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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

TAMMY SALING,

Plaintiff *Pro Se*,

vs.

KEITH ROYAL, Sheriff, Nevada County, California, et al.,

Defendants.

Case No.: 2:13-cv-1039 TLN EFB PS

EEOC'S REPLYAS *AMICUS CURIAE* IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S TITLE VII CLAIMS

The Honorable Edmund F. Brennan

Hearing Date: TBD
Time: TBD
Courtroom 8, 13th Floor

ARGUMENT ON REPLY

In arguing that Plaintiff Tammy Saling's Title VII claims are time-barred, Defendants Keith Royal, Sheriff of Nevada County, and Gayle Satchwell, former Director of Human Resources, Nevada County (collectively County Defendants) incorrectly assert that the charge Plaintiff presented to the Equal Employment Opportunity Commission (EEOC) on April 26, 2012, "did not initially institute proceedings" with the Department of Fair Employment and Housing (DFEH). *See* County Brf., District Court Docket Number (Dkt.) 69 at 3:13. In fact, pursuant to the existing worksharing agreement between the EEOC and the DFEH, the EEOC, acting as the DFEH's agent,

received the charge initially on the DFEH's behalf, thereby initiating the state agency's proceedings. The DFEH's proceedings were then immediately terminated under the agreement's self-executing waiver of exclusive jurisdiction, and Saling's charge was then filed with the EEOC. This interpretation of the worksharing agreement comports with the language and goals of Title VII's deferral provisions as well as decisions of the Ninth Circuit and other circuits, as explained below.

1. Because 42 U.S.C. § 2000e-5(c) Mandates that Proceedings Must be Commenced with the Appropriate State or Local Fair Employment Practices Agency Before a Charge May be Filed with the EEOC, the Prerequisite in 42 U.S.C. § 2000e-5(e)(1) for Extending the EEOC Charge-filing Deadline to 300 days is Necessarily Satisfied Before Such a Charge is Filed with the EEOC.

The County Defendants incorrectly argue that the EEOC ignores the plain language of 42 U.S.C. § 2000e-5(e)(1), which requires that a charge be "initially instituted" with a state or local agency before the EEOC filing deadline is extended to 300 days. The County Defendants argue that "initially" means "first," *see* Dkt. 69 at 4:16-18, and the EEOC agrees. In arguing that Saling did not meet this requirement, however, the County Defendants ignore the plain language of another subsection of Title VII's charge-filing provisions which ensured that Saling "initially instituted" proceedings with the DFEH before she filed her charge with the EEOC.

Specifically, 42 U.S.C. § 2000e-5(c) provides that where (as here) there is overlapping jurisdiction between a state agency and the EEOC, "no charge may be filed" with the EEOC until proceedings are first commenced under the state or local law and either 60 days elapse or the state or local agency terminates its proceedings, whichever comes first. Thus, when Saling brought her charge to the EEOC 297 days after she was terminated, Title VII required the EEOC to hold it in suspended animation until § 2000e-5(c)'s mandatory requirement—that proceedings first be commenced with the DFEH—was satisfied. Section 2000e-5(c) thus ensured that Saling met the "initially instituted" requirement in § 2000e-5(e)(1), because the EEOC could not accept Saling's charge for filing until it was. The County Defendants' brief wholly ignores the interplay between these two statutory provisions, the implementation of which is spelled out in the EEOC-DFEH worksharing agreement.[1]

[1] The County Defendants' brief is also factually inaccurate because it states that Saling filed a charge with the EEOC on April 12, 2012 (the actual date of filing was April 26, 2012), and then filed a later complaint with the DFEH. To the contrary, when Saling submitted her charge to the EEOC on April 26, 2012, the EEOC first accepted it on the DFEH's

2. The Agency Relationship Between the EEOC and the DFEH, Created by the Worksharing Agreement, Implements the Plain Meaning and Underlying Purposes of Title VII's "Deferral" Provisions.

