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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

TERRY COUSINS,

Plaintiff,

v.

KITSAP COUNTY, NED NEWLIN and
KITSAP COUNTY SHERIFF
DEPARTMENT,

Defendants.

CASE NO. 3:08-CV-05764-KLS

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT IN PART
AND DENYING IN PART

On February 5, 2010, the undersigned entered an order which granted the Defendants' Motion for Summary Judgment and dismissed all of plaintiff's claims. ECF. No. 19. On February 18, 2010 the Plaintiff filed a Motion for Reconsideration (ECF No. 20) which the undersigned subsequently granted.

Ms. Cousins asserts four claims for relief in her Complaint. They include (I) Title VII discrimination based on gender, (II) interference with Plaintiff's First Amendment right of freedom of speech and redress of grievance against government, (III) retaliation for whistle blower activity and (IV) retaliation for filing an EEOC claim.

1 In their summary judgment motion, the defendants assert that the Plaintiff's claims of
2 interference with her First Amendment rights (Claim II) and retaliation for whistle blower
3 activity (Claim III) are now barred by the doctrine of collateral estoppel. They also assert that
4 there are no material issues of fact regarding the claim of Title VII gender discrimination (Claim
5 I) and retaliation for filing an EEOCV claim (Claim IV) and that they are entitled to judgment as
6 a matter of law.

7 Having reviewed the pleadings filed in support of and in opposition to the motion, the
8 undersigned finds, for the reasons set forth below, that the Defendants' motion for summary
9 judgment should be granted in part and denied in part. More specifically, all of Plaintiff's claims
10 are dismissed with the exception of her Claim I as it relates to gender discrimination and the
11 failure to promote in March 2008.

12 SUMMARY JUDGMENT STANDARD

13 Summary judgment is proper where "the pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
16 of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The
17 Court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*
18 *O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79
19 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of fact
20 for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion that a genuine
21 issue of material fact exists, no longer precludes the use of summary judgment. *See California*
22 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir.
23 1987).

1 Genuine factual issues are those for which the evidence is such that “a reasonable jury
2 could return a verdict for the non-moving party.” *Anderson*, 477 U.S. at 248. Material facts are
3 those which might affect the outcome of the suit under governing law. *See id.* In ruling on
4 summary judgment, a court does not weigh evidence to determine the truth of the matter, but
5 “only determine[s] whether there is a genuine issue for trial.” *Crane v. Conoco, Inc.*, 41 F.3d
6 547, 549 (9th Cir. 1994)(citing *O’Melveny & Meyers*, 969 F.2d at 747). Furthermore, conclusory
7 or speculative testimony is insufficient to raise a genuine issue of fact to defeat summary
8 judgment. *Anheuser-Busch, Inc. v. Natural Beverage Distributors*, 60 F.3d 337, 345 (9th Cir.
9 1995). Similarly, hearsay evidence may not be considered in deciding whether material facts are
10 at issue in summary judgment motions. *Id.* at 345; *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610
11 F.2d 665, 667 (9th Cir. 1980).

12 **CLAIM I. Title VII Discrimination on the Basis of Gender**

13 Ms. Cousins has been an employee of the Corrections Division of the Kitsap County
14 Sheriff’s Office since August 25, 1994. She was promoted to Corrections Sergeant on July 21,
15 2003 and held that rank until she self-demoted on March 13, 2006.

16 Sometime in late 2007 the County announced an opening for Corrections Lieutenant.
17 Ms. Cousins submitted her application and was notified that she met the qualifications for the
18 position. The plaintiff, along with two other candidates, participated in testing, conducted by
19 JMF & Associations. The plaintiff’s score was 69.01% which placed her third among the three
20 candidates. The first two had scores of 79.34% and 79.16%. Ms. Cousins interviewed for the
21 position but was not offered the promotion. In fact, the Corrections Lieutenant position was not
22 filled at that time. ECF No. 14-2, p. 7.

