the Department issued Notice of Infraction No. PL-02-20 to Amazon. The Notice of Infraction imposed two penalties of \$500.00 each for violations of RCW 49.76.040(7) and RCW 49.76.120. The Notice of Infraction also ordered Amazon to reinstate Leslie Tullis to her position of employment at the time of termination, as authorized by RCW 49.76.080(2). Amazon timely filed its appeal on October 16, 2019.
2. A hearing was conducted before the Office of Administrative Hearings. On November 1, 2021, an administrative law judge issued the Initial Order in this matter. The Initial Order affirmed in part and reversed in part the Department's Notice of Infraction No. PL-02-20. The Initial Order affirmed the \$500.00 fine for Amazon's violation of RCW 49.76.040(7), and reversed the Department's determination that Amazon violated RCW 49.76.120, setting aside the second \$500.00 fine and the order to reinstate Tullis to her former position.
3. On November 29, 2021, the Department timely filed a petition for administrative review with the Director. Tullis timely filed a petition for administrative review with the Director on December 1, 2021. Amazon did not petition for administrative review.
4. Tullis worked for Amazon as a senior product manager from January 18, 2016, through July 31, 2019. She had a history of high achievement, obtaining her MBA from the University of Pennsylvania's Wharton School, working for the consulting firm, McKinsey, and then for Electronic Arts providing corporate strategy. She worked for the Amazon Game Studios team between January 2016 and June 2016, and thereafter worked for the Amazon Kids & Family team within the Devices organization.
5. Tullis was successful during her first year at Amazon. She worked long days, up to 270 hours in some months. When Tullis began working for the Amazon Kids & Family team in June 2016, her direct supervisor was Josh Sherman. Manlio Lo Conte began supervising her at the end of 2016. Tullis had positive relationships with Sherman and Lo Conte, both of whom provided her with positive feedback. She received a positive performance review in April 2017 from both managers and peers.
6. On June 2, 2017, Tullis informed Lo Conte that she was a domestic violence victim and that she needed to take time off because of this situation. Lo Conte was not aware of the Washington laws concerning domestic violence protected leave, and he did not recall receiving any training from Amazon about domestic violence leave. Amazon did not have a domestic violence leave policy during Tullis's employment.
7. Tullis began taking leave from work on June 5, 2017. She took some leave from June 5, 2017 through September 2017. The time off was not designated as domestic violence leave, but Amazon was aware that she was taking it due to domestic violence.
8. Amazon approved Tullis's use of continuous leave from October 3, 2017, through October 16, 2017, and intermittent leave beginning on October 17, 2017. This leave was

also not designated as domestic violence leave, but Amazon understood that Tullis was taking the leave due to domestic violence. On October 17, 2017, Amazon's Leave of Absence and Accommodations team notified Tullis that she was eligible for "Washington General State Leave," claim type "FML."

9. Amazon's third party leave administrator, the Reed Group, was not equipped to administer Tullis's use of domestic violence leave. She was required to report the domestic violence leave she took within two business days for the leave to be approved. Tullis was afraid that her leave would be denied if not fully reported and approved within two business days. As a result, she would sometimes forgo taking needed leave in order to be present in the office so she could report her previous leave.
10. Tullis lost valuable work time while trying to navigate the Reed Group's processes for reporting her domestic violence leave. For eight months, Tullis could spend several hours per week just managing the reporting of her domestic violence leave.
11. Throughout the time that Tullis was taking protected domestic violence leave, Lo Conte misunderstood the leave and conflated it with leave under the Family and Medical Leave Act (FMLA). Lo Conte also incorrectly assumed that there was a limit to how much leave Tullis could use.
12. Lo Conte demonstrated frustration with Tullis's extensive use of leave. In October 2017, he told Tullis that once she hit the "leave cap," she would need to go part-time or face further performance management steps due to her reduced productivity at work. In contrast to the 270 hours per month that Tullis had worked before, she was now working only 20 to 25 hours per week due to her use of domestic violence leave.
13. On November 15, 2017, Lo Conte contacted two individuals in Amazon Human Resources via email, asking at what point he could "start actively performance managing someone in the middle of an FMLA approved leave." Lo Conte was not aware of how much protected leave Tullis was taking, due to the leave not being properly recorded by Amazon.
14. Lo Conte admitted that his concerns about Tullis's performance at the end of 2017 were focused on her productivity, as opposed to any communication issues.
15. Other Amazon officials also expressed frustration about Tullis's use of leave. Amazon Employee Relations Advisor, Ryan MacFarlane, wrote to a colleague in December 2017 that Tullis's ability to be out "half the month seems excessive." When Tullis's preapproved leave increased to an anticipated 13 occurrences per month in January 2018, Lo Conte asked whether that amount could be vetted for "appropriateness," noting that "13 absences a month is essentially less than half time." But Amazon had already determined Tullis qualified for and was entitled to take this protected leave.
16. In January 2018, Lo Conte informed Tullis that she was trending to the "least effective" rating in the annual talent review process. Around this same time, he placed Tullis on