The County Defendants incorrectly contend that the procedures established under the EEOC-DFEH worksharing agreement do not satisfy the statutory prerequisite for the 300-day charge-filing time limit—the requirement under 42 U.S.C. § 2000e-5(e)(1) that a charge be "initially instituted" with a state or local agency. Under the worksharing agreement in effect when Saling filed her charge, the DFEH authorized the EEOC to accept charges on the DFEH's behalf and expressly agreed that submission of a charge to the EEOC automatically initiated DFEH proceedings. Plaintiff's Request for Judicial Notice, Dkt. 52, Exhibit 1 (FY2010-FY2012 Worksharing Agreement, § II.A). Hence, Saling's submission of her charge to the EEOC instituted DFEH proceedings on her charge for all legal and practical purposes. *See Griffin v. City of Dallas*, 26 F.3d 610, 612-13 (5th Cir. 1994) (holding that, because the EEOC received the plaintiff's charge as the agent of the state fair employment practices (FEP) agency, the EEOC's acceptance of the charge instituted proceedings in the FEP agency); *Velázquez-Peréz v. Developers Diversified Realty Corp.*, 753 F.3d 265, 277 (1st Cir. 2014) (holding that "worksharing agreements can permit state proceedings to be automatically initiated when the EEOC receives the charge").

The County Defendants further argue, incorrectly, that the cases cited in the EEOC's amicus brief are either distinguishable because the charge was initially presented to the FEP agency or unpersuasive because the court did not address the "direct conflict" with the plain language of the statute. Dkt. 69 at 5-6. To the contrary, the cases the EEOC cites all recognize the validity of worksharing agreements between the EEOC and state agencies like the DFEH and, specifically, the validity of provisions that (1) allow the EEOC to accept charges on a state agency's behalf, thereby initiating state proceedings; and (2) waive the state agency's period of exclusive jurisdiction, thereby terminating the state proceedings immediately after they were commenced. Indeed, in *Green v. Los Angeles County Superintendent of Schools*, 883 F.2d 1472 (9th Cir. 1989) the Ninth Circuit expressly accepted the validity of a provision in the EEOC-DFEH worksharing agreement allowing

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behalf and it became "filed" with the DFEH at that point. When Saling later filed another charge with the DFEH, that charge was her second DFEH charge.

each agency to accept charges on the other's behalf.

The Ninth Circuit noted in *Green* that "[t]he worksharing agreement then in effect between the EEOC and the DFEH provided, in relevant part, that each agency was the agent of the other for the purpose of receiving charges." 883 F.2d at 1474. Based on this provision, the Ninth Circuit held that the plaintiff's charge was "deemed to have been received by the EEOC on the same day" that she filed it directly with the DFEH "because under the worksharing agreement[,] the DFEH was an agent of the EEOC for the purpose of receiving charges." *Id.* at 1476.

The plaintiff in *Green* had submitted her charge directly to the DFEH and, thus, the specific question before the Ninth Circuit was whether that act sufficed to "file" her charge with the EEOC—the opposite of Saling's situation. In answering that question in the affirmative, however, the Ninth Circuit noted that the EEOC-DFEH worksharing agreement created an "agency" relationship in both directions. *See Id.* at 1474. Thus, the Ninth Circuit's rationale in *Green* dictates the conclusion that the worksharing agreement Saling submitted to this Court allowed the EEOC to accept Saling's charge on the DFEH's behalf, thereby initiating state agency proceedings. Indeed, the Ninth Circuit more recently applied this analysis to a situation like Saling's in *Peterson v. State Department of Corrections and Rehabilitation*, 319 Fed. Appx. 679 (9th Cir. 2009). In *Peterson*, the Ninth Circuit stated:

> When the relevant state agency has entered into a work sharing agreement with the EEOC and that agreement states that each agency will serve as the agent of the other for the purpose of receiving charges, it is well-settled law that a charge filed with the EEOC is "constructively filed" with the state agency either on the same day that the charge was filed with the EEOC or on the day that the EEOC refers the complaint to the state agency.[2]

Id. at 680 (citing *Green*). *See also Hubbard v. State of Washington, Dep't of Corrs.*, Ninth Cir. Docket No. 14-36051 (9th Cir. June 8, 2015) (vacating summary judgment order in Civ. No. 3:13-cv-5982, 2014 WL 675051 (W.D. Wash. Dec. 1, 2014)) (holding district court's grant of summary

