UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

CRYSTAL JANSEN, Plaintiff, v. DESCHUTES COUNTY and L. SHANE NELSON, an individual Defendants.	Case No.: 6:17-cv-01276-MK FINDINGS AND RECOMMENDATION RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

KASUBHAI, Magistrate Judge:

Plaintiff filed this action against Deschutes County and L. Shane Nelson, alleging sex discrimination and retaliation under Title VII and Oregon law, violations of 42 U.S.C. § 1983, aiding and abetting under ORS 659A and common law claims. Plaintiff filed the First Amended Complaint following discovery. Defendants then filed a Motion for Summary Judgment or, in the Alternative, Partial Summary Judgment. The parties fully briefed this matter and the Court heard oral argument.

For the reasons set forth below, Defendants' motion should be **GRANTED** in part and **DENIED** in part as follows:

First Claim	Title VII Sex Discrimination Claim Against Deschutes County	DENIED
Second Claim	Title VII Retaliation Claim Against Deschutes County	DENIED
Third Claim	ORS 659A.030(1)(b) Discrimination Claim Against Deschutes County	DENIED
Fourth Claim	ORS 659A.030(f) Retaliation Claim Against both Defendants	DENIED
Fifth Claim	ORS 659A.199 Retaliation for Good Faith Complaint Claim Against Deschutes County	DENIED
Sixth Claim	ORS 659A.203 Whistleblower Retaliation Claim Against Deschutes County	DENIED
Seventh Claim	§ 1983 First Amendment Retaliation Claim Against both Defendants	DENIED
Eighth Claim	§ 1983 Deprivation of Equal Protection Claim Against both Defendants	DENIED
Ninth Claim	Invasion of Privacy – Appropriation Claim Against both Defendants	GRANTED
Tenth Claim	Invasion of Privacy – False Light Claim Against both Defendants	GRANTED
Eleventh Claim	ORS 659A.030(1)(g) Aiding and Abetting Claim Against Nelson	DENIED

BACKGROUND

Plaintiff began her employment with Deschutes County Sheriff's Office in 1996 and has been continuously employed in the Corrections Division since 2007. Jansen Decl. ¶ 4 (ECF No. 62). From 2007 to 2013, Plaintiff worked as a deputy. *Id.* The general command structure of the Sheriff's Office is as follows: a team of deputies is supervised by two sergeants, each team including its sergeants is supervised by a lieutenant, and the lieutenant reports to the Corrections Division Captain who answers directly to the Sheriff. Laherty Decl. Ex. 1 (ECF No. 59).

In January 2013, Plaintiff was promoted from a deputy to a sergeant and was assigned to serve as Sergeant of Team D, which was headed by Lieutenant Robert Trono. *Id.* at Ex. 4 Trono Dep. 9:8-10:7 (ECF No. 59); First Am. Compl. ¶ 12, 16, 17 (ECF No. 29). At that time, there was only one other female sworn officer in a supervisory position. Jansen Decl. ¶ 5 (ECF No. 62). In November 2013, Defendant Nelson became the Corrections Division Captain by appointment. Laherty Decl. Ex. 3 McMaster Dep. 241:17-242:2, 244:1-14 (ECF No. 59); Stephenson Decl. Ex. 24 Deschutes County's Am. Answer to Pl.'s BOLI Compl. 2 (ECF No. 72). On July 1, 2015, Nelson was appointed to the position of Deschutes County Sheriff by Deschutes County Board of County Commissioners. Laherty Decl. Ex. 3 McMaster Dep. 310:23-311:1 (ECF No. 59); Stephenson Decl. Ex. 24 Deschutes County's Am. Answer to Pl.'s BOLI Compl. 2, n. 1 (ECF No. 72). On November 8, 2016, Nelson was elected as Deschutes County Sheriff. Stephenson Decl. Ex. 24 Deschutes County's Am. Answer to Pl.'s BOLI Compl. 2, n. 1 (ECF No. 72)

Soon after Nelson became the Corrections Division Captain, the Sheriff's Office announced in December 2013 a promotional process for a lieutenant position which had a change in qualification requirement that disqualified Plaintiff. Laherty Decl. Ex. 40 Announcement

(ECF No. 59); First Am. Compl. ¶ 14 (ECF No. 13). Under the new qualification requirement, a sergeant must currently hold a supervisor certificate, whereas previously a sergeant was required to receive the certificate within one year of appointment. Laherty Decl. Ex. 40 Announcement (ECF No. 59); First Am. Compl. ¶ 14 (ECF No. 13). Defendants claim that Nelson played no role in changing the process. Laherty Decl. Ex. 3 McMaster Dep. 232:17-233:12, 241:17-243:2 (ECF No. 59).

As Sergeant of Team D, Plaintiff received a good performance evaluation from Lt. Trono for the year of 2013, which states that Plaintiff had met or exceeded standards in all performance categories, and her overall performance was "effective - meets standards." Laherty Decl. Ex. 34 Evaluation (ECF No. 59). Lt. Trono recommended Plaintiff be granted a salary increase and Nelson who was the Captain at the time approved the recommendation. *Id.* However, Plaintiff alleges that throughout 2014 and 2015, Lt. Trono told her numerous times that Nelson did not like her and that she should lay low and try not to come to his attention, including (1) dropping any additional job responsibilities she had taken on that were above and beyond her minimum duties, and (2) removing Plaintiff's personal social media photos in uniform and any association with the Sheriff's Office. Jansen Decl. ¶¶ 10, 42 (ECF No. 62). Defendants assert that Lt. Trono's verbal counseling of Plaintiff was to address her performance or conduct issues, some at Lt. Trono's own volition, some at Nelson's request. Laherty Decl. Ex. 4 Trono Dep. 30:11-31:6, 31:1-32:6, 32:7-33:23, 32:16-23, 34:24-36:18, Ex. 26 Jansen Dep. 97:2-6, 102:16-103:14 (ECF No. 59).

In late 2014, Captain Nelson removed Plaintiff from Team D and assigned her to Team B which was supervised by Lt. Lutz. Defs.' Mot. for Summ. J. 24 (ECF No. 54); Jansen Decl. ¶ 12 (ECF No. 62). Plaintiff claims that Nelson set her up for failure by reassigning her because

Team B members assumed her to be a "bitch." Jansen Decl. ¶ 12 (ECF No. 62). Lt. Trono stated that Captain Nelson decided to move Plaintiff to Lt. Lutz's team in an effort to "fix her." Trono Decl. ¶ 12 (ECF No. 70). Plaintiff alleges that it was not a standard practice to move supervisors among teams and Plaintiff was the only person who was moved. Jones Decl. ¶ 4 (ECF No. 65); Stephenson Decl. Ex. 5 Jansen Dep. 119:25-120:3; Lutz Decl. ¶ 3 (ECF No. 67). Defendants contend that Nelson made the decision to transfer Plaintiff both for operational reasons and in an attempt to remedy Plaintiff's performance deficiencies. Defs.' Mot. for Summ. J. 24-25 (ECF No. 54). As to the alleged performance deficiencies of Plaintiff, Nelson asserts that, given Plaintiff's inability to remedy the deficiencies during the ten months she had spent on Team D under Lt. Trono's supervision, a transfer to Lt. Lutz's team might help her improve. Laherty Decl. Ex. 28 Nelson Dep. 63:13-24, Ex. 5 Lutz Dep. 14:1-3 (ECF No. 59).

As Sergeant of Team B, Plaintiff experienced similar "counseling" by Lt. Lutz who counseled Plaintiff at the request of Nelson or Lt. Michael Gill. First Am. Compl. ¶ 17 (ECF No. 29); Laherty Decl. Ex. 5 Lutz Dep. 75:16-77:20, 37:22-38:23, 40:4-24 (ECF No. 59); Lutz Decl. ¶¶ 8, 9 (ECF No. 67). Lt. Lutz believes that Lt. Gill "may have approached on instructions from Nelson because it was unusual for a lieutenant to give such feedback about a fellow lieutenant's direct-report." Lutz Decl. ¶ 9 (ECF No. 67). Such "counseling" restricted Plaintiff's work and she claims that no similarly situated male coworkers faced the restriction in such a manner. Jansen Decl. ¶¶ 39-42 (ECF No. 62). Both Lt. Trono and Lt. Lutz state in their declarations that Nelson's bias towards Plaintiff was apparent, and that Nelson's bias put them in a difficult and stressful position to do their job. Trono Decl. ¶¶ 3, 5, 15, 16, 17 (ECF No. 70); Lutz Decl. ¶¶ 10, 11, 12, 14, 15 (ECF No. 67). Plaintiff alleges that Nelson did not have the same heightened

scrutiny against male sergeants as he did against Plaintiff. Stephenson Decl. Ex. 9 Trono Dep. 47:3-48:6 (ECF No. 72); Lutz Decl. ¶ 12 (ECF No. 67).

In early 2015 when Nelson was still the Captain, after Lt. Trono completed Plaintiff's performance evaluation for the year of 2014, Lt. Trono changed some parts of the evaluation under Nelson's pressure. Trono Decl. ¶ 9 (ECF No. 70); Jones Decl. ¶ 2 (ECF No. 65). Plaintiff alleges that it was "completely out of the ordinary for normal protocol" for a captain to ask a lieutenant to lower an employee's evaluation. Jones Decl. ¶ 2 (ECF No. 65). Lt. Trono ultimately marked Plaintiff as "meet standards" for her overall performance and Nelson was not happy about it. *Id.* When Nelson returned the final evaluation of Plaintiff, he whited-out Plaintiff's overall rating and handwrote "needs improvement." *Id.* This final evaluation was during Plaintiff's probation and adversely affected her career advancement. *Id.*

In the second half of 2015, Plaintiff was intermittently on leave for family and medical reasons. First Am. Compl. ¶ 25 (ECF No. 29); Jansen Decl. ¶ 15 (ECF No. 62). Plaintiff alleges that Nelson frequently contacted her during her leave as an attempt to prevent her from returning to work. First Am. Compl. ¶ 25 (ECF No. 29); Jansen Decl. ¶ 15 (ECF No. 62).