Amazon's "Development List," a management tool for underperforming employees. Lo Conte did not inform Tullis that he was placing her on the Development List.

17. Being placed on the Development List limits an employee's ability to transfer, and makes the employee ineligible for rehire at Amazon if the employee leaves. The Development List is also a precursor to "Pivot," a formal performance improvement plan that an employee must successfully complete to avoid termination.
18. In response to a letter from Tullis's attorney, Amazon agreed to assign Tullis a "highly valued" rating for 2017. On February 7, 2018, it stated that Tullis would not be placed on the Development List "for the time being," even though Lo Conte had already placed her on the Development List the previous month. Lo Conte was not asked to remove Tullis from the Development List or to modify his Development List entries. Because Amazon never removed Tullis from the Development List, she remained eligible to be placed on Pivot.
19. In May 2018, Amazon stopped using the Reed Group to administer Tullis's leave, and she began reporting her leave to Senior Disability and Leave Services Master Specialist Joey Thompson. At times, Thompson asked Tullis for additional information regarding her domestic violence leave. For example, on July 23, 2018, Thompson asked Tullis if she had court dates or other legal events calendared, whether she anticipated any future needs for safety planning, and if she had mental health counseling appointments or any other mental health needs. Thompson also asked Tullis to provide advanced notice of her leave when she could.
20. Josh Sherman began supervising Tullis again on February 14, 2018. Amazon claimed this was to give Tullis a fresh start.
21. Tullis took domestic violence leave for all or part of 57 of the 71 workdays between February 14, 2018 and May 23, 2018.
22. On May 23, 2018, Sherman added a new entry to the Development List for Tullis, stating that, "[s]ince transitioning to me, Leslie continues to require direct, tactical direction of work tasks that are common place for a Sr. Product Manager." Sherman did not recall reviewing or assessing the amount of leave Tullis was taking when he made this entry on the Development List.
23. In June 2018, Sherman asked Tullis to advise him of known upcoming leave.
24. Sherman made another entry on the Development List on October 24, 2018. This entry related to a specific interaction between Tullis and a coworker. Tullis promptly resolved the communication issue referenced in Sherman's entry, but he did not remove his entry. Nor did he note in the Development List that Tullis had resolved the issue.
25. In January 2019, Tullis reached out to Principal Human Resources Business Partner Eilis Murphy to ask if there was any reason she would not be eligible for an internal transfer to a different manager. Murphy responded the following day that, "Given your

current level of performance and output, due to your ongoing reduced schedule, we would not support a transfer at this time.” Murphy never retracted this statement to Tullis.