23 According to Ms. Cousins, on March 3, 2008, Chief Ned Newlin informed her that she
24 would not have an interview for the Lieutenant position as he was only bringing in the male out-

1 of-state applicant for an interview. ECF No. 21, p. 5. Ms. Cousins complained to unnamed
2 department supervisors regarding Chief Newlin's statement, which Ms. Cousins considered to be
3 sex discrimination. On March 7, 2008 she received a call from Lieutenant Earl Smith of the
4 Sheriff's Department to schedule an interview for the Lieutenant position. While Ms. Cousins
5 was concerned that the interview would be what she calls a "sham interview," she did attend the
6 interview on March 18, 2008. While at the interview Chief Simpson asked Chief Newlin if they
7 had any of Ms. Cousins' evaluations or a resume to review. Chief Newlin advised the panel they
8 did not have to have any of those documents because Ms. Cousins' had been employed with the
9 County for years and they were not needed. ECF No. 21, p. 6. Following the interview Ms.
10 Cousins waited in the hallway while those who conducted the interview conferred.
11 Approximately ten minutes later she was called back into the room and was informed that she
12 would not be offered the position as she was not what they were looking for. *Id.* at p. 7.

13 The Corrections Lieutenant position as not filled following the first posting. Ms.
14 Cousins' offers hearsay as to what may have happened with regard to the male applicant but
15 there are no facts before the court as to whether the position was or was not offered to him.
16 There are also no facts before the court regarding the reason the second qualified applicant, also
17 a woman, did not participate in the final interview.

18 The County created a second register for the same Lieutenant position in July 2008 and
19 Ms. Cousins again applied. This time her test score of 77.70% ranked her second among the
20 three candidates. The position was not offered to Ms. Cousins. Instead, it was offered to Ms.
21 Genie Elton, who ranked first with a score of 84.10%, who was hired on August 11, 2008. ECF
22 No. 14-2, p.7.

23 Ms. Cousins alleges that she was discriminated against due to her gender when she was
24 not selected for promotion to the Lieutenant position. In order to establish a *prima facie* case of

1 discrimination based on failure to promote, Ms. Cousins' must show that (1) she belongs to a
2 protected class of persons, (2) she was qualified for the position to which she wished to be
3 promoted, (3) she was denied a promotion to that position, and (4) the job went to someone
4 outside the protected class (*Coughlan v. Amer. Seafoods, Co.*, 413 F.3d 1090, 1094 (9th cir.
5 2005)) or after her rejection, the position remained open and the employer continued to seek
6 applications from persons with comparable qualifications (*Cordova v. State Farm Insurance*
7 *Companies*, 124 F.3d 1145, 1148 (9th Cir. 1997)).

8 In this case, Ms. Cousins' had two opportunities to apply for the promotion to
9 Corrections Lieutenant. For purposes of this summary judgment motion, there is no dispute that
10 Ms. Cousins meets the three elements of a *prima facie* case. The Defendants assert that she
11 cannot meet the fourth element as the job eventually was given to another woman.

12 With regard to the second promotional opportunity, the Defendants are correct that Ms.
13 Cousins cannot make out a *prima facie* case of discrimination. The position was offered to
14 another woman and that woman was clearly not outside the protected class. The Defendants'
15 motion to dismiss that portion of Ms. Cousins claim regarding Title VII gender discrimination is
16 therefore **GRANTED**.

17 However, with regard to her first application for promotion, Ms. Cousins has made out a
18 *prima facie* case. She belongs to a protected class, she applied for and was qualified for the job
19 or she would not have been interviewed, she was rejected for the position **and** the position
20 remained open and the employer continued to seek applications from persons with comparable
21 qualifications. *Cordova, supra*, at p. 1148. The Court is mindful of the fact that the position
22 "closed" without it being filled. However, it was not long after the position closed that the
23 County again posted an opening for the very same position of Corrections Lieutenant.