[2] The latter clause of the Court's statement explaining when a charge is "constructively filed" with the state agency—"on the day that the EEOC refers the complaint to the state agency"—applies only where the applicable worksharing agreement explicitly requires the EEOC to transmit the charge to the state agency in order to initiate proceedings. The EEOC-DFEH Worksharing Agreement, however, included no such requirement. To the contrary, it specifically allowed for institution of proceedings upon the EEOC's receipt of the charge as DFEH's agent.

judgment on plaintiff's Title VII claim was "in error" where district court had ruled plaintiff had only 180 days to file her EEOC charge because she presented it first to the EEOC, even though the EEOC had in place, at the time, a worksharing agreement with Washington State) (For the convenience of the Court, these orders are attached hereto as Exhibit 1).

Thus, the Ninth Circuit has made it clear that there is no conflict between the dual-filing procedures of the worksharing agreement and Title VII's requirement that, to be entitled to a 300-day charge-filing time period, a charging party must first file her charge with the state or local agency. By arguing that such a conflict exists and that Saling's submission of her charge to the EEOC failed to initially institute proceedings with the DFEH, the County Defendants ignore the Ninth Circuit's explicit recognition of the validity of worksharing provisions like the one in effect when Saling presented her charge to the EEOC.

The County Defendants also err in their critique of the out-of-circuit cases the EEOC cited. As Defendants recognize, the cases the EEOC cited all "interpret workshare agreements between the EEOC and state agencies to allow dual filing to extend the statute of limitations" when a charging party first submits his or her charge to the EEOC. Dkt. 69 at 6:1-6. Defendants contend, however, that these decisions are unpersuasive because they do not address the alleged "direct conflict" between worksharing agreements and the plain language of Title VII. *See* Dkt. 69 at 6:1-16. In fact, two of these cases involved plaintiffs who, like Saling, first presented their charges to the EEOC and defendants who, like the County Defendants, argued that this failed to satisfy the "initially instituted" requirement of § 2000e-5(e)(1), and those courts necessarily had to grapple with this argument about the statutory language. The Second Circuit in *Tewksbury v. Ottaway Newspapers, Inc.*, 192 F.3d 322, 325-28 (2d Cir. 1999), explicitly acknowledged this statutory argument and concluded: "[H]owever paradoxical it may seem, [plaintiff's] charge must be deemed to have been filed 'initially' with" the New York state agency because Title VII dictates that filing with the state agency occur before it can be filed with the EEOC. *Id.* at 327. Likewise, the Fifth Circuit in *Griffin v. City of Dallas*, *supra*, addressed the same question, in the same procedural posture, and held that under the applicable worksharing agreement, the plaintiff had "initially instituted" proceedings with the Texas state agency when she presented her charge to the EEOC. 26 F.3d at 611-13. Although

the First Circuit, in *Velazquez*, *supra*, did not itself grapple with the statutory language, it specifically endorsed the decisions in *Griffin* and *Tewksbury*, reasoning that the EEOC's updated worksharing agreement made clear that submitting a charge to the EEOC first instituted, and then terminated, the local agency's proceedings. *See Velazquez*, 753 F.3d at 176-77 & n.13.

Finally, the County Defendants' position conflicts with the Congressional goals of collaboration and efficiency that underlie Title VII's mandated deferral to state and local agencies (*e.g.*, 42 U.S.C. §§ 2000e-5(c), 2000e-5(e)(1)) and Title VII's encouragement that EEOC establish worksharing arrangements with those agencies (42 U.S.C. § 2000e-8). *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 117-119 (1988) (explaining that the deferral provisions' goals are "to give States a reasonable opportunity to act under State law before the commencement of any Federal proceedings," and "to promote time economy and the expeditious handling of cases."). The position the County Defendants espouse would undermine a State's authority to enter into a voluntary worksharing agreement with the EEOC and would produce extraordinary inefficiency in the processing of discrimination charges without promoting any other goal of Title VII. Because the County Defendants' arguments are legally incorrect and, in addition, would undermine important congressional goals, this Court should reject the Defendants' position.