When preparing for Plaintiff's performance evaluation for 2015, Lt. Lutz believed that Plaintiff had significantly improved despite her personal stress in life (including her husband's serious illnesses), but he knew that "it was going to be challenging to give [Plaintiff] a positive review because of Nelson" who was the Sheriff. Lutz Decl. ¶ 12 (ECF No. 67). Lt. Lutz interviewed every member of his team (including deputies, nurses, and technicians) about Plaintiff's performance and every single person he interviewed commented that Plaintiff was doing really well and wanted to continue working with her. *Id.* "[Sheriff] Nelson called [Lt. Lutz] to inquire about how the interviews went, and [Lt. Lutz] told him [that Plaintiff] was doing

a good job [and] every person on [his] team gave positive feedback and … wanted to keep working with her. *Id.* "Nelson responded "that was 'not what I heard.'" *Id.* Lt. Lutz knew that if he gave Plaintiff a positive review, Nelson would not like it. *Id.* at ¶ 15. Nonetheless, Lt. Lutz marked Plaintiff's evaluation as "meets expectation" for her overall performance and in two categories as "exceeds expectations." *Id.* After Lt. Lutz left the evaluation with Captain McMaster, Plaintiff self-demoted to deputy in January 2016, a union-protected position. *Id.* at ¶¶ 15-16. Lt. Lutz checked with Captain McMaster several times on the status of Plaintiff's evaluation and was told by McMaster that he did not know where it was. *Id.* at ¶ 17. Lt. Lutz sensed that McMaster and Nelson were never going to approve a favorable evaluation of Plaintiff. *Id.* Since Plaintiff was no longer a sergeant, Lt. Lutz suggested that he rewrite the review and resubmit it. *Id.* In the rewritten evaluation, Lt. Lutz changed the two categories that were marked as "exceeds expectations" to "meets expectations" and removed one or two positive things he had commented about Plaintiff. *Id.* Lt. Lutz felt horrible that he had to modify Plaintiff's review, but he had to do so in order for it to be approved by Sheriff Nelson. *Id.*

Defendants contend that Lt. Lutz modified the evaluation because he felt the change accurately reflected Plaintiff's performance in 2015. Laherty Decl. Ex. 36 Starr Final Report p. 5 (ECF No. 59). However, Lt. Lutz stated in his declaration during discovery that "Nelson's focus on and disapproval of Jansen … put me in an incredibly difficult and stressful position because I believed that I could not personally succeed or satisfy Nelson unless Jansen was not succeeding" and "I felt like I was up against a brick wall in writing [Plaintiff]'s performance review because if I gave her a positive review, Sheriff Nelson would not like it." Lutz Decl. ¶¶ 11, 15 (ECF No. 67).

In 2014 and 2015, on several occasions, Plaintiff attempted to or applied for training and promotional opportunities, but she was either discouraged from applying or denied the opportunities. Jansen Decl. ¶¶ 14, 19, 20 (ECF No. 62); *see* Defs.' Mot. for Summ. J. 14-19 (ECF No. 54).

After receiving her 2015 performance evaluation in June 2016, Plaintiff made a formal complaint to the Sheriff's Office of discrimination and retaliation by Nelson. First Am. Compl. ¶ 31 (ECF No. 29); Laherty Decl. Ex. 7, 4-5 (ECF No. 59). Two days later, Nelson released to the media that two complaints had been made against him by "prior supervisors." *Id.*; Defs.' Mot. for Summ. J. 26 (ECF No. 54). Subsequently, the Sheriff's Office asked Deschutes County to hire investigator Renee Starr to investigate Plaintiff's complaint. Stephenson Decl. Ex. 23 Starr Dep. 74:1-5 (ECF No. 72). Starr acknowledged that this process at the outset of the investigation was problematic because it allowed Nelson to influence the witnesses. *Id.* at Ex. 23 Starr Dep. 99:8-102:9 (Eric Kropp (County Administrator) sent an email to several Deschutes County employees including Nelson with the subject "List of employees Renee Starr will interview," to which Starr admits that her "general practice would not be to notify the respondent in this case who I was interviewing … [b]ecause of the potential for influence.").

After Starr's investigation dismissed Plaintiff's complaint, Nelson promptly announced the result to the media on September 7, 2016. Stephenson Decl. Ex. 7 Molan Dep. 39:15-40:21, Ex. 17 (ECF No. 72). The next day, a news article titled "Probe clears Deschutes Sheriff" was published in a local newspaper. *Id.* at Ex. 18. Plaintiff alleges that Nelson also made a point on a couple occasions in public to demonstrate his dominance over her and to humiliate her. First Am. Compl. ¶ 33 (ECF No. 29).

After Plaintiff filed a BOLI (Bureau of Labor and Industry) complaint on October 18, 2016[1], Nelson spoke with the media and released additional information including a video. Stephenson Decl. Ex. 1 Nelson Dep. 97:14-24 (ECF No. 72). The video obscured all other employees' faces except Plaintiff's. Jansen Decl. ¶ 30 (ECF No. 62). In a news article in December 2016, Plaintiff alleges Nelson implied that Plaintiff's complaint about him was retaliation against him for trying to hold Plaintiff accountable for poor performance. Jansen Decl. ¶ 32 (62); *see* Defs.' Mot. for Summ. J. 28 (ECF No. 54) (citing December 2, 2016 KTVZ article "… Jansen was passed up for promotions because she had not been in her position long enough or had poor performance reviews. … I have an expectation of the teammates I work with and the supervisors I work with, … And I will continue to hold people accountable, and sometimes not everyone is going to like that.").

Plaintiff provided a notice to Defendants of her claim on October 21, 2016. Defs.' Mot. for Summ. J. 37 (ECF No. 54). After receiving the right to sue letters from BOLI and EEOC, Plaintiff brought this civil action on August 16, 2017. First Am. Compl. ¶ 40 (ECF No. 29). On July 12, 2018, Plaintiff filed an EEOC charge. Stephenson Decl. Ex. 25 Plaintiff's Second EEOC Filing (ECF No. 72).

Plaintiff alleges that discriminatory and retaliatory acts against her continued after she filed the complaints. First Am. Compl. ¶¶ 40-43, 45-47, 49 (ECF No. 29). Plaintiff was denied promotional or career development opportunities. Jansen Decl. ¶ 38 (ECF No. 62); First Am. Compl. ¶ 47 (ECF No. 29). She was harassed by Nelson or by others at his direction. First Am. Compl. ¶¶ 39, 40, 45 (ECF No. 29). Plaintiff's 2017 evaluation prepared by Sgt. Navarro was changed again because "upper management … wouldn't want anything about 'leadership' on her

[1] Plaintiff also cross-filed with the EEOC (Equal Employment Opportunity Commission) on October 18, 2016. Stephenson Decl. Ex. 26, at 4 (ECF No. 72-5).

evaluation." Navarro Decl. ¶¶ 2-4 (ECF No. 68). Nelson initiated an investigation to determine if Plaintiff had violated the Sheriff's Office policy by filing the BOLI complaint and this lawsuit. Stephenson Decl. Ex. 6 Nelson Dep. 234:17-22 (ECF No. 72); *see* Defs.' Mot. for Summ. J. 6 (ECF No. 54).

PLAINTIFF'S CLAIMS

Plaintiff brings eleven claims and generally alleges the following unlawful acts:

a. Denying Plaintiff promotional opportunities and desired assignments;

b. Denying Plaintiff training opportunities;

c. Pressuring Plaintiff to step down from various assignments and responsibilities;

d. Interfering with Plaintiff's performance evaluations, having the effect of making her ineligible for promotional opportunities;

e. Restricting Plaintiff's communications with coworkers;

f. Counseling Plaintiff for conduct that similarly situated coworkers were not counseled;

g. Creating or intentionally maintaining working conditions so intolerable that a reasonable person in his or her circumstance would demote himself or herself;

h. Unwelcomely touching Plaintiff;

i. Releasing a workplace video to the media in which Plaintiff's face and identity were the only discernable one;

j. Providing false and misleading information to the media impugning Plaintiff's work abilities; and/or

k. Failing to hire/promote Plaintiff.

The First Claim and the Third Claim allege that Deschutes County discriminated against Plaintiff because of sex in violation of Title VII and ORS 659A.030(1)(b).

The Second Claim alleges that Defendant Deschutes County retaliated against Plaintiff in violation of Title VII. The Fourth Claim alleges that Deschutes County and Nelson retaliated against Plaintiff in violation of ORS 659A.030(f).

The Fifth Claim alleges retaliation by Deschutes County for good faith complaint of illegal conduct in violation of ORS 659A.199. The Sixth Claim alleges unlawful whistleblower retaliation by Deschutes County in violation of ORS 659A.203.

The Seventh Claim and the Eighth Claim are brought under 42 U.S.C. § 1983 alleging that Deschutes County and Nelson deprived Plaintiff of her First Amendment right and right to equal protection.

The Ninth Claim and the Tenth Claim allege that Deschutes County and Nelson invaded Plaintiff's privacy via appropriation and false light. In the Ninth Claim, Plaintiff alleges that Defendants caused the release of information and video of Plaintiff which Nelson appropriated to his own use or benefit. In the Tenth Claim, Plaintiff alleges that the publication of the information and video of her depicted her in a false or misleading light, and the publication was unnecessary and outside the course and scope of Nelson's official duties.

The Eleventh Claim alleges that Nelson aided and abetted in violation of ORS 659A.030(1)(g).

STANDARD OF REVIEW

Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The movant has the burden of showing that there is no genuine issue of fact, but the plaintiff is not thereby relieved of his own burden of producing in turn evidence that would support a jury verdict." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). In determining a motion for

summary judgment, "the judge must view the evidence in the light most favorable to the nonmoving party." *McLaughlin v. Liu*, 849 F.2d 1205, 1208 (9th Cir. 1988).