1 In addition, “[a] plaintiff can also establish a prima facie case of disparate treatment
2 without satisfying the *McDonnell Douglas* test, if she provides evidence suggesting that the
3 ‘employment decision was based on a discriminatory criterion illegal under the [Civil Rights]
4 Act.’ *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 358, 97 S. Ct.
5 1843, 1866, 52 L. Ed.2d 396 (1977).” *Cordova, supra*, at p. 1148-1149. In this case, Ms.
6 Cousins has offered direct evidence of such discriminatory animus: Sheriff Newlin’s statement
7 that Ms. Cousins would not have an interview as he was only bringing in the male out-of-state
8 applicant for an interview. This statement is sufficient to create an inference of discriminatory
9 motive.

10 The undersigned concludes that Ms. Cousins has established a *prima facie* case of
11 discrimination by satisfying the four-part *McDonnell Douglas* test, and alternatively, by
12 providing direct and circumstantial evidence of discriminatory intent. Therefore, the
13 Defendants’ motion to dismiss this portion of the Plaintiff’s Title VII employment discrimination
14 claim is **DENIED**.

15
16 **CLAIM II. Interference with Right to Free Speech and**
17 **CLAIM III. Retaliation for Whistleblower Activity**

18 The defendants assert the affirmative defense of collateral estoppel based on two Final
19 Decisions and Orders issued by two separate Administrative Law Judges (ALJ) (ECF No. 14-2)
20 whose decisions necessarily decided issues presented in this litigation.

21 These two claims revolve around an incident that occurred on August 26, 2005 when Ms.
22 Cousins, along with a number of other correctional officers, participated as volunteers in a
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1 charity event called “Shop with a Cop.”¹ The participants included then Sgt. Jeff Taylor, Lt.
2 Roxanne Payne, and Officers Penny Harrell and Tiffany Gay. None of these officers were on
3 duty or in uniform during this event. Sgt. Taylor had his personal travel trailer at the event
4 which was being used as an office. At some time during that day and while in the trailer, Mr.
5 Taylor pointed a handgun directly at Sgt. Cousins. He had also pointed the handgun at the
6 teenage son of Officer Harrell and had the gun resting on a table pointing in their direction when
7 Officer Gay and Lt. Payne entered on separate occasions.

8 Ms. Cousins reported this incident to Lt. Payne later that day. On Monday, August 29,
9 2005 the County received several reports of the incident and, as a result, opened an internal
10 investigation, which was conducted by Sgt. Jim McDonough. A criminal investigation was also
11 conducted, and during that time, the internal investigation was put on hold. On October 24, 2005
12 the Kitsap County Prosecutor decided not to file any charges against Sgt. Taylor. The prosecutor
13 issued a Decline to Prosecute Notice and sent a letter to Ms. Cousins informing her of the
14 decision.

15 Following the decision not to prosecute, the internal investigation recommenced. Sgt.
16 Taylor was allowed to return to work on October 31, 2005. On March 8, 2006 the County
17 learned that Sgt. Taylor had not turned over all of his weapons, as earlier ordered. This led to a
18 second internal investigation and on March 31, 2006 Sgt. Taylor was advised of proposed
19 disciplinary action the County was considering taking, which action was officially announced on
20 April 21, 2006. Sgt. Taylor was demoted to Correctional Officer and suspended from duty
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24 ¹ These facts are taken from the Final Decision and Order of the Administrative Law Judge which he
entered following a hearing held on October 7 – 9, 2008, found at ECF No. 14-2, pages 4 – 7. A copy of the Final
Decision and Order was served on the parties on April 14, 2009. ECF No.14-2. p. 20.

1 without pay for eight days. He was ordered to limit any contact with Sgt. Cousins to contact
2 necessary to perform his on-duty responsibilities.

3 On March 13, 2006 the plaintiff voluntarily demoted from Sergeant to Corrections
4 Officer. In her letter of resignation she stated she understood she would not be able to promote
5 to the rank of Sergeant in the future without retesting.

6 In late April 2006 Ms. Cousins wrote Chief Newlin several letters/memos expressing her
7 safety concerns about working with Mr. Taylor. On May 10, 2006 she took a leave of absence
8 for medical reasons and was cleared to return to full duty as of July 1, 2006.