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CONCLUSION

Under the worksharing agreement existing when Ms. Saling presented her charge to the EEOC, the EEOC, acting as the DFEH's agent, first accepted Ms. Saling's charge on the DFEH's behalf, thereby initiating DFEH proceedings—and, under the worksharing agreement, immediately thereafter terminating those proceedings—*before* filing the charge with the EEOC, thus satisfying § 2000e-5(e)(1)'s prerequisite for the 300-day charge-filing time period. Defendants' contrary argument has no merit.

Respectfully submitted,

Dated: June 10, 2015

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EXHIBIT 1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SAMANTHA HUBBARD, Pro-Se, Plaintiff - Appellant, v. STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, Defendant - Appellee.	No. 14-36051 D.C. No. 3:13-cv-05982-RJB Western District of Washington, Tacoma ORDER

Before: McKEOWN, PAEZ, and TALLMAN, Circuit Judges.

A review of the record and appellee's April 9, 2015 "motion to withdraw defense" demonstrates that the district court's grant of summary judgment on appellant's Title VII claims was in error. *See* 42 U.S.C. § 2000e-5(e)(1) (where the plaintiff "has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice" a charge must be filed "within three hundred days after the alleged unlawful employment practice occurred"); *Velazquez-Perez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 276-77 (1st Cir. 2014); *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1509-11 (9th Cir. 1989), *overruled on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998).

AS/MOATT

Accordingly, the district court's order granting summary judgment on appellant's Title VII claims is vacated, and the appeal is remanded to the district court for further proceedings consistent with this order.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

SAMANTHA HUBBARD,

Plaintiff,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTION,

Defendant.

CASE NO. 13-5982 RJB

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on the Defendant State of Washington Department of Correction's ("DOC" or "State") Motion for Summary Judgment (Dkt. 46) and Plaintiff's "Counter Motion to Defendant's Motion for Summary Judgment" (Dkt. 64). The Court has considered the pleadings filed regarding the motions and the remaining file.

This employment case arises from the June 11, 2012 termination of Plaintiff's job with the DOC. Dkt. 1. The State now moves to summarily dismiss all Plaintiff's claims. Dkt. 46. For the reasons set forth below, the State's motion should be granted and the case dismissed.

I. FACTS

On August 1, 2007, Plaintiff began working as a Classification Counselor at Monroe Correctional Complex in Monroe, Washington. Dkt. 49, at 10.

On February 4, 2008, DOC wrote Plaintiff a "letter of concern" regarding her over 34 hours of work time used to make personal calls on the State's telephone system "SCAN." Dkt. 51, at 13.

According to the State, Plaintiff's performance was not meeting expectations, and she was placed on a Performance and Development Plan on November 18, 2008. Dkt. 51, at 15. The plan was developed due to the timeliness of Plaintiff's reports and errors therein, an increase in offender grievances regarding Plaintiff, and Plaintiff's attendance. *Id.*

She received a letter of reprimand on May 6, 2009, for failing to complete the essential functions of her job. Dkt. 51, at 21. In her Performance and Development Plan Evaluation, dated July 24, 2009, it was noted that her absenteeism was high (missing on average one day a week), her organization continued to be poor, her reports were still late and contained several errors. Dkt. 51, at 26.

In August of 2009, Plaintiff filed a charge with the Equal Employment Opportunity Commission ("2009 EEOC charge") alleging that her then supervisor, Lisa Howe, discriminated against her due to her race and her daughter's disability and retaliated against her. Dkt. 48, at 22. The EEOC dismissed the charge on June 9, 2010, unable to conclude that the information it obtained established violations of the relevant statutes. Dkt. 48, at 24.

In October of 2009, Plaintiff was assigned to a new unit within the facility, and initially made improvement. Dkt. 51, at 31-32. On October 25, 2010, Plaintiff received another letter of reprimand for excessive use of the State's telephone system (for several long distance calls) and inappropriate use of the internet. Dkt. 51, at 50. On December 9, 2010, she received a letter of

reprimand for brining an "empty prescription bottle of oxycodone," leaving it on the floor in her office (which was located in one of the prison's units) and for leaving her "institutional keys" on her office's desk. Dkt. 51, at 38.