In the context of employment cases, the Ninth Circuit has held that "[a]s a general matter, the plaintiff in an employment discrimination action need produce very little evidence in order to overcome an employer's motion for summary judgment." *Chuang v. University of California Davis, Bd. Of Trustees*, 225 F.3d 1115, 1123 (9th Cir. 2000) (citing *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir. 1996)). "The requisite degree of proof necessary to establish a *prima facie* case for Title VII … on summary judgment is minimal and does not even need to rise to the level of preponderance of the evidence." *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994) (citation omitted).

DISCUSSION

1. First and Second Claims – Title VII Claims[2]

1.1 Statute of Limitations

Pursuant to 42 USC § 2000e-5(e)(1):

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred …, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice …, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

[2] In addition to the two issues discussed here concerning the First and the Second Claims, Defendants also cite 42 USC § 1981a(b)(3)(D) as a statutory bar for damages in excess of $300,000. Defs.' Mot. for Summ. J. 39 (ECF No. 54). Defendants merely state the law without making any substantive argument. For the purpose of summary judgment, the Court does not need to address this issue.

Defendants assert that Title VII bars Plaintiff from bringing a Title VII action for any act that took place more than 300 days before the date Plaintiff filed her complaint with BOLI on October 19, 2016[3] (*i.e.*, any act occurring before December 24, 2015), citing 42 USC § 2000e-5(e)(1). Defs.' Mot. for Summ. J. 30-31 (ECF No. 54)[4].

Additionally, as to the alleged actions "that occurred after Plaintiff filed her October 16, 2016[5] BOLI [sic] (and therefore could not have been addressed in her BOLI complaint)," Defendants argue that Title VII also bars Plaintiff from bringing suit for these alleged actions because Plaintiff failed to file an EEOC action within 180 days after the occurrence. Defs.' Mot. for Summ. J. 32 (ECF No. 54).

Plaintiff in response argues that her Title VII and Oregon law claims are not time barred "[d]ue to the [c]ontinuing [v]iolation [d]octrine." Pl.'s Resp. 22-23 (ECF No. 71) (citing *National R.R. Passenger Corp., v. Morgan*[6], 536 U.S. 101, 117, 103 (2002)). Plaintiff claims that her hostile work environment claim in both Title VII and Oregon law claims involves "a series of related discriminatory acts that are part of the same continuous conduct." *Id.* at 24. "Because [a hostile work environment] claim is composed of a series of separate acts that collectively constitute one 'unlawful employment practice,' it does not matter that some of the component acts fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability." *Morgan*, 536 U.S. at 117.

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[3] Plaintiff alleges that she filed BOLI complaint on October 18, 2016. First Am. Compl. ¶ 34 (ECF No. 29); *see also* Laherty Decl. Ex. 9 BOLI Compl. 6 (ECF No. 59).

[4] Defendants (1) mis-cite the statute as "42 USC 20000e-5e(1);" (2) mis-quote the "one hundred eighty days" as "one hundred days;" and (3) do not mark any quoted language as emphasized but included "(emphasis added)" in the citation.

[5] The filing date of Plaintiff's BOLI complaint is October 18, 2016. First Am. Compl. ¶ 34 (ECF No. 29); *see* Laherty Decl. Ex. 9 BOLI Compl. 6 (ECF No. 59).

[6] Plaintiff cites the case as *Amtrak v. Morgan*, 536 U.S. 101, 117, 103 (2002).

"Under the continuing violation doctrine, a systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990) (citation and internal quotation marks omitted).

However, Defendants argue that Plaintiff failed to adequately plead a hostile work environment claim because the First Amended Complaint does not use the phrase "hostile work environment," and she failed to allege any facts of offensive conduct because of her sex that was severe or pervasive enough to substantiate a hostile work environment claim. Defs.' Reply 4 (ECF No. 80) (citing *Stell v. Intel Corp.*, No. 10-90-AA, 2010 WL 2757555, *2 (D. Or., 2010) ("To state a claim based on hostile work environment, plaintiff must allege that the offensive conduct regarding a protected class was sufficiently severe or pervasive that it altered the working conditions and created a hostile environment.").

A plaintiff must either plead the additional theory in the complaint or make known during discovery the intention to pursue recovery on the theory omitted from the complaint. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000). "Only if the defendants have been put on notice may the plaintiffs proceed on [an additional theory] at the summary judgment stage." *Id.* Here, the First Amended Complaint does not use the phrase "hostile work environment." *See* First Am. Comp. (ECF No. 29). The issue is whether Defendants were "put on notice" of a hostile work environment claim by the facts alleged in the complaint or through discovery. *See Coleman*, 232 F.3d at 1294.

1.1(a). The Law of Hostile Work Environment Claims

The Supreme Court has held that "[a] discrete retaliatory or discriminatory act 'occurred' on the day that it 'happened.'" *Morgan*, 536 U.S. at 110. "A party, therefore, must file a charge

within either 180 or 300 days of the date of the act or lose the ability to recover for it." *Id.* However, "[a] charge alleging a hostile work environment claim … will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the time period." *Id.* at 122. "Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct." *Id.* at 115 (citation omitted) ("The repeated nature of the harassment or its intensity constitutes evidence that management knew or should have known of its existence")). "The 'unlawful employment practice' therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own." *Id.* (citing *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) ("As we pointed out in *Meritor* [*Savings Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986),] 'mere utterance of an ... epithet which engenders offensive feelings in a[n] employee,' (internal quotation marks omitted), does not sufficiently affect the conditions of employment to implicate Title VII")). "Such claims are based on the cumulative effect of individual acts." *Id.*

"When the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated." *Harris,* 510 U.S. at 21 (citations omitted). The determination of whether an actionable hostile work environment claim exists requires an examination of "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Morgan*, 536 U.S. at 103. The standard of whether a conduct is severe or

pervasive enough is "one that a reasonable person would find hostile or abusive – as well as the victim's subjective perception that the environment is abusive." *Harris*, 510 U.S. at 368; *see also Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) ("[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.").

Conduct constituting a hostile work environment claim are those of "discriminatory intimidation, ridicule and insult." *Id.* at 116. The Supreme Court provided some examples of non-discrete acts in hostile work environment claims based on race discrimination: racial jokes, racially derogatory acts, negative comments regarding the capacity of blacks to be supervisors, and racial epithets. *Id.* at 120. In sex discrimination-based hostile work environment claims, courts have held that the following acts constitute non-discrete acts: sexually propositioning an employee, making offensive comments, spitting in the employee's food, referring to the female employee as a "fucking bitch" and "whore," yelling insults and obscenities at the employee, unwanted sexual touching, ostracism by coworkers, and derogatory and humiliating statements. *Porter v. California Dept. of Corrections*, 419 F.3d 885, 893 (9th Cir. 2005); *EEOC v. Fred Meyer Stores*, 954 F.Supp.2d 1104, 1119 (D. Or. 2013); *Moore v. King County Fire Protection Dist. No. 26.*, No. C05-442JLR, 2005 WL 2898065, at *3 (W.D. Wash. 2005).

1.1(b). Analysis of the Evidentiary Support Offered by Plaintiff

Based on the above framework, the Court first needs to determine which alleged acts are the "non-discrete acts" that could substantiate a hostile work environment claim. *See Porter*, 419 F.3d at 893. To do so, the Court eliminates acts that are "discrete," which are individually actionable and "occurred" on the day they "happened," and finds that the following alleged acts

are not individually actionable on their own and could substantiate a hostile work environment claim.

- Because of Captain Nelson's complaint, Lt. Trono asked Plaintiff to remove her uniform photo from Facebook, while other male supervisors in the department who posted pictures with direct relation to the department on Facebook were not requested to do the same. Trono Decl. ¶ 4 (ECF No. 70); First Am. Compl. ¶ 15 (ECF No. 29).
- Team B members were resistant to Plaintiff's transfer to supervise Team B because they assumed that she would be a bitch (in or around October 2014). Jansen Decl. ¶ 12 (ECF No. 62); Lutz Decl. ¶ 5 (ECF No. 67); First Am. Compl. ¶ 16 (ECF No. 29).
- Lt. Lutz told Plaintiff on various occasions that Nelson did not like her, was focused on her, and that she should keep her head low and try to avoid Nelson's attention; Lt. Lutz restricted Plaintiff from sending out almost any emails, and had her forward emails to the administrative lieutenant for dissemination so it would not come from Plaintiff (between about October 2014 and January 2015). First Am. Compl. ¶ 17 (ECF No. 29); *see* Lutz Decl. ¶¶ 6, 8, 9 (ECF No. 67).
- When Plaintiff expressed her interest in applying for a lieutenant position, Lt. Lutz told her not to apply because Captain Nelson would not support her and eligibility for this process required Nelson's support (in or around March 2015). Jansen Decl. ¶ 14 (ECF No. 62); First Am. Compl. ¶ 20 (ECF No. 29).
- Following Plaintiff's complaint to Lt. Lutz that she felt harassed by getting reprimanded for the same conduct others engaged in without reprimand, Sheriff

Blanton commented at a meeting that any employee that puts the Sheriff's Office in a bad light would be dealt with accordingly and held accountable (April – May 2015). First Am. Compl. ¶ 23 (ECF No. 29).