26. Tullis’s “reduced schedule” was solely due to her extensive use of domestic violence leave, which was at times for almost an entire month at a time.
27. Tullis learned for the first time in January 2019 that, despite Amazon’s assurances in February 2018, she had been on the Development List for almost a year. After acknowledging that Lo Conte had placed Tullis on the Development List, Amazon deleted Lo Conte’s Development List entry, keeping no record of its contents. Lo Conte could not recall what he wrote in the entry. Nor could Sinsley, Murphy, or Sherman recall the entry’s contents. At hearing, no one from Amazon could even say how many entries Lo Conte had made. There is no contemporaneous record of Lo Conte’s motivation for placing Tullis on the Development List.
28. On February 15, 2019, an Amazon director reached out to Tullis via email to ask if she would be interested in working on a new team that was being created. Tullis forwarded this email to Employee Relations Manager Ty Ragland, writing that:

I should be able to pursue opportunities like this one from a fellow McKinsey alum. But Eilis Murphy said in the email I forwarded you that the team will block a transfer due to my ongoing reduced schedule. Internal mobility between teams is an important and valuable benefit of employment that I’ve been denied because I took job-protected domestic violence leave.
29. In this email, Tullis told Amazon that their actions were unlawful retaliation due to her use of protected domestic violence leave. Amazon did not reply to the email or deny that it would block her from transferring to a different team. Amazon never informed Tullis that she could possibly transfer with additional steps. As a result, Tullis did not pursue any transfer opportunities.
30. In early March 2019, Amazon added an additional responsibility to Tullis’s workload, related to the Parent Dashboard. This new responsibility was added to Tullis’s workload at a time when Tullis’s supervisors considered her to already be underperforming.
31. On March 25, 2019, Sherman wrote in an email to Tullis that failing to meet a specific deadline would “lead to further performance management steps.”
32. On March 28, 2019, Sherman and Daniel Osias, Tullis’s nominal manager, made another entry on the Development List. The entry indicated Tullis needed to prioritize her work to complete a document in anticipation of a formal leadership review on April 15, 2019. That same day, Osias submitted a request to Human Resources to create a performance action “Pivot” plan for Tullis. This request was approved.

33. When an employee is entered into Pivot, they have the option to either resign voluntarily with no potential for rehire, or to enter into an improvement plan with the goal to meet certain identified expectations.
34. On April 30, 2019, Tullis was notified of that Amazon had entered her into the Pivot program. Tullis opted to participate in the improvement plan, rather than lose her employment.
35. Tullis's Pivot program contained four Expectations. Expectation #1 was to "Define Production feature set for Glow with crisp stack-rank and justification." Expectation #2 was to "Define a customer research study to validate these product ideas for Project Glow." Expectation #3 was to "Prepare a PR/FAQ to define the product vision for FreeTime's Daily Time Limits Everywhere feature." Expectation #4 was to "Meet the day-to-day responsibilities as the Parent Dashboard PMT."
36. Amazon notified Tullis that if she failed any one of the Expectations, she would fail Pivot and be fired.
37. On May 17, 2019, Tullis informed Human Resources that she was dealing with a new incident of domestic violence.
38. Tullis asked Human Resources if she was using an appropriate amount of leave to reflect how many hours per day she was able to work. Rather than clarifying how many hours Amazon expected Tullis to work on a day when she utilized domestic violence leave, MacFarlane responded: "the amount of leave you take should be determined by how much time away from work you need for the purposes of which such leave is allowed under the law; not because you think that taking a certain amount of leave will provide relief from accountability for any work deadlines that may exist."
39. The initial Pivot Expectation due dates were updated after Pivot was paused during an internal Amazon investigation into Tullis's complaint that her placement in Pivot was in retaliation for taking protected leave.
40. On June 3, 2019, Tullis was informed of the new due dates for her Pivot plan. Tullis had until June 19, 2019 to meet Expectation #1.
41. Sherman claimed that he took into account Tullis's expected leave when establishing the Pivot deadlines, but he determined that the deadlines were appropriate based only on the "rough pattern" of Tullis's leave in the previous months. Tullis had warned Amazon that she would need more leave than usual during the Pivot timeframe.
42. In fact, Tullis needed to take domestic violence leave on nine out of the twelve workdays between June 3, 2019, and June 19, 2019. Tullis informed Sherman and her leave administrator each time she took domestic violence leave.
43. On June 17 and 18, 2019, Tullis utilized ten hours of unplanned domestic violence leave for an incident involving the alleged sexual assault of her daughter. Tullis immediately

notified Sherman and Osias of her need to take leave, explaining that there was a risk she would not meet the deadline for Expectation #1 on June 19, 2019, due to her need to take the domestic violence leave.

