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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Mark Peticone,

10 Plaintiff,

11 v.

12 Bell Motors LLC, et al.,

13 Defendants.
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No. CV-16-02852-PHX-DGC

ORDER

16 Plaintiff Mark Peticone filed a complaint against Defendant Bell Motors LLC for
17 discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, 42
18 U.S.C. § 2000e et seq. (“Title VII”). Doc. 1-1. Defendant moves for summary judgment
19 on all claims (Doc. 41), and Plaintiff moves for summary judgment on Defendant’s
20 *Faragher/Ellerth* affirmative defense (Doc. 43). The motions are fully briefed, and no
21 party requests oral argument. For the reasons that follow, the Court will deny both
22 motions.

23 **I. Background.**

24 Plaintiff worked as a car salesman at Defendant’s dealership from February to
25 September 2013. Doc. 42-1 at 50; Doc. 49 at 13. This position required him to
26 “[p]rospect on a day-to-day basis by phone[.]” Doc. 42-1 at 3, 19. In practice,
27 supervisors asked salesmen to contact prospective customers approximately every three
28 days. Doc. 42-1 at 21.

1 Plaintiff is a Baptist who believes that Sunday is a day of rest for all people. *See*
2 Doc. 42-1 at 20-22, 25; Doc. 50-1 at 15. But Defendant requires all of its salesmen to
3 work on Sunday. Doc. 50-1 at 14. So when he interviewed for the position, Plaintiff
4 informed his manager that he could work on Sunday, but he would not make unsolicited
5 sales calls on Sunday. Doc. 42-1 at 20, 26; Doc. 50-1 at 16. His religious beliefs
6 prevented him from interrupting others' observance of the day of rest. Doc. 42-1
7 at 20-21; Doc. 49 at 24. General sales manager Frank Stevens and desk manager Neil
8 Lyons were informed of this arrangement. Doc. 42-1 at 30-31, 33.

9 On Sunday, September 1, 2013, Mr. Lyons told Plaintiff to make unsolicited calls
10 to prospective customers. Doc. 42-1 at 29. When Plaintiff protested, Mr. Lyons
11 expressed frustration and left to get Mr. Stevens. Doc. 42-1 at 29; Doc. 50-1 at 51.
12 Minutes later, Mr. Stevens arrived and stated something to the effect of "I do not give a
13 f--- about your religion. Get on the phones, or you are fired." Doc. 42-1 at 29-30.
14 Plaintiff was not otherwise forced to make the calls. Doc. 42-1 at 52. Intending to file a
15 complaint, Plaintiff called Human Resources specialist Janice Jordan later that day.
16 Doc. 42-1 at 34; Doc. 44-4 at 3. He left a voicemail requesting a call back about an
17 interaction with his supervisor that morning. Doc. 42-1 at 35-36. Another salesman who
18 joined in Plaintiff's protest left a voicemail for Human Resources as well. Doc. 42-1
19 at 98-99.

20 At all times relevant to this case, Defendant had an anti-discrimination policy that
21 provided multiple avenues to report harassment. Doc. 42-1 at 59-95. This policy
22 required Defendant to "investigate claims of harassment thoroughly and promptly," and
23 release the information it gathered only on a "need to know" basis. Doc. 44-6 at 8. And
24 it provided for different methods of resolution depending on the nature and severity of the
25 complaint. Doc. 44-4 at 6. For routine personnel conflicts, Human Resources could rely
26 on local management to resolve the issue. Doc. 44-6 at 6. But for more severe
27 complaints of discrimination, Human Resources, the Legal Department, or the Business
28 Ethics Committee would get involved. Doc. 44-6 at 6.

1 Ms. Jordan never returned the calls of Plaintiff or his co-worker to determine the
2 nature of their complaints, their severity, or the need for confidentiality. Doc. 50-1
3 at 58, 62. She did alert general manager Eric Zimmerman about the voicemails.
4 Doc. 50-1 at 57-58. When she visited the dealership on September 3, 2013, Mr.
5 Zimmerman told her that he had handled the situation. Doc. 50-1 at 59. She did not
6 follow up with Plaintiff to encourage him to report any acts of retaliation. Doc. 50-1
7 at 68.

8 On September 4, 2013, Mr. Stevens called Plaintiff into his office to discuss his
9 performance. Doc. 42-1 at 36. At the end of the meeting, Mr. Stevens told Plaintiff that
10 he had listened to the voicemail Plaintiff left for Human Resources. Doc. 42-1 at 37. Mr.
11 Stevens directed Plaintiff to report any further complaints to him, not Human Resources.
12 Doc. 42-1 at 37. When Plaintiff asked what to do if he needed to file a complaint against
13 him, Mr. Stevens smirked and said “We’re done. Get out.” Doc. 50-1 at 44-45.