- While Plaintiff was on leave, learning that hearing from him would exacerbate Plaintiff's stress, Nelson began contacting Plaintiff frequently as an attempt to prevent her from returning to work (June-December 2015). Jansen Decl. ¶ 15 (ECF No. 62); First Am. Compl. ¶ 25 (ECF No. 29).
- About two days after Plaintiff filed her harassment complaint and during the time Nelson was facing a contested Sheriff's election, Nelson announced to the media the filing of two complaints against him which made at least the identity of Plaintiff clear (June 9, 2016). *Id.* at ¶ 27; First Am. Compl. 31 (ECF No. 29).
- After Plaintiff filed her complaint, the Sheriff's Office asked Deschutes County to hire investigator Starr to investigate the complaint, and Nelson had notice of the employees that Starr planned to interview. Stephenson Decl. Ex. 23 Starr Dep. 99:8-102:9.
- The day after Nelson announced that Plaintiff's complaint was unfounded, Nelson publicly showed his dominance over Plaintiff and made her feel humiliated in front of other people by standing over her as she sat below him in a lowered chair, winked at her and placed his hand on her shoulder (on or around August 31, 2016). First Am. Compl. ¶ 33 (ECF No. 29). Another time, Nelson caressed Plaintiff's shoulder in a meeting to further demean her (sometime after August 31, 2016). *Id.*

- Since Plaintiff's complaints became public, Nelson has suspended, fired, and discredited employees who have truthfully confirmed the discrimination faced by Plaintiff (June 2016 and later), including Lt. Trono, Lt. Lutz, Sgt. Molan, Brian Bishop, and Lt. Navarro[7]. Stephenson Decl. Ex. 4 Jansen Dep. 151:10-24 (ECF No. 72).
- Nelson provided a video and made statements to the media after Nelson announced that Plaintiff's complaint was unfounded to discredit Plaintiff and create a negative public view of Plaintiff (December 2016 and June 2017). Jansen Decl. ¶¶ 29, 30 (ECF No. 62).
- Plaintiff was called to an investigatory meeting to be asked about discrimination of women at the Sheriff's Office without her attorney's presence; despite Plaintiff's confirmation of sex discrimination in the Sheriff's Office and her provision of a female staff member's name to the investigator, the investigator never interviewed that staff member (August 2017 and later). First Am. Compl. ¶ 39 (ECF No. 29).
- Nelson drove thirty miles to a training which he normally does not participate, to harass Plaintiff; Nelson called Plaintiff by another female staff's name in order to humiliate her (September 2017). Jansen Decl. ¶ 17 (ECF No. 62).
- Sgt. Molan told Sgt. Navarro that command staff would not like the piece Sgt. Navarro noted about encouraging Plaintiff to take on more of a leadership role (September 2017). Navarro Decl. ¶ 2-4 (ECF No. 68).

[7] The suspension and firing of other employees did not directly impact Plaintiff's employment compensation, terms, conditions and privilege, therefore are not actionable by Plaintiff. Viewing the facts in the light most favorable to Plaintiff, the Court should construe them as non-discrete acts because they may have a cumulative effect on Plaintiff's employment.

- Nelson did not provide to the media about Deputy Christine Daugherty's exoneration and reinstatement following a finding that her wrongful termination was based on the Sheriff's Office's internal investigation that distorted the facts (November 2017). First Am. Compl. ¶ 44 (ECF No. 29).
- Nelson organized a mandatory training for Deschutes County regarding pending lawsuits against Deschutes County, putting Plaintiff in the spotlight, making Plaintiff feel humiliated and retaliated (January 2018). *Id.* at ¶ 45.
- Plaintiff was excluded from a panel because of her gender and her complaints against Nelson (April 2018). *Id.* at ¶ 47.
- When issues regarding treatment to female staff at the Sheriff's Office were identified by Captain Deron McMaster's investigation, Nelson did not publish the conclusions as he did for the investigation following Plaintiff's complaint (March 2018). *Id.* at ¶ 48.
- Within the first two years of Nelson becoming the Sheriff, about fifty percent of the female officers, who were all in the lowest possible rank in the Sheriff's Office (deputy), quit or were terminated (July 1, 2015 – July 2017)[8]. *Id.* at ¶ 50; Stephenson Decl. Ex. 25 Plaintiff's Second EEOC Filing 4 (ECF No. 72).
- Nelson constantly criticized Plaintiff as to "how she did her job, including the way she spoke, the way she did anything, or her lack of doing something." Trono Decl. ¶ 12 (ECF No. 70).

[8] The quitting and termination of other female officers are not actionable by Plaintiff because they did not directly impact Plaintiff's employment compensation, terms, conditions and privilege. Viewing the facts in the light most favorable to Plaintiff, the Court should construe them as non-discrete acts for they may have a cumulative effect on Plaintiff's employment.

- Nelson has an unusual focus on Plaintiff even though he does not directly supervise Plaintiff and he does not have the same attention to other sergeants. Lutz Decl. ¶ 12 (ECF No. 67).
- Nelson's bias against Plaintiff was known to other sergeants and lieutenants in the Corrections Division and he made statements to others about Plaintiff. Trono Decl. ¶ 2 (ECF No. 70) ("In conversation I had with Nelson, he always had something negative to say about Jansen. Nelson would make Jansen the focal point of conversations, regardless of the circumstances."); Lutz Decl. ¶ 14 (ECF No. 67) (a lieutenant who was friendly with Nelson told Lt. Lutz that "[Plaintiff]'s fucking done;" "if she made a single mistake Nelson would immediately demote her;" "Nelson hated that she was promoted by Captain Espinoza;" "You can change her performance, but you can't change her personality."); Jones Decl. ¶ 2 (ECF No. 65) ("I also had heard supervisors mention that Nelson didn't like Crystal [Plaintiff].").
- Lt. Trono was put on administrative leave days following the conclusion of the internal investigation conducted by Starr; Starr interviewed Lt. Trono and Lt. Trono stated that "Jansen was being treated worse than others by Nelson" and generally supported Plaintiff and her complaints against Nelson; Lt. Trono was ultimately terminated on April of 2017[9]. Trono Decl. ¶¶ 14-15 (ECF No. 70).

[9] The administrative leave and termination of Lt. Trono was not an actionable act by Plaintiff. The Court should construe it to be an alleged non-discrete act in the light most favorable to Plaintiff for her hostile work environment claim because of the alleged underlying cause of Lt. Trono's administrative leave.

- "[P]eople believed Jansen was moved off [Lt. Trono's] team due to having an 'abrasive and ineffective leadership style' and this was causing issues on [Lt. Trono's] team" but "it was simply not true." *Id.* at ¶ 13.
- Anything about "leadership" on Plaintiff's evaluation "wasn't going to fly" with upper management. Navarro Decl. ¶ 2 (ECF No. 68) (quoting Sgt. Mike Molan).

The next step is to determine whether a reasonable person as well as Plaintiff in her subjective perspective would find these acts hostile or abusive based on "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Morgan*, 526 U.S. at 103; *see Porter*, 419 F.3d at 893; *Harris*, 510 U.S. at 368.

Plaintiff presented evidence that the discriminatory conduct was frequent. Specifically, between late 2013 and 2018, Nelson was "constantly" focused on her and criticizing her. After Nelson became the Sheriff in 2015 and "was far removed in supervision from [Plaintiff], … he was consistently focused on her performance … [and] would also often make her the focus of conversations." Lutz Decl. ¶ 10 (ECF No. 67).

Plaintiff has also adduced evidence of severity or pervasiveness that altered her employment conditions. Specifically, Nelson's bias towards Plaintiff was apparent to all sergeants and lieutenants in the Corrections Division. Trono Decl. ¶¶ 2, 3, 5, 15, 16, 17 (ECF No. 70); Lutz Decl. ¶¶ 10, 11, 12, 14, 15 (ECF No. 67). Some sergeants and lieutenants engaged in discriminatory acts against Plaintiff at Nelson's direction. Laherty Decl. Ex. 4 Trono Dep. 30:11-31:6, 31:1-32:6, 32:7-33:23, 32:16-23, 34:24-36:18 (ECF No. 59). The effect of Nelson's public bias towards Plaintiff ostracized Plaintiff because people were made to believe that she was "a

bitch" and had performance issues. Lutz Decl. ¶ 5 (ECF No. 67); Trono Decl. ¶ 13 (ECF No. 70). Employees were terminated, put on administrative leave, or quit after they provided support for Plaintiff. Trono Decl. ¶ 15 (ECF No. 70). Plaintiff felt pressured enough and ultimately self-demoted. Jansen Decl. ¶ 23 (ECF No. 62). In addition, Plaintiff felt publicly humiliated by Nelson on multiple occasions, including calling her by a different name at a training, winking at her and touching her during a briefing just days after the investigation of Plaintiff's complaint was announced unfounded, and putting her under the spotlight after Plaintiff filed her complaints. Jansen Decl. ¶ 17 (ECF No. 62); First Am. Compl. ¶¶ 33, 45 (ECF No. 29); Stephenson Decl. Ex. 24, 18 (ECF No. 72). Nelson also allegedly restricted Plaintiff's day-to-day job duties as a sergeant while "he was far removed in supervision from [Plaintiff]." Lutz Decl. ¶ 10 (ECF No. 67).

Based on the proffered evidence, the Sheriff's Office can be characterized as a male-dominated work environment. *See* Stephenson Decl. Ex. 1 Nelson Dep. 173:1-14, 37:8-13 (in 2017, there were no females in the rank of captain, lieutenant, or sergeant), Ex. 2 McMaster Dep. 168:3-14 (ECF No. 72) (in 2018, there were zero females in leadership positions) (ECF No. 72); Jones Decl. ¶¶ 6-7 (ECF No. 65) ("there were no female deputies working in the [S]heriff's [O]ffice on the patrol side, nor other sworn female supervisors *at all* in the agency.") (emphasis supplied); Stephenson Decl. Ex. 25 Plaintiff's Second EEOC Filing 4 (ECF No. 72) ("As of June of 2018, of the approximately 180 'sworn' officers (deputies, sergeants, lieutenants, captains) in the Sheriff's Office, less than one percent are women. … [A]ll of the female officers were in the lowest possible rank, deputy."). It is therefore reasonable that a jury can infer from these facts that Plaintiff felt intimated and threatened when facing Nelson's constant and open scrutiny and criticism. Plaintiff ultimately self-demoted to deputy because of her negative performance

review, the ongoing scrutiny, and intense animosity directed toward her. Jansen Decl. ¶ 23 (ECF No. 62).

1.1(c). Conclusion

Viewing these "non-discrete" acts in all the circumstances and in the light most favorable to Plaintiff, the Court should find that these acts were frequent and sufficiently severe and pervasive that a reasonable person, and Plaintiff in her subjective perception, would find them to be hostile or abusive. *See Morgan*, 536 U.S. at 103; *see also Harris*, 510 U.S. at 21, 368. Accordingly, Plaintiff has adequately pled facts to substantiate a hostile work environment claim and put Defendants on notice of the claim. It is undisputed that some non-discrete acts occurred within the statute of limitations and are part of the same unlawful employment practice. *See* Defs.' Mot. for Summ. J. 31 (ECF No. 54). Therefore, Plaintiff's Title VII claims are not time barred. *Morgan*, 536 U.S. at 122.