44. Throughout June 17 and 18, 2019, Sherman refused to commit to adjusting any deadlines for Tullis, telling her to assume that the meeting on June 19, 2019 for Expectation #1 would stay as scheduled. Sherman ultimately refused to move the deadline for Expectation #1.
45. Tullis informed Sherman that her use of protected domestic violence leave immediately prior to the deadline meant that she did not have enough time to produce a document that met Amazon's standards. She asked for Sherman to reschedule the meeting with leadership related to Expectation #1 for as soon as possible so she could demonstrate that she only needed the amount of time equivalent to the amount of domestic violence leave she had taken to complete Expectation #1.
46. Sherman agreed to cancel and reschedule the meeting, but informed Tullis that she failed Expectation #1 of the Pivot plan due to missing the June 19, 2019 deadline.
47. The meeting for Expectation #1 was held two days later, on June 21, 2019. Sherman acknowledged that meeting was productive.
48. Sherman had the power to change any of the Pivot deadlines. Tullis met the requirement of Expectation #1, except for the fact that she did not do so by June 19, 2019. Nevertheless, Sherman determined that Tullis had failed Expectation #1.
49. Sherman determined that Tullis also failed to meet Expectation #3 on July 1, 2019, finding that her work did not meet the standards of the assignment.
50. Sherman decided that Tullis missed two of the four Expectations and determined that she had failed her Pivot improvement plan. On July 9, 2019, Sherman ended the Pivot plan and told Tullis to stop working on the remaining Expectations.
51. Amazon Career Ambassador, Claire Amsler, notified Tullis that she could either take a severance and leave Amazon, or appeal Sherman's determination that she had failed Pivot. Tullis chose to appeal.
52. In the appeal, Sherman and Tullis both had the opportunity to provide written documentation and to address the appeal panel, which was comprised of Tullis's peers.
53. Amazon confined the issue on appeal to whether or not Tullis met the Expectations in the Pivot plan. To demonstrate that Tullis had failed the Pivot plan, Sherman submitted evidence to show that Tullis failed to meet Expectations #1 and #3.
54. Amazon restricted and redacted Tullis's submissions to the appeal panel. It did not allow Tullis to include information regarding her domestic violence leave and its impact on her ability to complete Expectation #1 by the deadline.

55. The appeal panel agreed that Tullis failed Pivot. Sherman did not eliminate the missed deadline for Expectation #1 from his stated reasons for determining that Tullis had failed Pivot, and there is no evidence that the appeal panel did not consider this missed deadline as a factor in its decision. On July 24, 2019, Amazon notified Tullis that her appeal was unsuccessful.
56. Amazon terminated Tullis's employment on August 1, 2019.