14 After September 1, 2013, Plaintiff began to suffer hostile treatment from co-
15 worker J.P. Hah. Doc. 42-1 at 38-40. Mr. Hah was not well-liked at the dealership
16 because he often stole customers from other salesmen. Doc. 42-1 at 39, 47, 108-09.
17 Despite the fact that they had been friendly before September 1, Mr. Hah began giving
18 Plaintiff dirty looks and cursing at him. Doc. 42-1 at 38-40, 44-45, 49. Plaintiff
19 complained about this treatment to Mr. Stevens and Mr. Lyons. Doc. 42-1 at 38, 52;
20 Doc. 50-1 at 34. Mr. Stevens responded by telling Plaintiff that if he sold 20 or more cars
21 per month like Mr. Hah, then Stevens would discipline Mr. Hah. Doc. 50-1 at 34.
22 Plaintiff averaged only about 13 to 15 cars per month. Doc. 50-1 at 34.

23 On September 5 or 6, 2013, Plaintiff helped one of Mr. Hah’s customers purchase
24 a vehicle because Mr. Hah was not at work. Doc. 50-1 at 28. As was customary,
25 Plaintiff completed the deal paperwork to reflect that he and Mr. Hah should split the
26 commission. Doc. 42-1 at 42-43; Doc. 50-1 at 31. Mr. Hah complained to Mr. Stevens,
27 who took Plaintiff’s name off the deal. Doc. 42-1 at 42-43; Doc. 50-1 at 28-30. Another
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1 manager confirmed to Plaintiff that what Mr. Stevens did was not right, but that he had
2 no authority to overrule the general sales manager. Doc. 42-1 at 41.

3 On September 20, 2013, Plaintiff witnessed Mr. Hah scratching his name off the
4 rotation list for new customers. Doc. 42-1 at 48-49. When Plaintiff confronted him, Mr.
5 Hah admitted to doing it and suggested that they could handle the disagreement with a
6 physical altercation outside. Doc. 42-1 at 48-50. Plaintiff immediately quit his position
7 at Defendant's dealership. Doc. 42-1 at 50; Doc. 50-1 at 39.

8 Later that day, Mr. Lyons asked Plaintiff to come back to work. Doc. 42-1 at 114.
9 Plaintiff declined, explaining:

10 Too much stuff has happened since I started her[e.] JP has a problem with
11 a lot of [p]eople. [H]e cost me money this week by taking my name off the
12 list[,] and Lenny got my up and got a deal on a [G]rand Cherokee[.] [T]hat
13 was my deal[.] JP harasses me all the time[.] I told you guys plenty of
14 times[,] and nobody did nothing [sic] about it[.] [T]hanks and have a good
day[.]

15 Doc. 42-1 at 115. Mr. Lyons apologized for disappointing Plaintiff. Doc. 42-1 at 115.

16 **II. Legal Standard.**

17 A party seeking summary judgment "bears the initial responsibility of informing
18 the district court of the basis for its motion, and identifying those portions of [the record]
19 which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*
20 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Summary judgment is appropriate if the
21 evidence, viewed in the light most favorable to the nonmoving party, shows "that there is
22 no genuine dispute as to any material fact and the movant is entitled to judgment as a
23 matter of law." Fed. R. Civ. P. 56(a). Summary judgment is also appropriate against a
24 party who "fails to make a showing sufficient to establish the existence of an element
25 essential to that party's case, and on which that party will bear the burden of proof at
26 trial." *Celotex*, 477 U.S. at 322. Only disputes over facts that might affect the outcome
27 of the suit will preclude the entry of summary judgment, and the disputed evidence must
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1 be “such that a reasonable jury could return a verdict for the nonmoving party.”
2 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

3 **III. Discussion.**

4 Plaintiff alleges three Title VII discrimination claims against Defendant: failure to
5 accommodate, hostile work environment, and constructive discharge. Doc. 1-1 at 8-11.
6 Plaintiff also asserts a Title VII retaliation claim. *Id.*

7 **A. Plaintiff’s Discrimination Claims.**

8 The Ninth Circuit analyzes Title VII discrimination claims under a two-part
9 framework:

10 Under the first part, [Plaintiff] must establish a prima facie case by showing
11 that: (1) he had a bona fide religious belief, the practice of which conflicted
12 with his employment duties . . . ; (2) he informed [Defendant] of his beliefs
13 and the conflict; and (3) [Defendant] threatened him with or subjected him
14 to discriminatory treatment, including discharge, because of his inability to
15 fulfill the job requirements. Once an employee establishes a prima facie
16 case, the burden of proof then shifts to the employer under the second part
17 of the framework to establish that it initiated good faith efforts to
18 accommodate the employee’s religious practices or that it could not
19 reasonably accommodate the employee without undue hardship.