1.2 Failure to Exhaust Administrative Remedies

A complainant, before commencing a Title VII action in court, must file a charge with the EEOC. 42 U.S.C. §§ 2000e-5(e)(1), (f)(1); *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 204 L. Ed. 2d 116 (2019). "[I]n jurisdictions, such as Oregon, that have joint work-sharing agreements between the EEOC and an equivalent state agency," an employee must file a discrimination claim with either the equivalent state agency (BOLI, in Oregon), or the EEOC, "within 300 days of the alleged unlawful employment practice." *Pearson v. Reynolds Sch. Dist. No. 7*, 998 F. Supp. 2d 1004, 1019 (D. Or. 2014) (citations omitted).

Defendants assert that Plaintiff failed to exhaust administrative remedies for four alleged unlawful employment practices because she did not include in her BOLI or EEOC claim these practices. Defs.' Mot. for Summ. J. 37 (ECF No. 54). Specifically, (1) the verbal counseling of

Plaintiff about her posting of her photos on social media, (2) Plaintiff was not selected as a transport/court security deputy in January 2018[10], (3) changes made to Plaintiff's 2016 annual performance evaluation, and (4) Defendants' release of information to the media or any third party. *Id.*

While failure to exhaust administrative remedies may bar acts that are not stated in an administrative charge, a plaintiff "may base her Title VII claims on [Defendants'] alleged acts occurring after she filed her [administrative] charge to the extent she can show such acts are part of a single hostile work environment claim." *Scott v. Gino Morena Enterprises, LLC*, 888 F.3d 1101, 1112 (9th Cir. 2018). As discussed above, Plaintiff's complaint has a hostile work environment claim. To the extent that an act is a non-discrete act that is part of Plaintiff's hostile work environment claim alleged in the administrative charge, for example, the first and the fourth acts identified by Defendants, Plaintiff's hostile work environment claim is not barred for failure to exhaust administrative remedies.

1.3 Conclusion

To the extent that the alleged acts are part of Plaintiff's hostile work environment claim, the Court should find that Plaintiff's First and Third Claims are not time barred and do not fail to exhaust administrative remedies.

[10] Defendants state the position to be a transport sergeant and the date to be October 2017. Defs' Mot. for Summ. J. 37 (ECF No. 54); *but see* First Am. Compl. ¶ 46 (ECF No. 29).

2. Third, Fourth, Fifth, Sixth and Eleventh Claims – ORS Chapter 659A Discrimination and Retaliation Claims[11]

2.1 Statute of Limitations

A BOLI complaint "must be filed no later than one year after the alleged unlawful practice." ORS 659A.820(2). A civil action alleging an unlawful employment practice must be commenced within one year after the occurrence of the unlawful employment practice unless a BOLI complaint has been timely filed, in which case a civil action must commence within 90 days after BOLI mails a right to sue letter. ORS 659A.875(1)-(2).

Defendants contend that the statute of limitations bars certain alleged acts. Specifically, (1) acts that occurred one year before Plaintiff filed the BOLI complaint on October 18, 2016, and (2) acts that occurred one year before the civil complaint but not alleged in her BOLI complaint. Defs.' Mot. for Summ. J. 34 (ECF No. 54).

"Oregon courts have consistently held that the case law developed in federal courts in the interpretation of Title VII can be used to interpret Chapter [659A] of the Oregon Revised Statutes because the statutory schemes are similar and Chapter [659A] is patterned after Title VII." *Atwood v. Oregon Dept. of Transp.*, 2008 WL 803020 at *13 (D. Or. Mar. 20, 2008) (additional citation omitted). "Indeed, the continuing violation doctrine under federal law appears perfectly congruous with the lines drawn between continuous torts and separate discrete acts under Oregon law." *Id.* Accordingly, the same continuing violation doctrine applies to Plaintiff's hostile work environment claim under Oregon law. *See id.*

[11] In addition to the arguments discussed, Defendants also cite ORS 30.272(2) as a statutory bar for damages exceeding the statutory cap. Defs.' Mot. for Summ. J. 39 (ECF No. 54). Because Defendants merely state the law without making any substantive arguments, the Court will address this issue.

The premise of Defendants' argument is that Plaintiff did not plead a hostile work environment claim. *See Shepard v. City of Portland*, 829 F.Supp.2d 940, 955 (citing *Morgan*, 536 U.S. at 113) ("discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges.")). Since Plaintiff's complaint includes a hostile work environment claim to which continuing violation doctrine applies, to the extent that any alleged non-discrete acts are part of Plaintiff's hostile work environment claim, they are not time barred. *See Atwood*, 2008 WL 803020 at *13.

2.2 Oregon Tort Claims Act (OTCA) Notice Time Bar

Oregon Revised Statute 30.275(1) provides: "No action arising from any act or omission of a public body or an officer, employee or agent of a public body … shall be maintained unless notice of claim is given …" For claims other than wrongful death, the notice shall be given within 180 days after the alleged loss or injury." ORS 30.275 (2)(b). Defendants argue that Plaintiff's claims based on acts that took place 180 days before the date of her notice on October 21, 2016 are barred. Defs.' Mot. for Summ. J. 27 (ECF No. 54).

"As Oregon courts have pointed out on numerous occasions, the purpose of the OTCA notice provisions is to permit a reasonable investigation of the operative facts relied on for the claim. Nevertheless, Oregon courts have approved of the use of the continuing tort theory in the context of employment discrimination cases." *Atwood,* 2008 WL 803020, at *12 (citations and internal quotation marks omitted). Therefore, to the extent that the alleged acts are part of Plaintiff's hostile work environment claim, they are not barred by OTCA.

2.3 Conclusion

The Court should find that the Third, the Fourth, the Fifth, the Sixth and the Eleventh Claims are not time barred to the extent that the alleged non-discrete acts are part of Plaintiff's hostile work environment claim.

3. Seventh and Eighth Claims – § 1983 Claims (First Amendment Retaliation and Equal Protection)

3.1 Statute of Limitations

"An action for … any injury to the person or rights of another, not arising on contract, and not especially enumerated in this chapter, shall be commenced within two years …" ORS 12.110(1). Defendants move to bar Plaintiff's § 1983 claims based on the acts that occurred before August 16, 2015 on the grounds of the two-year statute of limitations imposed by ORS 12.110(1). Defs.' Mot. for Summ. J. 34 (ECF No. 54).

The Ninth Circuit has held that the continuing violation doctrine is applicable in a § 1983 claim. *Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997) ("If the continuing violations doctrine were inapplicable to [Section 1983] actions, it is difficult to ascertain exactly when such claims would accrue … Therefore, the continuing violations doctrine is applicable to [a Section 1983 claim for employment discrimination.]"). It therefore follows that Plaintiff's § 1983 claims are not time barred.

3.2 Qualified Immunity[12]

In the Seventh Claim, Plaintiff alleges that Defendants deprived her of her First Amendment rights based on acts occurring both before and after Plaintiff filed the sex

[12] Defendants also suggest that Plaintiff has a due process claim when making the qualified immunity argument. Defs.' Mot. for Summ. J. 41 (ECF No. 54). Plaintiff denies that she made such a claim. Pl.'s Resp. 48 (ECF No. 71). The Court therefore does not address the issue of a "due process claim."

discrimination complaint. First Am. Compl. ¶ 87-92 (ECF No. 29). Defendants argue that Plaintiff cannot establish that Nelson should have known, prior to the date of Plaintiff's complaint, that his conduct might constitute a violation of Plaintiff's First Amendment right to complain of such discrimination. Defs.' Mot. for Summ. J. 40 (ECF No. 54).

"Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 230 (2009). "The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact.' " *Id.* (citations omitted). Resolving a qualified immunity claim requires the determination of two questions: (1) "whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right[,]" and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 232 (internal citation omitted). "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* Courts have the discretion to decide which prong should be addressed first based on the circumstances. *Id.* at 236 (courts may exercise their sound discretion in deciding which of the two prongs should be addressed first "in light of the circumstances in the particular case at hand").

In this case, the Court starts with the second prong. The right at issue is Plaintiff's First Amendment right. *See* Defs.' Mot. for Summ. J. 40-41 (ECF No. 54). An employee's speech is protected under the First Amendment if it addresses "a matter of legitimate public concern." *Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 571, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); additional citation omitted). When

Plaintiff filed her sex discrimination complaints with the Sheriff's Office in June 2016, the complaint was deemed speech that is a matter of legitimate public concern. *Alpha Energy Savers, Inc. v. Hansen,* 381 F.3d 917, 926-27 (9th Cir.2004) ("Disputes over racial, religious, or other such discrimination by public officials are not simply individual personnel matters. They involve the type of governmental conduct that affects the societal interest as a whole—conduct in which the public has a deep and abiding interest."). Therefore, Plaintiff's First Amendment right was "clearly established" upon filing the first sex discrimination complaint on June 7, 2016.

As to the first prong, "in a Title VII retaliation suit for protected speech, an 'adverse employment action' [i]s an action 'reasonably likely to deter employees from engaging in protected activity [under the First Amendment]." *Coszalter*, 320 F.3d at 976. Plaintiff alleges and has produced evidence of adverse employment actions, among other acts, that occurred after she filed the initial complaint. For example, she was denied a transport/court security deputy position in 2017. First Am. Compl. ¶¶ 42, 46 (ECF No. 29); Stephenson Decl. Ex. 5, Jansen Dep. 35: 22-36:22 (ECF No. 72). Thus, Plaintiff has offered evidentiary support that can make out a violation of her rights under the First Amendment after she filed the complaint in June 2016, and the first prong of the qualified immunity analysis is satisfied.