9 On July 11, 2006 Officers Cousins and Harrell wrote Prosecutor Hauge requesting he
10 reconsider his decision not to file charges against Mr. Taylor. They also asked him to transfer
11 the filing decision to another county because of a perceived conflict of interest. As a
12 consequence of this letter, Officers Cousins and Harrell met with Prosecutor Hague in late July
13 2006. Prosecutor Hague, in his deposition, admitted to mentioning the whistleblower statute or
14 ordinance during that meeting but denied identifying the two officers as whistleblowers entitled
15 to protection. Officer Penny Harrell's recollection is the same as Prosecutor Hague. On the
16 other hand, Ms. Cousins contends that Mr. Hauge specifically told them he considered them
17 whistleblowers for reporting the Jeff Taylor incident.

18 On October 30, 2006 Officer Cousins requested reinstatement to Sergeant. Under the
19 relevant civil service rule, the Corrections Division would have to join in the reinstatement
20 request. Chief Newlin, in a November 30, 2006 letter, declined to support the request on the
21 grounds that when Ms. Cousins self-demoted she had agreed that she would have to retest for
22 Sergeant.

23 In late 2007 the County announced an opening for Corrections Lieutenant. As noted
24 above, Ms. Cousins applied for the position twice and it was not offered to her.

1 Ms. Cousins filed a whistleblower complaint with the Kitsap County Board of
2 Commissioners in which she claimed that the failure to promote her to Corrections Lieutenant
3 was in retaliation for her reports regarding Sgt. Taylor. The Board of Commissioners denied her
4 complaint. Ms. Cousins appealed the denial to the State of Washington Office of Administrative
5 Hearings. The first full and complete administrative hearing was subsequently conducted by an
6 Administrative Law Judge on October 7 – 8, 2008. The record contains a copy of the ALJ's
7 Final Decision and Order at ECF No. 14-2, pp. 2 – 20.

8 Undersheriff Bonneville and Chief Newlin testified, at the first administrative hearing,
9 that the reason Ms. Cousins was not offered the position had to do with her relatively low score,
10 her failure to satisfactorily address her voluntary self-demotion in 2006, and her lack of recent
11 command level experience. Ms. Cousins testified that she felt she was denied promotion because
12 she made the complaint against Mr. Taylor in 2005 and that she was known to be unhappy with
13 the decision not to fire Mr. Taylor.

14 The ALJ concluded that the Kitsap County Ordinance 151-1993, as amended by Ord.
15 151-A, governed the proceedings as opposed to R.C.W. 42.41. The ALJ found that the
16 “Ordinance and program it establishes meets the stated intent of the state local government
17 whistleblower act and therefore the county is exempt from its provisions, making the County
18 Ordinance the controlled regulation in this area.” ECF No. 14-2, p. 8.

19 While the ALJ found that the facts did not support a claim of improper governmental
20 action, due to the fact that at the time of the gun incident Sgt. Taylor was not performing his
21 official duties, he did proceed to analyze Ms. Cousin's claims on the assumption that there was,
22 in fact, improper governmental action. The ALJ noted that Ms. Cousins bears the burden of
23 proving, by a preponderance of the evidence, “that a retaliatory action was taken against her
24 because of her good-faith report of improper governmental action and that she complied with the

1 Ordinance’s reporting requirements.” ECF No. 14-2, p. 9 – 10. The ALJ found that the “stated
2 reasons for not selecting her for promotion were legitimate and not pretextual. Ms. Cousins may
3 have concerns that the County had other reasons – improper reasons - for not selecting her as the
4 new Lieutenant. However, my decision cannot be based on speculation and must be based on the
5 evidence presented at hearing, and that evidence does not support a determination that her denial
6 of promotion to Lieutenant was in retaliation against her for pursuing the Jeff Taylor complaint
7 in 2005 and 2006.” ECF No. 14-2, p. 10.

8 In her response, the Plaintiff asserts that the Defendants waived the affirmative defense of
9 collateral estoppel (issue preclusion) as it was not specified in the Answer. The Defendants note
10 that they asserted the defense of estoppel in their answer and then immediately raised it more
11 specifically in this motion for summary judgment. The Plaintiff has shown no prejudice to her,
12 even assuming that the defense was not more specifically asserted in the Answer, and the
13 undersigned finds that the affirmative defense was not waived.