20 *Lawson v. Washington*, 296 F.3d 799, 804 (9th Cir. 2002) (internal quotation marks and
21 citations omitted); *see also Berry v. Dep’t of Soc. Servs.*, 447 F.3d 642, 655 (9th
22 Cir. 2006).

23 **1. Bona Fide Religious Belief.**

24 Bona fide religious beliefs “include moral or ethical beliefs as to what is right and
25 wrong which are sincerely held with the strength of traditional religious views.” 29
26 C.F.R. § 1605.1. Defendant contends that Plaintiff’s belief against making unsolicited
27 sales calls on Sunday is neither sincere nor religious. Doc. 41 at 5.

28 Defendant argues that Plaintiff’s willingness to work on Sunday establishes that
his belief is insincere. Doc. 41 at 6-7. Plaintiff counters that he would interrupt his own
day of rest because Defendant required all salesmen to work on Sunday, but he refused to
interrupt that day for others. Doc. 51 at 4. This dispute of material fact prevents
summary judgment on the sincerity of Plaintiff’s belief.

1 Defendant next argues that Plaintiff's belief is not religious because he cannot
2 prove that the Baptist faith espouses this belief. Doc. 41 at 5-6. Plaintiff counters that he
3 need not make such a showing (Doc. 51 at 3-4), and the Court agrees. "The fact that no
4 religious group espouses such beliefs or the fact that the religious group to which the
5 individual professes to belong may not accept such belief will not determine whether the
6 belief is a religious belief of the employee or prospective employee." 29
7 C.F.R. § 1605.1.

8 Defendant also contends that Plaintiff's religious belief did not conflict with his
9 employment duties because he was not forced to make calls on Sunday. Doc. 41 at 4.
10 But Mr. Lyons and Mr. Stevens were aware of Plaintiff's religious belief, yet still ordered
11 Plaintiff to make unsolicited sales calls on a Sunday. The Court cannot conclude as a
12 matter of undisputed fact that Plaintiff lacked a bona fide religious belief that conflicted
13 with his employment duties.

14 **2. Notification to Employer.**

15 Defendant contends that Plaintiff failed to make a religious accommodation
16 request and therefore never notified it of his religious conflict. Doc. 41 at 4. But an
17 employee need not explicitly ask for an accommodation. *Lawson*, 296 F.3d at 804.
18 "[A]n employee need only inform his employer about his religious needs for the
19 employer to understand the conflict between the employer's expectations and the
20 employee's religious practices." *Id.* (citing *Heller v. EBB Auto Co.*, 8 F.3d 1433, 1439
21 (9th Cir. 1993)). The employee must convey "only enough information about [his]
22 religious needs to permit the employer to understand the existence of a conflict between
23 [his] religious practices and the employer's job requirements." *Heller*, 8 F.3d at 1439.

24 The record reflects that Plaintiff conveyed to his supervisors that his religious
25 belief would prevent him from making unsolicited sales calls on Sunday. Plaintiff
26 communicated this belief when he interviewed for the job. Both Mr. Lyons and Mr.
27 Stevens were informed of this belief. And Mr. Stevens confirmed his apprehension of
28 this religious conflict when he used disrespectful language to describe how little he cared

1 about Plaintiff's religion. The Court cannot conclude as a matter of undisputed fact that
2 Defendant was not notified of Plaintiff's religious belief.

3 **3. Failure to Accommodate.**

4 Defendant contends that Plaintiff's failure to accommodate claim must fail
5 because Plaintiff did not notify it of a conflict caused by a bona fide religious belief. *See*
6 Doc. 41 at 3-7. For the reasons discussed above, this argument cannot support summary
7 judgment.