Defendants' argument of qualified immunity only concerns the time period prior to Plaintiff's filing of a complaint in June 2016. Defs.' Mot. for Summ. J. 40 (ECF No. 54). This argument is unavailing for the time period after Plaintiff filed her first complaint with the Sheriff's Office. For purposes of summary judgment, the Court should find that Plaintiff has alleged that Nelson violated her clearly established First Amendment right *after* she filed the sex discrimination complaint.

3.3 Conclusion

The Court should find that the Seventh and the Eighth Claims are not time barred and Nelson is not entitled to qualified immunity.

4. Ninth and Tenth Claims – Invasion of Privacy

4.1 Absolute Privilege and Qualified Privilege

"There are two forms of privilege that may apply in a defamation action[:] a defamatory statement may be either 'absolutely privileged' or 'qualifiedly privileged." *Wallulis v. Dymowski*, 323 Or. 337, 347, 918 P.2d 755 (1996). "An 'absolute privilege' bars a claim for defamation." *Id.* at 347-48. "A 'qualified privilege' 'does not bar the action, but requires [the] plaintiff to prove that the defendant' abused the privileged occasion[.]" *Id.* at 348 (citation omitted). "[T]he question of whether or not a defamatory statement is privileged, either absolutely or conditionally, depends upon the balance that the court strikes between competing interests." *Lee v. Paulsen*, 273 Or. 103, 105, 539 P.2d 1079 (1975). "Public policy considerations dictate that participants in the governmental process be encouraged to speak candidly, uninhibited by the fear of possible civil liability for defamation." *Johnson v. Brown*, 193 Or.App. 375, 383 (2004).

"[An absolute] privilege is available to a defendant only if he publishes the defamatory matter in the performance of his official duties." *Shearer v. Lambert*, 274 Or. 449, 455 (1976). "The absolute privilege … extends to public officials at all levels of government with respect to statements made in the performance of their official duties …" *Brown*, 193 Or.App. at 383. Defendants assert absolute privilege for the alleged statements because Nelson, as the Sheriff of Deschutes County, made the statements in the performance of his public official duties. Defs.' Mot. for Summ. J. 41-43 (ECF No. 54). Defendants argue that the statements cannot form the

basis for recovery against either Defendant. *Id.* at 41. Plaintiff does not dispute that Nelson is a government official, but cites ORS 206.010 and argues that making statements or releasing information to the media is not part of Nelson's official duties. Pl.'s Resp. 50 (ECF No. 71).

While ORS 206.010 does not explicitly provide that the official duties of the Sheriff include making statements to the media, it states that "[t]he sheriff is the chief executive officer … of the county." Policy 3.70 of the Sheriff's Office grants the Sheriff broad authority to release information to the media regarding matters of public interest. Laherty Supp. Decl. Ex. 56. (ECF No. 81). Information concerning alleged wrongful employment practices at the Sheriff's Office concerns public interest. *See Alpha Energy Savers, Inc.*, 381 F.3d at 926-27. It is reasonable to infer that making statements to the media concerning discrimination in the Sheriff's Office is a part of the Sheriff's official duties. For these reasons, the Court should find that an absolute privilege exits in this action.

Defendants also assert qualified privilege in the alternative. Defs.' Mot. for Summ. J. 43-44 (ECF No. 54). Qualified privilege requires the plaintiff to prove that the defendant acted with actual malice. *DeLong v. Yu Enterprises, Inc.*, 334 Or. 166, 170 (2002). Since absolute privilege exists, the Court does not need to address the alternative issue of qualified privilege. *Christensen v. Marvin*, 273 Or. 97, 100 (1975) ("Since we have decided that defendant had an absolute privilege[,] the contention of plaintiff that he abused the privilege is not applicable").

4.2 Statute of Limitations

"An action for libel or slander shall be commenced within one year." ORS 12.120(2). Defendants move to bar claims of the alleged acts under the Ninth and the Tenth Claims that occurred prior to August 16, 2016 based on the one-year statute of limitation under ORS 12.120(2). Defs.' Mot. for Summ. J. 35-36 (ECF No. 54). Plaintiff does not respond to this

argument and therefore has waived the argument. *See* Pl.'s Resp. 48-51 (ECF No. 71); *United States v. McEnry*, 659 F.3d 893, 902 (9th Cir. 2011) (where an argument is available but not raised, it is waived). Since absolute privilege bars the Ninth and the Tenth Claims, the Court does not need to address the alternative issue of statute of limitations.

4.3 Conclusion

The Court should find that absolute privilege bars the Ninth and the Tenth Claims.

5. Failure to State a Claim – All Claims

5.1 First and Third Claims (Sex Discrimination Under Title VII and Oregon Law)

Title VII and Oregon law discrimination claims are analyzed with the same standard. *Pullom v. U.S. Bakery*, 477 F.Supp.2d 1093, 1100 (D. Or. 2007) ("Because ORS 659A.030 is modeled after Title VII, plaintiff's state law discrimination claims can be analyzed together with his federal discrimination claims."). Defendants present four arguments to support their position that Plaintiff failed to state a sex discrimination claim. The Court addresses them in turn.

5.1(a). Some alleged acts are not cognizable adverse employment actions

Defendants first argue that the following acts do not rise to the level of adverse employment actions: (a) Lt. Trono's and Lt. Lutz's verbal counseling of Plaintiff; (b) Nelson's decision to send two sergeants to a training in 2014 and to send Plaintiff to the training in 2015; (c) Nelson's decision to send two female line deputies to a training in 2015 but not Plaintiff; (d) Nelson denied Plaintiff's request to attend a training in another county in February 2015; (e) Nelson's decision to transfer Plaintiff from Team D to Team B; (f) Nelson's communications with Plaintiff while she was on leave; (g) Trono's and Lutz's discouraged Plaintiff from applying for the March 2015 lieutenant opening; (h) the change to Plaintiff's 2015 performance evaluation; (i) the Sheriff's Office request for Plaintiff to participate in an investigation regarding

sex discrimination in 2017; (j) the removal of Plaintiff from a 2018 interview panel. *Id.* at 46-47. Defendants do not cite any authority to support this argument. Because Plaintiff pled a hostile work environment claim, which does not require "discreet" adverse employment actions but rather "discriminatory intimidation, ridicule, and insult[]" that is "sufficiently severe or pervasive to alter the conditions of the victim's employment," the Court should find Defendants' argument unpersuasive. *Harris*, 510 U.S. at 21 (citations omitted).

5.1(b). Plaintiff cannot establish a *prima facie* case

Defendants next assert that, "[w]ith regard to those actions of a Defendant that may constitute an adverse employment action for Title VII purposes," Plaintiff is unable to demonstrate a *prima facie* case of sex discrimination. Defs.' Mot. for Summ. J. 47-48 (ECF No. 54).

A plaintiff alleging disparate treatment may defeat summary judgment by offering either direct evidence or circumstantial evidence of discrimination. *Pearson v. Reynolds School Dist. No. 7*, 998 F. Supp. 2d 1004, 1020 (9th Cir. 2014). Direct evidence requires the showing of a discriminatory intent. *Whitley v. City of Portland*, 654 F. Supp. 2d 1194, 1207 (D. Or. 2009). To establish a *prima facie* discrimination case by circumstantial evidence, a plaintiff needs to show that she belongs to a protected class under Title VII, she was performing her job satisfactorily, she suffered an adverse employment action, and her employer treated her less favorably than a similarly-situated employee who does not belong to the same protected class as the plaintiff. *Pearson*, 998 F. Supp. 2d at 1020. Defendants argue that Plaintiff cannot prove these claims by either direct evidence or circumstantial evidence, because (1) Plaintiff does not plead and cannot prove that Defendants made statements that would establish discriminatory intent, nor can Plaintiff directly show that any employment action was based on her sex; and (2) Plaintiff cannot

prove that her job performance was satisfactory, or that she was treated less favorably than similarly-situated employees outside the protected class. Defs.' Mot. for Summ. J. 47-49 (ECF No. 54).

However, Defendants' argument regarding the *prima facie* elements is premised on a disparate treatment claim, rather than a hostile work environment claim. *See Pearson*, 998 F. Supp. 2d at 1020 (discussion of *prima facie* elements is under the heading "Standards for disparate treatment claims"). As discussed above, Plaintiff has pled and proffered sufficient facts to sustain a hostile work environment claim. Therefore, Defendants' second argument fails.

5.1(c). Deschutes County is neither vicariously liable nor negligent

"A plaintiff may state a case for harassment against the employer under one of two theories: vicarious liability or negligence." *Swinton v. Potomac Corp.*, 270 F.3d 794, 803 (9th Cir. 2001). "If the harasser is a supervisor, the employer may be held vicariously liable. If, however, the harasser is merely a co-worker, the plaintiff must prove that the employer was negligent, *i.e.*[,] that the employer knew or should have known of the harassment but did not take adequate steps to address it." *Id.* (internal citations omitted).

Defendants contend that Deschutes County is neither vicariously liable nor negligent because Nelson as Captain and the other employees who are not the Sheriff were not Plaintiff's supervisors. Defs.' Mot. for Summ. J. 50-51 (ECF No. 54). Defendants reason that a supervisor is someone who can effect "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities or a decision causing a significant change in benefits." *Id.* at 50 (citing *Faragher*, 524 U.S. at 806). Since only the Sheriff had such authority, Defendants argue that Nelson prior to becoming the Sheriff, and Lt. Gill, Lt. Trono or Lt. Lutz were only Plaintiff's co-workers. *Id.* at 51.

Defendants' reading of the meaning of a "supervisor" is inappropriately narrow and its reliance on *Faragher* is misplaced. The *Faragher* Court only discussed supervisory actions in *dictum* since the issue of the meaning of the term "supervisor" was not before the Court. *Faragher*, 524 U.S. at 790; *Vance v. Ball State University*, 570 U.S. 421, 422, , 438, 133 S.Ct. 2434 (2013) ("In light of the [*Faragher*] parties' undisputed characterization of the alleged harassers, this Court simply was not presented with the question of the degree of authority that an employee must have in order to be classified as a supervisor."). Later, the issue of whether an employee is a supervisor in a Title VII case was before the Supreme Court and the Court granted certiorari to resolve the conflict arising out of the lower courts' disagreement about the meaning of the term "supervisor." *Vance*, 570 U.S. at 423, 428-31, 438 ("In this case, we decide a question left open in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 141 L.Ed.2d 633 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998), namely who qualifies as a 'supervisor' in a case in which an employee asserts a Title VII claim for workplace harassment?").