II. CONCLUSIONS OF LAW

1. The Director has jurisdiction pursuant to WAC 296-135-150, RCW 49.76.070, and RCW 34.05.
2. The Department contends that the administrative law judge improperly entered a protective order relating to a discovery dispute. This order requires the Department to notify Amazon of any public records request requiring the production of confidential Amazon documents obtained by the Department during discovery. The administrative law judge acted within his authority to require this notice under the Administrative Procedure Act. Because there was no error, the Director adopts the order. It was reasonable to require the Department to give notice to Amazon about the potential disclosure of the company's confidential documents. The purpose of a protective order is to allow the full explication of evidence at hearing while preserving the confidentiality of sensitive materials and information. It would be a strange rule to allow protection at hearing but not after the litigation has terminated.
3. Tullis asserts that the administrative law judge improperly closed the video hearing to public observation, noting the absence of analysis under *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). But administrative proceedings are not subject to an *Ishikawa* analysis under the Washington constitution. See *Mills v. Western Wash. Univ.*, 170 Wn.2d 903, 915, 246 P.3d 1254 (2011). The administrative law judge did not err in closing the hearing to the public.
4. "The burden of proof at hearing shall be on the party alleging violation of chapter 49.76 RCW and these rules," and "[t]he standard of proof is by a preponderance of the evidence." WAC 296-135-150(3). The Department and Tullis bear this burden.
5. "An employee is required to provide only the information enumerated in [RCW 49.76.040(2)] to establish that the employee's leave is protected under [the Domestic Violence Leave Act]." RCW 49.76.040(7); WAC 296-135-080(1). "An employer is prohibited from requiring any information that is beyond the scope of RCW 49.76.040(2) and WAC 296-135-070." WAC 296-135-080(2). When an employee seeks to utilize domestic violence leave, the employer may only require verification that the employee and/or a member of the employee's family is a victim and that the leave to be taken is for one of the activities described in RCW 49.76.030 and WAC 296-135-020. RCW 49.76.040(2); WAC 296-135-070(1).

6. Here, on at least two occasions, Amazon asked Tullis to project her leave for the future, and even asked her about certain kinds of leave that she might be considering. Amazon argued that these inquiries were in order to plan and that Amazon is entitled to advance notice of leave when possible. However, there is no evidence in the record of instances where Tullis did not give advance notice when she was able to do so. Moreover, she was only required to provide information sufficient to establish that her use of domestic violence leave was for a qualifying purpose. It was unlawful for Amazon to ask Tullis to project her need for leave in the future.
7. Amazon violated RCW 49.76.040(7) when it requested information from Tullis about her leave that it was not entitled to ask for. Accordingly, Amazon violated RCW 49.76.040(7) and is liable for payment of the fine of \$500. *See* RCW 49.76.120. Amazon did not appeal this penalty, and it also stands for this reason.
8. The Domestic Violence Leave Act's purpose is to protect the economic independence of domestic violence victims. RCW 49.76.010. Access to reasonable leave from work is critical to this protection. RCW 49.76.010. "Victims of domestic violence [should be able to] maintain employment without fear that they will face discrimination." RCW 49.76.010(1). Thus, under the Act, "[n]o employer may discharge, threaten to discharge, demote, deny a promotion to, sanction, discipline, retaliate against, harass, or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee" took protected domestic violence leave. RCW 49.76.120; WAC 296-135-190.
9. There is no case law addressing the Domestic Violence Leave Act. But the elements of retaliation are largely consistent across various protected employment activities. *See Allison v. Housing Auth. of City of Seattle*, 118 Wn.2d 79, 821 P.2d 34 (1991). An adverse action includes termination or withholding of employment benefits. *Bierlein v. Byrne*, 103 Wn. App. 865, 871, 14 P.3d 823 (2000).
10. To show retaliation, there must be a causal link between the protected employment activity and the adverse action. *Cornwell v. Microsoft Corp.*, 192 Wn.2d 403, 411-12, 430 P.3d 229 (2018). The employee's protected activity does not need to have been the primary factor leading to the adverse action; it is enough to show that it was a substantial factor. "An employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable" for retaliation. *Scrivener v. Clark College*, 181 Wn.2d 439, 447, 334 P.3d 541 (2014). An employee's exercise of their protected right need not be the "determining factor," but merely a "substantial factor," in an employer's adverse employment decision. *Mackay v. Acorn Custom Cabinetry, Inc.*, 127 Wn.2d 302, 310-11, 898 P.2d 284 (1995).
11. Because employers rarely reveal that their actions are motivated by retaliation, employees may point to circumstantial evidence to demonstrate the causal connection. *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 69, 821 P.2d 18 (1991). Circumstantial evidence may be the only evidence available and can be sufficient. *Id.* Proximity in time between the protected activity and the adverse action may imply

causation. *Id.*; see *Raad v. Fairbanks North Star Borough Sch. Dist.*, 323 F.3d 1185, 1197 (9th Cir. 2003); *Yartzoff v. Thomas*, 809 F.2d 1371, 1376 (9th Cir. 2003). On the other hand, protected leave is not a shield from legitimate disciplinary action. *Throneberry v. McGehee Desha Cty. Hosp.*, 403 F.3d 072, 978 (8th Cir. 2005).