8 Defendant also argues that it never forced Plaintiff to make unsolicited sales calls
9 on Sunday. Doc. 41 at 4. Because Plaintiff did not make those calls, Defendant argues,
10 Plaintiff cannot show a lack of accommodation. *Id.* Plaintiff counters by citing harassing
11 incidents that reveal Defendant's failure to accommodate: the September 1 belittling of
12 his religious beliefs by Mr. Stevens, a derogatory comment on the same day by a desk
13 manager, Mr. Stevens's threat of termination if Plaintiff did not make the unsolicited
14 sales calls, Mr. Stevens's decision to revoke Plaintiff's share of a deal's commission, and
15 Mr. Stevens's toleration of Mr. Hah's harassment. *See* Doc. 51 at 5-6.

16 The fact that Plaintiff never made an unsolicited sales call on Sunday does not
17 require a finding that Defendant actually accommodated his religious belief. To the
18 contrary, a reasonable jury could conclude that Plaintiff refused to make those calls
19 despite Defendant's failure to accommodate. Significantly, Plaintiff presents evidence
20 that Mr. Stevens threatened to fire Plaintiff if he did not make those calls. The Court
21 therefore cannot conclude as a matter of undisputed fact that Defendant accommodated
22 Plaintiff's religious belief.

23 **4. Hostile Work Environment.**

24 To prevail on his hostile work environment claim, Plaintiff must show that (1) he
25 was subjected to verbal or physical conduct because of his religion, (2) the conduct was
26 unwelcome, and (3) the conduct was sufficiently severe or pervasive to alter the
27 conditions of his employment and create an abusive work environment. *Kang v. U. Lim*
28 *Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002); *see also Knickmeyer v. Nevada,*

1 No. 16-15740, 2017 WL 5494029, at *1 (9th Cir. Nov. 16, 2017) (referencing the *Kang*
2 elements). In assessing severity, courts look at all the circumstances, “including ‘the
3 frequency of the discriminatory conduct; its severity; whether it is physically threatening
4 or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with
5 an employee’s work performance.’” *Faragher v. City of Boca Raton*, 524 U.S. 775,
6 787-88 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)); *see also*
7 *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998); *Vasquez v. Cty. of L.A.*,
8 349 F.3d 634, 642 (9th Cir. 2003). “The required level of severity or seriousness varies
9 inversely with the pervasiveness or frequency of the conduct.” *Nichols v. Azteca Rest.*
10 *Enters.*, 256 F.3d 864, 872 (9th Cir. 2001) (internal quotation marks omitted). “Simple
11 teasing, offhand comments, and isolated incidents (unless extremely serious) will not
12 amount to discriminatory changes in the terms and conditions of employment.” *Id.*
13 (internal quotation marks omitted).

14 Defendant asserts that there was only one isolated incident of disrespect on
15 September 1. *See* Doc. 41 at 7. Noting that Title VII is not a civility code, Defendant
16 argues that isolated incidents are not sufficiently severe or pervasive to sustain a hostile
17 work environment claim. *Id.* at 6-7.

18 Plaintiff responds by citing a number of harassing incidents: the September 1
19 belittling of his religious beliefs by Mr. Stevens, a derogatory comment on the same day
20 by a desk manager, Mr. Stevens’s threat of termination if Plaintiff did not make the
21 unsolicited sales calls, the September 4 questioning regarding Plaintiff’s call to Human
22 Resources, Mr. Stevens’s decision to revoke Plaintiff’s share of a deal’s commission, and
23 Mr. Stevens’s toleration of Mr. Hah’s harassment. Doc. 51 at 7-10. Although the Court
24 finds this to be a close case, it cannot conclude that a reasonable jury necessarily would
25 find these incidents insufficient to alter the conditions of Plaintiff’s employment and
26 create an abusive work environment. *Kang*, 296 F.3d at 817.

27 Cases cited by Defendant do not require a different result. Doc. 52 at 5-6.
28 *Williams v. Arrow Chevrolet, Inc.*, 121 F. App’x 148 (7th Cir. 2005), involved only two

1 instances of religious harassment. *Id.* at 150-51. *Bourini v. Bridgestone/Firestone North*
2 *American Tire, LLC*, 136 F. App'x 747 (6th Cir. 2005), involved eight instances, but they
3 were spread out over five years and the court found them insufficient because they were
4 “relatively infrequent and isolated.” *Id.* at 751. Here, the incidents identified by Plaintiff
5 occurred in less than three weeks. Finally, the court in *Mills v. PeaceHealth*, 31 F.
6 Supp. 3d 1099 (D. Or. 2014), found that comments from co-workers were either
7 misunderstood or involved political discussions regarding the Middle East, and that the
8 supervisor’s comments about conversion to Christianity were primarily responses to the
9 plaintiff’s comments about Catholics. *Id.* at 1117.