In December 2011, the State notified Plaintiff that she was under investigation. Dkt. 48, at 26. She was interviewed several times about the allegations which included: misuse of the State's telephone system and email system, improper use of sick leave, inappropriate use of her DOC badge, and failing to pay for lunches in the staff lounge. Dkt. 48, at 41-44, and 46-51.

On April 9, 2012, Plaintiff's union filed a grievance on her behalf, alleging that the State violated a provision of the collective bargaining agreement when they took over 90 days to complete the investigation without seeking written authorization to extend the time frame. Dkt. 48, at 34. A meeting between the State and the union was held, and the union requested "a full make whole remedy, including a conclusion and resolution to the investigation." *Id.* In response, the State sent a letter to the union, explaining the reasons for the delay, and indicating that they were working on a final resolution. *Id.* The State indicated that Plaintiff would be notified as soon as possible. *Id.*

On June 11, 2012, Plaintiff's employment was terminated. Dkt. 51, at 41. The termination letter lists the following misconduct for which the action was taken:

> 1. During the period October 1, 2011, through December 31, 2011, you admitted that you used the State's Scan telephone system on multiple occasions for personal telephone calls.
> 2. On December 23, 2011, you attended Pierce County Superior Court regarding your fugitive warrant out of Louisiana, after you submitted a leave request form on December 20, 2011, that requested Sick Leave on December 23, 2011, for the entire shift. .
> 3. You wore your Department of Corrections (DOC) badge to Pierce County Superior Court on December 23, 2011, for your personal hearing.
> 4. During the period December 2011, through January 2012, you admitted you received personal e-mails on your DOC Outlook account on numerous occasions.

> 5. You admitted to receiving correspondence from Office Assistant 3, Leslie Chu, on January 5, 2012, that was derogatory in nature regarding another staff person.
> 6. During-the period October 6, 2011 through November 15, 2011, you misappropriated state resources when you recorded coupon numbers on the Staff Lounge Receipt Log that had been purchased and used by other employees, and consumed lunches that you did not pay for on October 6, 7, 14, 18, 28, 2011; and November 2, 7, 10, 15, 16, 2011.
> 7. You did not submit coupons for the lunches you consumed on October 13, 2011 and October 27, 2011.

Dkt. 50, at 41-42. On June 13, 2012, Plaintiff's union filed a grievance on her behalf regarding her termination. Dkt. 48, at 29. The union withdrew that grievance "after a thorough investigation and review of the case" on January 8, 2013. Dkt. 48, at 32.

On January 14, 2013, Plaintiff filed a charge with the EEOC alleging racial discrimination and retaliation for filing the 2009 EEOC charge. Dkt. 48, at 37. The EEOC dismissed the charge, concluding that it was unable to find that the information obtained showed a statutory violation. Dkt. 48, at 39.

Plaintiff, acting *pro se*, filed her Complaint, entitled "Employment Discrimination Complaint," on November 13, 2013. Dkt. 1. She alleges that she suffered disparate treatment due to her race and that she was retaliated against because she filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). Dkt. 1-1. Plaintiff additionally references due process in connection with the termination of her employment. *Id.* Plaintiff also filed an "Additional Statement of Facts," docketed as an Amended Complaint, which references due process and the collective bargaining agreement and "wrongful termination." Dkt. 13. Much of Plaintiff's Complaint and subsequent "Additional Statement of Facts"/Amended Complaint are difficult to decipher.

On October 14, 2014, Defendant filed the instant motion for summary dismissal of all Plaintiff's claims, and noted the motion for November 7, 2014. Dkt. 46. Plaintiff then filed a

pleading that was construed as a motion for an extension of time to: 1) conduct more discovery and 2) file a response to the motion for summary judgment. Dkt. 54. Plaintiff's motion for an extension of time to conduct further discovery was analyzed as a motion pursuant to Fed. R. Civ. P. 56 (d), and was denied because Plaintiff failed to "identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." Dkt. 58 (*citing Tatum v. City and County of San Francisco*, 411 F.3d 1090, 1100 (9th Cir. 2006)). Plaintiff's motion for an extension of time to respond to the summary judgment motion, which Plaintiff noted included hundreds of pages of attachments, was granted and the motion for summary judgment renoted to November 28, 2014. Dkt. 58. The State's Motion for Summary Judgment is now ripe for review.