14 The Plaintiff does seem to argue that because she had an administrative proceeding
15 pending simultaneously with this federal court case that the Defendants had an obligation to raise
16 an objection regarding the dual claims some time prior to this summary judgment motion and
17 their failure to do so should prevent them from pursuing the affirmative defense of collateral
18 estoppel. The Plaintiff cited the case of *Clements v. Airport Authority of Washoe County*, 69
19 F.3d 321 (9th Cir. 1995) in support of that proposition. However, *Clements* discussed the issue of
20 claim splitting and concluded, on the facts in that case, that claim preclusion could not be
21 asserted by the defendants. The court in *Clements* did not reach the same conclusion regarding
22 issue preclusion, which is the affirmative defense raised by the defendants in this case.

23 “Collateral estoppel, or issue preclusion, bars relitigation of an issue in a subsequent
24 proceeding involving the same parties. (citations omitted).” *Christensen v. Grant County*

1 *Hospital District No. 1*, 152 Wash.2d 299, 306, 96 P.3d 957 (1004). It is distinguished from
2 claim preclusion (also called *res judicata*), “in that, instead of preventing a second assertion of
3 the same claim or cause of action, it prevents a second litigation of *issues* between the parties,
4 even though a different claim or cause of action is asserted.” *Rains v. State*, 100 Wash.2d 660,
5 665, 674 P.2d 165 (1983).

6 Collateral estoppel may be applied to preclude only those issues that have actually
7 been litigated and necessarily and finally determined in the earlier proceeding.
8 (citation omitted). Further, the party against whom the doctrine is asserted must
9 have had a full and fair opportunity to litigate the issue in the earlier proceeding.
10 *Nielson v. Spanaway Gen. Med. Clinic. Inc.*, 135 Wash.2d 255, 264-65, 956 P2d
11 312 (1998). For collateral estoppel to apply, the party seeking application of the
12 doctrine must establish that (1) the issue decided in the earlier proceeding was
13 identical to the issue presented in the later proceeding, (2) the earlier proceeding
14 ended in a judgment on the merits, (3) the party against whom collateral
15 estoppel is asserted was a party to, or in privity with a party to, the earlier
16 proceeding, and (4) application of collateral estoppel does not work an injustice
17 on the party against whom it is applied. (citations omitted).

18 *Christensen, supra*, at p. 307.

19 The fact that the issues were decided by an ALJ in an administrative hearing does not
20 prevent application of collateral estoppel. “Both state and federal courts have applied collateral
21 estoppel where an issue was adjudicated by an administrative agency in the earlier proceeding.”

22 *Christensen, supra*, at p. 307.

23 An analysis of the factors identified in *Christensen, supra*, supports the conclusion that
24 collateral estoppel applies to the facts of this case. First, the Plaintiff does not dispute that the
issue decided in the earlier administrative proceeding was identical to that presented in the later
proceeding. In the administrative proceeding, Ms. Cousins claimed that she was not promoted to
Lieutenant in retaliation for reporting improper local governmental action which related to the
incident involving Sgt. Taylor. Ms. Cousins makes the same claim in this litigation. The issue
of retaliation was decided against Ms. Cousins in the administrative hearing. The ALJ made the

1 specific finding that the “evidence does not support a determination that her denial of promotion
2 to Lieutenant was in retaliation against her for pursuing the Jeff Taylor complaint in 2005 and
3 2006.” ECF No. 14-2, p. 10.

4 Second, the administrative hearing ended with a judgment on the merits (*See* Final
5 Decision and Order, ECF No. 14-2, pp. 2 – 20.). Ms. Cousins did file an appeal to the Superior
6 Court regarding the ALJ’s decision but, for various reasons, that appeal has not been perfected.
7 However, an appeal does not suspend or negate the collateral estoppel aspects of a judgment or
8 administrative order. Therefore, the status of the “appeal” has no impact on the finality of the
9 judgment. *Nielson v. Spanaway General Medical Clinic, Inc.*, 135 Wash.2d 255, 264, 956 P.3d
10 957 (1998).