12. Here, there is abundant evidence of a causal connection between Tullis's use of protected domestic violence leave and Amazon's adverse actions.
13. The timing of Amazon's actions implies that Tullis's use of protected leave was a factor in its decisions. Amazon contends that Tullis displayed performance deficits before she revealed that she was a victim of domestic violence in June 2017. But her supervisors did not engage in any formal performance management steps until after Tullis began taking protected domestic violence leave. And it placed her on the Development List only several months later. The proximity in time between Tullis's use of leave and these adverse actions implies a causal relationship.
14. Almost from the outset, Amazon demonstrated hostility toward Tullis's use of leave, which undisputedly reduced her productivity for the company. Amazon human resources staff characterized her use of intermittent domestic leave as "excessive." Her supervisor, Lo Conte, wondered whether her request for leave could be vetted for "appropriateness," noting Tullis's decline in productivity during a time when she was utilizing intermittent domestic violence leave and experiencing difficulty in requesting and reporting that leave. While Lo Conte was unaware of how much leave Tullis was taking (due to problems in reporting the leave), he nonetheless wanted to begin performance managing her. Because Tullis's reduced productivity more likely than not resulted from Tullis's use of protected leave, it was improper for Amazon to consider it when assessing her performance.
15. Tullis's use of protected leave was also a substantial factor in her placement on the Development List in January 2018. Lo Conte did not inform Tullis that he had taken this action, and Amazon later deleted all record of his Development List entries, making it difficult to assess whether his justification for this adverse action improperly related to Tullis's use of protected leave. Nevertheless, given Lo Conte's demonstrated frustration with Tullis's use of domestic violence leave at this time, her use of protected leave was likely a substantial factor in his decision to begin performance managing Tullis and to place her on the Development List. In fact, despite Amazon's assurances in February 2018 that Tullis would not be placed on the Development List "for the time being" and that she would retain a "highly valued" rating, it never removed her the Development List at any point for the remainder of her employment.
16. Amazon admitted at times that the company considered Tullis's use of protected leave in assessing her performance. When she asked whether Amazon would support her transfer to a different team, it informed her: "Given your current level of performance and output, due to your ongoing reduced schedule, we would not support a transfer at this time." But Tullis's "ongoing reduced schedule" was due solely to her use of domestic violence leave, showing that it was a substantial motivating factor in Amazon's decision to block Tullis from attempting to transfer. While the company now

disavows this statement, no one from Amazon ever sought to correct it until litigation was underway.