In the pending motion, the State argues that: (1) Plaintiff's claims are barred for failure to file her EEOC charge within 180 days of her termination, (2) her discrimination and retaliation claims fail under the *McDonnell Douglas* burden shifting scheme, and (3) she cannot show a violation of due process or the collective bargaining agreement. Dkt. 46.

In Plaintiff's November 26, 2014 "counter motion" she asserts that "there are several facts in dispute" and simultaneously moves for "all the relief sought in this case." Dkt. 64. Plaintiff repeatedly argues that the State's attorneys and various witnesses are not being honest about the facts in the case. *Id*. She contests the various reasons given for the termination of her employment and asserts that defense counsel is "using her wealth of legal knowledge purely preying on the legal naivety of the plaintiff who is pro se in this case and has little or no legal pedigree." *Id.*, at 25.

The discovery deadline was September 15, 2014 and the dispositive motions deadline was October 14, 2014. Dkt. 26. Trial is set to begin on January 12, 2015. *Id.*

II. DISCUSSION

A. PLAINTIFF'S LATE FILED PLEADING

Pursuant to Local Rule W.D. Wash. 7(d)(3), Plaintiff's response to the State's Motion for Summary Judgment was due on November 24, 2014. The dispositive motions deadline was October 14, 2014. Plaintiff filed her response and "counter motion" on November 26, 2014. Plaintiff did not move for an extension of time to file a response or motion for summary judgment.

In the interest of fully and fairly considering all issues, the Court should consider the late filed pleading. The Court notes that Plaintiff has requested, and received, an extension of time to respond to the Defendant's motion for summary judgment. Plaintiff has filed extensive briefing on this motion and related motions. As demonstrated below, no further briefing on any of the issues is necessary.

B. SUMMARY JUDGMENT STANDARD

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt."). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a

material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, T.W. *Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and "missing facts" will not be "presumed." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

C. TIMING OF 2013 EEOC CHARGE AND TITLE VII CLAIMS

To establish federal subject matter jurisdiction, a plaintiff is required to exhaust his or her administrative remedies before seeking adjudication of a Title VII claim. *B.K.B. v. Maui Police Dep't*, 276 F.3d 1091, 1099 (9th Cir. 2002). A Title VII plaintiff must exhaust administrative remedies by filing a timely charge with the EEOC, or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge. 42 U.S.C. § 2000e-5(b). Generally, the charge must be filed with the EEOC "within one hundred and eighty days after the alleged unlawful employment practice occurred." 42 U.S.C. § 2000e-5(e)(1). In a state, like Washington, "that has an entity with the authority to grant or seek relief with respect to the

alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice." *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002). "A claim is time barred if it is not filed within these time limits." *Id.*

Plaintiff's claims for discrimination and retaliation, brought pursuant to Title VII should be dismissed for failure to timely exhaust her administrative remedies. This Court does not have subject matter jurisdiction over these claims. There is no evidence that Plaintiff instituted proceedings with the Washington State Human Rights Commission or any other state or local agency with authority to grant relief before she filed her charge with the EEOC. Accordingly, she had 180 days from after the date of "alleged unlawful employment practice occurred" to file her charge. 42 U.S.C. § 2000e-5(e)(1). _Plaintiff was discharged from employment on June 11, 2012. She did not file her EEOC charge until January 14, 2013 – 217 days after her discharge. Plaintiff does not allege (much less point to any evidence) that she suffered discrimination or retaliation contrary to Title VII after her discharge date. Her claims for discrimination and retaliation under Title VII are time barred. The State's motion (Dkt. 46) should be granted and Plaintiff's claims for discrimination and retaliation should be dismissed.