11 Third, Ms. Cousins was clearly a party in the administrative hearing.

12 Fourth, application of collateral estoppel will not work an injustice on Ms. Cousins.
13 “In determining whether application of the doctrine of collateral estoppel would work an
14 injustice, we focus on whether the parties to the earlier adjudication were afforded a full and fair
15 opportunity to litigate their claim in a neutral forum. *Rains*, 100 Wash. 2d at 666, 674 P.2d 165;
16 *Neff v. Allstate Ins. Co.*, 70 Wash.App. 796, 801, 855 P.2d 1223 (1993).” *Nielson, Id at p. 264.*
17 Ms. Cousins has not provided any facts that to show that she was not provided a full and fair
18 opportunity to litigate her claim in the administrative arena nor has she provided any facts to
19 show that the administrative hearing was not a neutral forum. The Court notes that Ms. Cousins
20 makes conclusory statements in her declaration regarding the conduct of discovery as well as
21 conduct of the hearing. She does not, however, provide any facts that support her assertions.

22 Ms. Cousins does assert that the difference in remedy available through the
23 administrative hearing as opposed to this civil litigation would work an injustice. She argues that
24 she only had a prospective injunctive remedy available to her in the administrative hearing and

1 | could not recover back pay, which would be available in civil litigation. However, as noted
2 | above, the concern regarding the issue of injustice focuses on “a full and fair opportunity to
3 | litigate their claim in a neutral forum.” *Nielson, Id.* Ms. Cousins has a full and fair opportunity
4 | to litigate her claim and she did so.

5 | In addition to the four *Christensen* factors, “[t]hree additional factors must be considered
6 | under Washington law before collateral estoppel may be applied to agency findings: (1) whether
7 | the agency acted within its competence, (2) the differences between procedures in the
8 | administrative proceeding and court procedures, and (3) public policy considerations. *Reninger,*
9 | 134 Wash.2d 450, 951 P.2d 782; *Shoemaker*, 109 Wash.2d 508, 745 P.2d 858; *State v. Dupard,*
10 | 93 Wash.2d 268, 609 P.2d 961 (1980).” *Christensen, supra*, at p. 308.

11 | With regard to the first additional factor, the plaintiff does not assert that the agency acted
12 | outside its competence.

13 | The second *Reninger* factor focuses on the differences between an administrative
14 | proceeding and court procedures. In this case, no facts have been presented which would lead to
15 | the conclusion that the differences, if any, argue against the application of collateral estoppel. It
16 | is undisputed that a qualified administrative law judge conducted the hearing, held a prehearing
17 | conference, identified the issues to be resolved at the hearing, presided over a two day hearing in
18 | which the plaintiff attended in person, heard testimony of several witnesses and admitted 99
19 | exhibits into the record. This second factor supports the application of collateral estoppel.

20 | With regard to the third *Reninger* factor, Ms. Cousins does assert that the difference in
21 | relief available through the administrative hearing compared to court procedures argues against
22 | the application of collateral estoppel.

23 | Disparity of relief between what one can recover in the first action compared
24 | to what one can recover in the second action is not the gravamen of the decision
whether to apply collateral estoppel to the findings of an administrative board.

1 Rather, courts look to disparity of relief to determine whether sufficient incentive
2 existed for the concerned party to litigate vigorously in the administrative hearing.
3 Courts have reasoned that if the amount a party can recover in an
4 administrative proceeding is insignificant, the party is not likely to have litigated
5 the crucial issues vigorously and it would be unfair to employ collateral estoppel
6 against that party in future proceedings to prevent the relitigation of those
7 same issues in another forum.