17. Amazon continued to retaliate against Tullis for her use of protected leave during the Pivot review process. At the initial Pivot entry meeting, Tullis told Amazon that she would need to use more domestic violence leave than usual and that she did not feel the Pivot Expectations were reasonable. Amazon claims it took Tullis's potential domestic violence leave into consideration when setting the deadlines for the four Pivot Expectations. But under the Domestic Violence Leave Act, Amazon was required to accommodate the actual amount of protected leave that Tullis took, not judge her performance based on its own estimates of what the company believed she might need.
18. The Act does not permit an employer to take an adverse action based on an employee's use of protected leave. Tullis took necessary domestic violence leave on June 17 and 18, 2019. The due date for Expectation #1 in her Pivot plan was June 19, 2019, and Tullis told her supervisor, Sherman, that she needed additional time to meet this expectation based on her use of this unplanned domestic violence leave. Nevertheless, despite his authority to do so, Sherman refused to extend the Expectation #1 deadline. Tullis successfully completed Expectation #1 two days later on June 21, 2019. But Sherman still determined that she failed the expectation based on the missed deadline. Tullis's use of protected domestic violence leave was a substantial factor, indeed the primary factor, in Amazon's determination that Tullis failed Expectation #1.
19. Tullis's failure to meet Expectation #1's deadline led directly to her termination. Sherman determined that Tullis failed Pivot because she failed to meet Expectations #1 and Expectation #3. During her appeal of that decision, Amazon precluded Tullis from arguing to the appeal panel that she missed Expectation #1 due to her use of unplanned domestic violence leave. Thus, the panel had no opportunity to determine that Tullis's failure to meet this deadline should be excused. At no time did Amazon claim that Tullis' failure to meet the deadline for Expectation #1 was not a factor in its determination that Tullis failed Pivot.
20. The appeal panel agreed that Tullis failed Pivot. Nothing in the record indicates that the panel excused Tullis's missed Expectation #1 deadline in reaching this decision. In fact, as noted above, given the limitations Amazon placed on Tullis's arguments, the appeal panel had no opportunity to do so. Amazon terminated Tullis's employment after her appeal failed, and Tullis's failure to complete Expectation #1 was a substantial factor for this decision. Because she failed this expectation only because she took protected leave, there is causal connection between Tullis's use of leave and Amazon's decision to terminate her employment.

Indeed, by preventing Tullis from referencing her domestic violence leave to the appeal panel, Amazon improperly enabled this unlawful retaliation. Under the Act, an employer must evaluate whether an employee's decreased job performance is the result of a protected activity, and it may not retaliate against the employee for a decline in productivity that results from the use of protected leave. By precluding the appeal panel

from considering this issue, Amazon ensured that the panel could terminate Tullis for impermissible reasons.

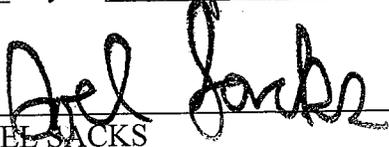
21. Once an employee establishes a prima facie case of unlawful retaliation, the employer can rebut by showing its adverse actions were justified by legitimate business needs. But to succeed on such claim, the employer must have taken the actions only for these legitimate reasons. As noted above, “[a]n employer may be motivated by multiple purposes, both legitimate and illegitimate, when making employment decisions and still be liable” for retaliation. *Scrivener*, 181 Wn.2d at 447. Washington courts have long since rejected the “but for” standard. *Allison*, 118 Wn.2d at 91. An employee’s exercise of their protected right need not be the “determining factor” but merely a “substantial factor” in an employer’s adverse employment decision. *Mackay*, 127 Wn.2d at 310-11.
22. Regardless of whether Amazon was motivated in part by legitimate reasons, Tullis’s use of intermittent domestic violence leave was a substantial motivating factor in Amazon’s decisions to engage in formal performance management, deny her the opportunity to transfer internally, and terminate her employment.
23. Amazon violated RCW 49.76.120 by retaliating against Tullis. Amazon is liable for payment of the \$500 fine and reinstatement of Tullis. RCW 49.76.080; WAC 296-135-140(2)(c).¹

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, Notice of Infraction no. PL-02-20 is affirmed. Amazon is ordered to pay two penalties of \$500.00 each for violations of RCW 49.76.040(7) and RCW 49.76.120, and to reinstate Tullis to her former position of employment or to an equivalent position.

The protective order is adopted, and the Department is directed to provide a copy of the administrative law judge’s protective order and this decision to the Public Records Unit.

DATED at Tumwater, Washington this 14 day of July, 2022.


JOEL SACKS

Director

¹ If the relationship of the parties makes reinstatement infeasible, the Director would accept a settlement providing reasonable front pay to Tullis.

DECLARATION OF SERVICE

I, Lisa Deck, declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 14 date of July 2022 via email and U.S. Mail, postage paid, to the following:

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Seattle, WA 98108
Appellant/Employer

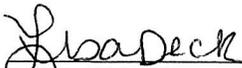
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Counsel for Department

DATED this 14 day of July, 2022, at Tumwater, Washington.



LISA DECK