The Court need not reach the Defendant's other basis for dismissal of these claims, or Plaintiff's other arguments that her motion on these claims be granted. To the extent that Plaintiff makes a motion regarding these claims (Dkt. 64), it should be denied.

D. DUE PROCESS/VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

To the extent that Plaintiff asserts a procedural due process violation in connection with the Collective Bargaining Agreement, the State's motion to dismiss it (Dkt. 46) should be granted, and her claim should be dismissed.

The Fourteenth Amendment protects individuals from the deprivation of property without due process of law. There are three elements for procedural due process claims under Section 1983: (1) a property interest protected by the Constitution; (2) a deprivation of that interest by the government; and (3) a lack of process. *Portman v. County of Santa Clara*, 995 F.2d 898, 904 (9th Cir. 1993). A public employer may meet its due process obligations by providing a collective bargaining agreement if that agreement contains grievance procedures that satisfy due process. *Armstrong v. Meyers*, 964 F.2d 948, 950 (9th Cir.1992).

Plaintiff fails to point to any evidence that her Collective Bargaining Agreement with the State did not contain grievance procedures that satisfy due process. The record shows that under the agreement, when misconduct allegations were made against her, she was notified of them, had an opportunity to be heard, an opportunity to dispute the State's evidence and an opportunity to file grievances. She has made no showing that her procedural due process rights were violated. The State's Motion for Summary Judgment on Plaintiff's due process claim (Dkt. 46) should be granted and the claim dismissed.

To the extent that she makes a motion for summary relief on her claim for due process (Dkt. 64), it should be denied. She provides no argument or evidence in support of her motion.

E. VIOLATION OF COLLECTIVE BARGAINING AGREEMENT

The State's motion to summarily dismiss Plaintiff's claims for violation of the Collective Bargaining Agreement (Dkt. 46) should be granted. To the extent that Plaintiff makes a motion for summary relief on her claim for violation of the Collective Bargaining Agreement (Dkt. 64), it should be denied.

To the extent that Plaintiff argues generally that the Collective Bargaining Agreement was violated, she fails to point to any particular provision that was violated, except the provision that

requires that investigations be conducted in 90 days. She acknowledges, however, that her union grieved the issue. She does not point to any evidence that she was damaged as a result of the alleged violation or that she did not receive the relief she requested. The claim should be dismissed.

F. WRONGFUL TERMINATION

Section 301 of the Labor Management Relations Act ("LMRA") provides that all suits seeking relief for violation of a collective bargaining agreement may be brought in federal court. *Humble v. Boeing Co.*, 305 F.3d 1004, 1007 (9th Cir. 2002). The Supreme Court has held in a variety of contexts that § 301 acts to preempt state law claims that: "substantially depend" on a collective bargaining agreement, "that are premised on negotiable or waivable state law duties the content of which has been covered" by a collective bargaining agreement or "that seek to enforce the terms" of a collective bargaining agreement, for example, breach of contract claims. *Id.*

To the extent that Plaintiff asserts a claim for wrongful termination under state law for asserted violations of the Collective Bargaining Agreement, her claim is preempted by § 301 of the LMRA, and so should be dismissed. To the extent that Plaintiff asserts a claim for wrongful termination as a breach of the Collective Bargaining Agreement, Plaintiff fails to identify which provision applies or any evidence in support of her assertions. Plaintiff's claim for wrongful termination should be dismissed.

G. CONCLUSION

The State's Motion for Summary for Summary Judgment (Dkt. 46) should be granted. To the extent that Plaintiff moves for summary judgment, (Dkt. 64), her motion should be denied. Plaintiff's claims should be dismissed and this case closed.

III. ORDER

IT IS ORDERED THAT:

- Defendant State of Washington Department of Correction's Motion for Summary Judgment (Dkt. 46) **IS GRANTED;**
- Plaintiff's "Counter Motion to Defendant's Motion for Summary Judgment" (Dkt. 64) **IS DENIED**;
- Plaintiff's claims are **DISMISSED**; and
- This case is **CLOSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 1st day of December, 2014.

ROBERT J. BRYAN
United States District Judge