8
9 *Reninger v. Department of Corrections*, 134 Wash.2d 437, 453, 951 P.2d 782 (1998). Ms.
10 Cousins asserts that the remedy available through the administrative hearing was limited to
11 injunctive relief, costs and attorneys fees. She asserts that promotion and back pay was never
12 possible. However, the Court notes that the parties agreed an issue for determination by the ALJ
13 was “[w]hether promotion to corrections lieutenant is an appropriate remedy.” ECF No. 14-2, p.
14 3. While the remedy may be different, there is no dispute that Ms. Cousins vigorously litigated
15 her claim before the ALJ. She participated in a prehearing telephone conference, developed a
16 discovery plan with opposing counsel, attended a two day hearing and had forty-two exhibits
17 admitted into the record. The Court , therefore, concludes that the application of collateral
18 estoppel is appropriate which then requires dismissal of Claims II and III.

19 Ms. Cousins also alleges that Chief Newlin released her identity as a whistleblower to
20 several county employees “in retaliation to create unnecessary hostile employee relations for
21 me.” ECR No. 21, p. 15. She also accuses Burt Furuta, Kitsap County Personnel Director, of
22 the same conduct. The Court notes, however, that Mr. Furuta is not a party to this litigation. Ms.
23 Cousins’ allegation is somewhat confusing as she claims her identity was released on “07
24 October 2008” yet cites to a letter written to her dated July 16, 2008. The County employees she
25 references are Undersheriff Dennis Bonneville, who already knew about the whistleblower
26 complaint and who testified at the first administrative hearing; Deborah Boe a Deputy
27 Prosecuting Attorney in the Prosecuting Attorney’s Office; Lt. Roxane Payne, who already knew

1 about the whistleblower complaint (see Final Decision and Order, ECF No. 14-2, p. 26) and Sgt.
2 Keith Hall, who also already knew about the initial whistleblower complaint.

3 Ms. Cousins filed four additional whistleblower complaints² against the Kitsap County
4 Sheriff's Office, one of which reasserted the claim of retaliation which is also being made in this
5 litigation. The complaints were denied by the Board of County Commissioners and Ms. Cousins
6 appealed the denial to the Office of Administrative Hearings. As was done with regard to the
7 first hearing, the parties exchanged discovery, a hearing was held on Jun 21 – 23, 2009 before an
8 Administrative Law Judge, testimony presented, exhibits admitted and post –hearing briefs filed
9 and on October 2, 2009 the ALJ issued a Final Decision and Order (ECF No. 14-2, p. 22 – 48).

10 Complaint No. 1, dated August 20, 2008, is the only complaint that alleged retaliation.
11 This complaint related to the same July 16, 2008 letter that is complained of in Ms. Cousins'
12 declaration. ECF No. 21, p. 15. Ms. Cousins asserted that the letter was a reprimand issued in
13 retaliation for making the whistleblower complaints that alleged improper government activity
14 by Sgt. Hall, Chief Newlin, Undersecretary Bonneville and Kitsap County Sheriff Stephen A.
15 Boyer. In the Final Decision and Order, the ALJ concluded:

16 16. There is sufficient evidence to find, to a preponderance of evidence standard,
17 that the letters dated July 16 and July 22, 2008 were intended by Chief Newlin to
18 clarify the use of county facilities and equipment for personal use and to state,
19 from Chief Newlin's understanding based on the Human Resource Director's e-mail,
20 that Whistle Blower activity was a personal matter for which annual leave or
21 comp time could be approved, but paid release time could not be authorized.

22 17. The facts establish, to a preponderance of the evidence standard, that Ms.
23 Cousins's working conditions were unchanged and no chain-of-command or other
24 employees were encouraged or led to believe that Ms. Cousins should be treated
in a negative or less than professional manner, nor was any action taken by persons
other than Chief Newlin that could reasonably be construed as encouraging any
negative or hostile action towards Ms. Cousins.

²Complaint No. 1 dated August 20, 2008; Complaint No. 2 dated October 16, 2008; Complaint No. 3 dated October
15, 2008; and Complaint No. 4 dated October 20, 2008.