In *Vance*, the Supreme Court held that "an employee is a 'supervisor' for purpose of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim." *Id.* at 431, 450. When explaining that "the law often contemplates that the ability to supervise includes the ability to take tangible employment actions," the Supreme Court cited two examples of Code of Federal Regulations, one refers to a supervisor's authority to include "tak[ing] other disciplinary action[s] against … employees" and the other defines "supervisory work" to include "assigning work, managing performance, recognizing and rewarding employees, and other associated duties." *Id.* at 435 (citing 5 CFR

§§ 9701.511(a)(2)-(3) (2012) and 5 CFR § 9701.212(b)(4)). The Supreme Court also further explored its *Ellerth/Faragher* framework and explained that

> Only a supervisor has the power to cause "direct economic harm" by taking a tangible employment action. Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control … Tangible employment actions are the means by which the supervisor brings the official power of the enterprise to bear on subordinates.

Id. at 440 (internal citation and quotation marks omitted; emphasis supplied).

It is undisputed that the lieutenants in this case were empowered to evaluate Plaintiff's performance and recommend or not recommend a salary increase. *See e.g.* Laterty Decl. Exs. 17, 34 (ECF No. 59). Based on the Supreme Court's reasoning in *Vance*, the lieutenants were Plaintiff's supervisors because their evaluation of Plaintiff and decision whether to recommend a salary increase would cause "direct economic harm" to Plaintiff. Similarly, Nelson as the Corrections Division Captain was also Plaintiff's supervisor because the parties do not dispute that he was empowered to assign Plaintiff from one team to another, approve Plaintiff's performance evaluation, and approve Lt. Trono's recommendation of salary increase for Plaintiff, all of which are economic decisions affecting Plaintiff. Because there is no genuine issue of the material facts regarding Captain Nelson and the lieutenants' ability to take tangible employment actions against Plaintiff, the Court should find that Captain Nelson and the lieutenants were Plaintiff's supervisors. "If the harasser is a supervisor, the employer may be held vicariously liable." *Swinton*, 270 F.3d at 803. Therefore, Defendants' motion for summary judgment on the grounds that Deschutes County is not vicariously liable should be denied. For the same reason, since the negligence theory applies "[i]f … the harasser is merely a coworker[,]" Defendants' argument that Deschutes County is not negligent is unavailing as the harassers were supervisors. *See Id.*

5.1(d). *Faragher/Ellerth* affirmative defense

Defendants then raise the *Faragher/Ellerth* affirmative defense in the alternative, asserting that no tangible employment action was taken against Plaintiff. Defs' Mot. for Summ. J. 52-54 (ECF No. 54). The Supreme Court explained in *Faragher* and *Ellerth*:

> When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence. The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Faragher, 524 U.S. at 807 (internal citation omitted); *Ellerth*, 524 U.S. at 745 (internal citation omitted). "No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment." *Faragher*, 524 U.S. at 808; *see also Ellerth*, 524 U.S. at 745.

A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, 524 U.S. at 761. "Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment." *Id.* at 752; *see Pennsylvania State Police v. Suders*, 542 U.S. 129, 143, 124 S. Ct. 2342, 2352, 159 L. Ed. 2d 204 (2004) ("Title VII encompasses employer liability for a constructive discharge."). Like the plaintiff in *Suders* who resigned because of sexual harassment, Plaintiff self-demoted to a deputy position because of an alleged hostile work environment of sex discrimination. Defendants' argument that there is no adverse employment action does not comport with the Supreme Court's finding in *Suders*. The Court should find that the *Faragher/Ellerth* affirmative defense is not available because Defendants' alleged

discrimination culminated in a tangible employment action – a constructive demotion – against Plaintiff.

5.2 Second and Fourth Claims (Retaliation Under Title VII and Oregon Law)

Plaintiff's retaliation claim under Title VII and Oregon law should be analyzed under the same standard. *Pullom*, 477 F.Supp.2d at 1105 (analyzing retaliation claim under Title VII and Oregon law with the same standard). One of the required elements for a *prima facie* retaliation claim under Title VII is a causal link between the protected activity and the adverse employment action. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (a prima facie case of retaliation requires the showing that "(1) [the employee] engaged in a protected activity; (2) his employer subjected him to an adverse employment action; and (3) a causal link exists between the protected activity and the adverse action."). Defendants argue that Plaintiff is unable to establish a causal link between the alleged actions and her complaints of sex discrimination, harassment and/or retaliation. Defs.' Mot. for Summ. J. 54-56 (ECF No. 54).

To show a causal link between an alleged protected activity and an adverse employment action, a plaintiff must show that the protect activity constituted the "but-for cause" of the employer's adverse employment action. *Lindsey v. Clatskanie People's Util. Dist.*, 140 F. Supp. 3d 1077, 1088 (D. Or. 2015) (citing *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 360, 133 S.Ct. 2517, 2533, 186 L.Ed.2d 503 (2013) ("Title VII retaliation claims must be proved according to traditional principles of but-for causation.... This requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.")). "Oregon courts use a 'substantial factor' test but construe the test as a 'but for' standard." *Id.* (citing *Hardie v. Legacy Health Sys.,* 167 Or.App. 425, 436, 6 P.3d 531 (2000)).

"[C]ausation is a question of fact, [but] may be decided as a matter of law if, under undisputed facts, reasonable minds could not differ." *Iolab Corp. v. Seaboard Sur. Co.*, 15 F.3d 1500, 1506 n. 4 (9th Cir. 1994). For purposes of summary judgment, Plaintiff has presented sufficient evidence that – when considered as a whole – raises a genuine issue of material fact concerning a causal link between the adverse treatment against her and her complaints of discrimination. For example, Plaintiff presented evidence showing that after her complaints, Nelson released information to the media concerning Plaintiff and the release to media during the course of an investigation was "highly unusual." Trono Decl. ¶ 16 (ECF No. 70); Jansen Decl. ¶¶ 29-34; *see Meyer v. State*, 292 Or. App. 647, 680-81 (2018) (finding that the imposition of increased supervision and the release of a report to the media that could result in "ridicule and ostracism" by other employees and the boss' "sending a warning" were adverse actions). Plaintiff also presents evidence showing that Nelson requested an investigation of her to determine if she had violated the Sheriff's Office policy by filing the BOLI complaint and this lawsuit. Stephenson Decl. Ex. 6 Nelson Dep. 234:17-22 (ECF No. 72); *see* Defs.' Mot. for Summ. J. 6 (ECF No. 54). As such, the Court should find that causation cannot be decided as a matter of law and should be left for the jury. Summary judgment is improper and should be denied.

5.3 Fifth Claim (Retaliation for Good Faith Complaint Under ORS 659A.199)

Defendants contend that Plaintiff failed to allege a valid claim under ORS 659A.199 against Deschutes County, a public employer, because ORS 659A.199 is limited to claims against private employers. Defs.' Mot. for Summ. J. 57 (ECF No. 54) (citations omitted). The issue whether the legislature intended ORS 659A.199 to apply to public employers was recently before the Oregon Court of Appeals. *Burley v. Clackamas Cty.*, 298 Or. App. 462 (2019). While

Defendants' motion was pending before this Court, the Court of Appeals held that "the legislature intended both to provide protections against retaliation to the employees of private employers and to supply additional protections to employees of public employers." *Id.* at 468. In light of this holding, Defendants conceded during the oral argument that ORS 659A.199 applies to public employers including Defendants. This issue is now moot.

5.4 Sixth Claim (Whistleblower Retaliation Under ORS 659A.203)

Defendants advance the argument that Plaintiff's whistleblower retaliation claim under ORS 659A.203 cannot be based on acts occurring prior to Plaintiff's filing of her complaint. Defs.' Mot. for Summ. J. 58 (ECF No. 54). Plaintiff does not dispute this argument. Pl.'s Resp. 41 (ECF No. 71). Defendants do not otherwise argue that Plaintiff failed to state a claim. For purposes of the summary judgment, Plaintiff has stated a claim based on the alleged acts occurring after she filed a complaint. The Court should deny Defendants' motion against the Sixth Claim.

5.5 Seventh and Eighth Claims (§ 1983 Claims)

"The elements of a First Amendment claim brought under section 1983 in the employment context are (1) the plaintiff engaged in constitutionally protected speech or association; (2) the defendant took an adverse employment action against the plaintiff; and (3) the plaintiff's speech or association was a substantial or motivating factor for the adverse employment action." *La Manna v. City of Cornelius,* 276 Or. App. 149, 166 366 P.3d 773 (citing *Hudson v. Craven,* 403 F.3d 691, 695 (9th Cir. 2005)).

The equal protection claim is parallel to claims of disparate treatment arising under Title VII "because both require proof of intentional discrimination." *Lowe v. Monrovia*, 775 F.2d 998, 1010 (Cir. 1985). "The same standards are used to prove both claims." *Id.*

Defendants contend that Plaintiff cannot prove that Defendants' alleged retaliatory actions were motivated by Plaintiff's complaints. Defs.' Mot. for Summ. J. 59 (ECF No. 54). However, Plaintiff has produced sufficient evidence to create a genuine issue of material fact as to whether Defendants' acts were motivated by Plaintiff's protected speech. Defendants' argument is not persuasive.

In addition, Defendants contend that Deschutes County is not liable for an employee's unconstitutional act because Deschutes County and the Sheriff's Office at all times had in place relevant policies and procedures that prohibited sex discrimination, harassment, and other unlawful employment practices. *Id.* at 59-60 (citing *Monell v. Dep't of Social Servs. Of the City of New York*, 436 U.S. 658, 690-91 (1978) (a municipality is only subject to § 1983 liability for an employee's unconstitutional act where the execution of the municipality's policy or custom caused the constitutional injury)).