1
2 ECF No. 14-2, p. 33 – 34. The ALJ went on to reiterate that after July 15, 2008, there was “no
3 adverse change in Ms. Cousins’ employment status, terms and conditions of employment, or any
4 change in her duties, working environment and work assigned. There is no evidence to support a
5 finding that hostile actions were encouraged by any chain-of-command supervisor.” ECF No.
6 14-2, p. 44.

7 With regard to Chief Newlin’s July 16, 2008 letter, the ALJ concluded that “informing
8 Ms. Cousins that her Whistleblower activity was a personal matter and directing her to take
9 personal leave were not acts of retaliation.” ECF No. 14-2, p. 46. He concluded by making a
10 finding that Ms. Cousins “hasn’t met her burden to prove retaliation.” ECF No. 14-2, p. 46.

11 The undersigned also notes that Ms. Cousins has not shown, by any admissible facts, that
12 the July 16, 2008 letter identified her as a whistleblower to employees who did not already have
13 that knowledge. Therefore, sending a copy of the letter to those individuals, who already have
14 knowledge, cannot support an allegation of retaliation. Finally, the ALJ made clear findings that
15 her working conditions did not change in any fashion following the date of that letter.

16 The three other complaints were not filed as claims of retaliation and were found, by the
17 ALJ, to not allege improper governmental action. Those complaints are not part of this
18 litigation.

19 The undersigned concludes that collateral estoppel applies Ms. Cousin’s claims related to
20 Sheriff Newlin and the July 16, 2008 letter for the same reasons discussed above. In addition,
21 Ms. Cousins has presented no facts to support her assertion that Sheriff Newlin released her
22 identity as a whistleblower to other county employees who did not know of her whistleblower
23 complaint and she cannot therefore factually support any claim of retaliation or violation of any
24 first amendment rights relating to the July 16, 2008 letter.

1 For the reasons stated, the defendants' motion to dismiss Claims II and III is

2 **GRANTED..**

3 **Claim IV: Retaliation for Filing an EEOC Claim**

4 In her fourth claim for relief, Ms. Cousins alleges that the defendants retaliated against
5 her for filing an EEOC claim against them. The only claim that was actually filed against the
6 defendants is contained in the Notice of Charge of Discrimination dated April 9, 2008 which
7 alleged sex discrimination under Title VII. ECF No. 16-2, p. 10. Attached to the Notice of
8 Charge of Discrimination was a Washington State Human Rights Commission Complaint signed
9 by Terry Cousins on April 6, 2008. ECF No. 16-2, p. 11. Ms. Cousins' Complaint was with
10 regard to the denial of a promotion to the Lieutenant position on March 18, 2008. She
11 specifically stated that she believed she was denied the "promotional opportunity and
12 discriminated against because of my sex." *Id.* She did not file any other complaint with the
13 EEOC after April 6, 2008.

14 The basis of Ms. Cousins' claim is that she was not promoted to the Corrections
15 Lieutenant position in August 2008 because she filed the April 2008 EEOC charge. Thus, the
16 date she was discriminated against, based on her assertions, was on August 11, 2008, the date
17 that the position was filled by Genie Elton.

18 As a prerequisite to filing suit, a Title VII complainant must file a charge of
19 discrimination with the EEOC with either within 180 days or 300 days after the alleged unlawful
20 employment practice occurred. *See* 42 U.S.C. § 20003-5(e)(1). Exhaustion of administrative
21 remedies is a clear requirement for bringing a suit under Title VII. "Each discrete discriminatory
22 act starts a new clock for filing charges alleging that act. The charge, therefore, must be filed
23 within the 180- or 300-day time period after the discrete discriminatory act occurred." *National*
24 *R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002).

1 Ms. Cousins failed to file the required claim with the EEOC and her fourth claim must therefore
2 be dismissed.

3 **CONCLUSION**

4 For the above stated reasons, the Court is **GRANTING** the Defendants' motion to
5 dismiss (ECF No. 14) all of the plaintiff's claims with the exception of her Claim I of gender
6 discrimination for failure to promote to the Lieutenant position in March 2008.

7 DATED this 29th day of December, 2010.

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11 Karen L. Strombom
12 United States Magistrate Judge
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