A plaintiff may impose § 1983 liability against a municipality when an employee was acting as a final policymaker. *Knox v. City of Portland*, 543 F. Supp. 2d 1238, 1250 (D. Or. 2008) (citing *Lytle v. Carl,* 382 F.3d 978, 982 (9th Cir.2004) (a plaintiff must rely on one of three theories to impose § 1983 liability against a municipality: "(1) that a[n] employee was acting pursuant to an expressly adopted official policy; (2) that a[n] employee was acting pursuant to a longstanding practice or custom; or (3) that a[n] employee was acting as a 'final policymaker.'"). It is undisputed that Nelson was acting as a final policymaker regarding the Sheriff's Office and its personnel matters. Nelson Decl. ¶ 2 (ECF No. 58); Laherty Decl. Ex 3 McMaster Dep. 68:19-21, 116:8-13 (ECF No. 59); Laherty Decl. Ex. 28 Nelson Dep. 237:17-18 (ECF No. 59); Stephenson Decl. Ex. 2 McMaster Dep. 68:19-25 (ECF No. 72); *see* Stephenson Decl. Ex. 1 Nelson Dep. 89:20-23 (ECF No. 72). Plaintiff therefore can pursue § 1983 liability

against Deschutes County for Nelson's acts. *Knox*, 543 F. Supp. 2d at 1250; *see Lytle*, 382 F.3d at 982. Accordingly, summary judgment is improper and should be denied.

5.6 Ninth and Tenth Claims (Invasion of Privacy)

As explained above, absolute privilege bars the Ninth and the Tenth Claims. The Court does not need to address Defendants' argument of failure to state a claim.

5.7 Eleventh Claim (Aiding and Abetting Under ORS 659A.030(1)(g))

"It is an unlawful employment practice … [f]or any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under [ORS Chapter 659A] or to attempt to do so." ORS 659A.030(1)(g)[13]. "Courts have not identified the elements for aiding and abetting under [ORS] § 659A.030(1)(g)." *Aichele v. Blue Elephant Holdings, LLC*, 292 F.Supp.3d 1104, 1114 (D. Or. Nov. 13, 2017).

Defendants move to dismiss the aiding and abetting claim "to the extent this Court finds that any act of any Defendant does not support a claim under ORS Chapter 659A." Defs.' Mot. for Summ. J. 63 (ECF No. 54). Since Plaintiff has produced sufficient evidence to defeat summary judgment with respect to her claims under ORS Chapter 659A, Defendants' argument fails. *See Peters v. Betaseed, Inc.*, No. 6:11–cv–06308–AA, 2012 WL 5503617, at *7 (D. Or. Nov. 9, 2012) (rejected defendants' argument that the aiding and abetting claim must fail if the retaliation claim fails because plaintiff has adduced sufficient evidence to defeat summary judgment with respect to his claim of retaliation under ORS 659A.199).

Defendants argue alternatively that a primary actor cannot be held liable for aiding and abetting when that person was the primary decision-maker and acting pursuant to his authority. Defs.' Reply 32-33 (ECF No. 80) (citing *Aichele*, 292 F.Supp.3d at 1114). Because the parties

[13] Defendants incorrectly cite the statutes as "ORS 65A.030(1)(g)" and "ORS Chapter 659" in the motion. Defs.' Mot. for Summ. J. 63 (ECF No. 54).

do not dispute that Nelson was the primary actor of the allegedly unlawful employment actions and he was the executive officer of the County with the authority to terminate deputies, Defendants contend that the aiding and abetting claim under ORS 659A.030(1)(g) should be dismissed. *Id.*

Multiple decisions from this District have found that a person cannot aid and abet himself or herself. *See Hannan v. Business Journal Publications, Inc.*, 2015 WL 9265959, at *18 (D. Or. Oct. 2, 2015) (held that because the individual defendant was the primary actor in the alleged discrimination, he cannot be liable for aiding and abetting); *See White v. Amedisys Holding, LLC*, No. 3:12-CV-01773-ST, 2012 WL 7037317, at *5 (D. Or. Dec. 18, 2012) (Findings and Recommendation), *adopted* 2013 WL 489674 (D. Or. Feb. 7, 2013) ("It is not aiding and abetting 'if … the employee would be aiding and abetting himself or herself' "); *see Peters*, 2012 WL 5503617, at *7 (distinguished the facts in *Gaither v. John Q. Hammons Hotels Mgmt., LLC*, 2009 WL 9520797 (D. Or. Sept. 3, 2009) where the manager and employer were separate and distinct, the individual defendant in the case at issue was both plaintiff's manager and the executive authority of the corporate defendant; "To apply *Gaither* under the present facts would be to suggest that it is possible to aid and abet oneself."); *Gaither*, 2009 WL 9520797, at *4 ("…you cannot aid and abet yourself …").

Other decisions from this District, however, have held that allegations of wrongful employment action taken by a "primary actor" or someone with "executive authority" acting for a corporate employer on behalf of the employer are sufficient to state an aiding and abetting claim. *Ekeya v. Shriners Hospital for Children, Portland*, 258 F.Supp.3d 1192, 1203 (D. Or. July 10, 2017) (citing *White*, 2012 WL 7037317, at *5–6 ("Given the lack of settled Oregon law in this area, this court finds that [plaintiff] White has alleged sufficient facts to demonstrate a

possibility that [defendant] Brock could be found liable for aiding and abetting the alleged unlawful employment discrimination and retaliation by [defendant employer] Amedisys in violation of ORS 659A.030(1)(g).")); *Daniels v. Netop Tech, Inc.*, 2011 WL 127168, at *3 (D. Or. Jan. 14, 2011) (the Court "cannot conclude that as a matter of law, plaintiff cannot prevail on a claim of aiding and abetting under Oregon law" based on defendant "Greiner's role of authority in the company and as plaintiff's direct supervisor ..."); *Demont v. Starbucks*, 2010 WL 5173304, at *5 (D. Or. Dec. 15, 2010) (allowed claims to proceed against two supervisors based on allegations sufficient to demonstrate a possibility of aiding and abetting the plaintiff's termination); *Chambers v. United Rentals*, 2010 WL 2730944, at *2 (D. Or. July 7, 2010) (remanded to state court because the failure to state a claim against an employee for aiding and abetting the employer was "not obvious according to the settled rules of the state."); *Gaither*, 2009 WL 9520797, at *3 (remanded to state court because "there is a possibility that [defendant] might be found liable for aiding and abetting in the discrimination and harassment alleged by [plaintiff]").

This District has attempted to clarify the meaning of the aiding and abetting statute. For example, U.S. Magistrate Judge Janice Stewart in the Findings and Recommendation of *White*, adopted by U.S. District Judge Anna Brown, explained that any discipline or termination by a manager is not done to benefit that manager, but is done "on behalf of and within the course and scope of her employment for the employer." *White*, 2012 WL 7037317, at * 5. Thus, "only where an employee is 'legally equivalent to the employer, as in a sole proprietorship, or arguably when exercising 'executive authority' would the employee be aiding and abetting himself or herself." *Ekeya*, 258 F.Supp.3d at 1203 (citing *White*, 2012 WL 7037317, at *5).

U.S. District Judge Michael Simon explained that "[n]either the Oregon Supreme Court nor the Oregon Court of Appeals … have yet explicitly addressed the question of whether a complaint states a claim for aiding and abetting liability under [ORS] § 659A.030(1)(g) against a 'primary actor,' or someone with 'executive authority,' acting for a corporate employer when a complaint alleges that a wrongful employment action has been taken by that person on behalf of the corporate employer." *Ekeya*, 258 F.Supp.3d at 1203. "Similarly, the text of [ORS 659A.030(1)(g)] does not unambiguously resolve this issue." *Id.* at 1204. "Because this legal question has not been resolved at the appellate level, it would be inappropriate for this court to conclude that it is 'obvious' that [the plaintiff]'s aiding and abetting allegations against [the individual defendant] fails to state a claim." *Id.*

Here, contrary to Defendants' characterization, Plaintiff does not concede that Nelson was the executive officer of the County – the employer – although Plaintiff agrees that Nelson was acting as a final policy maker with regard to the Sheriff's Office and its personnel matters. *See* Pl.'s Resp. 46 (ECF No. 71) (citing ORS 206.010 which states that the sheriff is the "chief executive officer" over peace of the county). ORS 206.010 provides that "[t]he sheriff is the chief executive officer and conservator of the peace of the county." The listed "executive" duties of the Sheriff do not involve any internal employment-related acts. *See* ORS 206.010. It is clear from the statute that Sheriff Nelson is the "executive authority" for maintaining peace of Deschutes County. *See Id.* However, it is not clear from the statute whether Nelson is "legally equivalent to" Deschutes County when he took the discriminatory and retaliatory acts against Plaintiff. Defendants do not cite authority to support that Nelson is legally equivalent to Deschutes County. It therefore would be inappropriate for the Court to conclude that Plaintiff failed to state an aiding and abetting claim.

Moreover, the alleged discriminatory acts in Plaintiff's hostile work environment claim include the time period when Nelson was not the Sheriff, but the Captain of Corrections Division between December 2013 and July 1, 2015. To the extent that Plaintiff's aiding and abetting claim is based on the time period when Nelson was the Captain, the Court should find that Plaintiff has established a genuine issue of material fact sufficient to defeat the motion for summary judgment.

RECOMMENDATION

For the reasons explained above, the Court should GRANT Defendants' motion as to the Ninth Claim and the Tenth Claim and DENY Defendants' motion as to the remaining claims.

This recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of the district court's judgment or appealable order. The parties shall have fourteen (14) days from the date of service of a copy of this recommendation within which to file specific written objections with the court. Thereafter, the parties shall have fourteen (14) days within which to file a response to the objections. Failure to timely file objections to any factual determination of the Magistrate Judge will be considered as a waiver of a party's right to *de novo* consideration of the factual issues and will constitute a waiver of a party's right to appellate review of the findings of fact in an order or judgment entered pursuant to this recommendation.

DATED this 30 day of September, 2019.

Mustafa T. Kasubhai
United States Magistrate Judge