10 At summary judgment, the Court must “view the evidence in the light most
11 favorable to the nonmoving party and draw all reasonable inferences in that party’s
12 favor.” *Jones v. Las Vegas Metro. Police Dep’t*, 873 F.3d 1123, 1127 n.1 (9th Cir. 2017)
13 (internal quotation marks omitted). Doing so, the Court concludes that factual issues
14 prevent summary judgment on the hostile work environment claim.

15 **5. Constructive Discharge.**

16 “[C]onstructive discharge occurs when the working conditions deteriorate, as a
17 result of discrimination, to the point that they become sufficiently extraordinary and
18 egregious to overcome the normal motivation of a competent, diligent, and reasonable
19 employee to remain on the job to earn a livelihood and to serve his or her employer.”
20 *Poland v. Chertoff*, 494 F.3d 1174, 1184 (9th Cir. 2007) (quoting *Brooks v. City of San*
21 *Mateo*, 229 F.3d 917, 930 (9th Cir. 2000)). The Ninth Circuit “set[s] the bar high for a
22 claim of constructive discharge because federal antidiscrimination policies are better
23 served when the employee and employer attack discrimination within their existing
24 employment relationship, rather than when the employee walks away and then later
25 litigates whether his employment situation was intolerable.” *Id.*

26 “Whether working conditions were so intolerable and discriminatory as to justify a
27 reasonable employee’s decision to resign is normally a factual question for the jury.”
28 *Wallace v. City of San Diego*, 479 F.3d 616, 626 (9th Cir. 2007) (internal quotation marks

1 omitted). The Ninth Circuit has held that a constructive discharge claim can be shown
2 through a continuous pattern of discriminatory treatment over months and years. *See*
3 *Satterwhite v. Smith*, 744 F.2d 1380, 1382-83 (9th Cir. 1984) (evidence that a black
4 employee could not obtain promotion or gain access to training and advancement
5 opportunities that white employees received was sufficient to support a claim of
6 constructive discharge); *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361-62 (9th
7 Cir. 1987) (an alleged pattern of discriminatory actions by an employer was sufficient to
8 survive a motion for summary judgment). For reasons explained above with respect to
9 the hostile work environment claim, the Court concludes that Plaintiff has created a
10 question of fact on whether a reasonable person in his position would have felt forced to
11 quit because of intolerable working conditions.

12 **B. *Faragher/Ellerth* Affirmative Defense.**

13 Defendant asserts an affirmative defense pursuant to the Supreme Court's
14 decisions in *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City*
15 *of Boca Raton*, 524 U.S. 775 (1998) (collectively, *Faragher/Ellerth*). Doc. 5 at 6-8. The
16 Ninth Circuit has explained:

17 Under *Faragher/Ellerth*, when an employee has been subjected to an
18 unlawful "tangible employment action" by a supervisor, the employer may
19 be held liable without more; when the employee has been unlawfully
harassed, but there has been no "tangible employment action," the
employer may avoid liability by proving the defense of "reasonable care."

20 *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1167 (9th Cir. 2003).¹

21 The parties dispute whether Defendant can establish reasonable care to avoid
22 vicarious liability for harassment by a co-worker. *See* Doc. 41 at 9; Doc. 43 9. "The
23 defense comprises two necessary elements: (a) that the employer exercised reasonable
24 care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff
25 employee unreasonably failed to take advantage of any preventive or corrective

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27 ¹ The motions do not address – and the Court does not evaluate – the existence of
28 a tangible employment action. Defendant's motion only argues that it exercised
reasonable care (Doc. 41 at 9), and Plaintiff's motion only acknowledges a factual
dispute between the parties on this issue (Doc. 43 at 9).

1 opportunities provided by the employer or to avoid harm otherwise.” *Ellerth*, 524 U.S.
2 at 765.

3 Plaintiff contends that Defendant cannot establish that it acted reasonably.
4 Doc. 43 at 9-13. Plaintiff emphasizes that Defendant had a clear anti-discrimination
5 policy, yet its Human Resources specialist failed to investigate Plaintiff’s complaint in
6 accordance with that policy. *Id.* She never returned Plaintiff’s request for a telephone
7 call. *Id.* at 11-12. Unaware of the nature of the complaint, Ms. Jordan chose instead to
8 ask local management to handle the situation. *Id.*

9 Defendant counters that the mere existence of its comprehensive anti-
10 discrimination policy establishes that it acted reasonably. Doc. 47 at 4-5. Defendant
11 argues that this is the dispositive fact because Plaintiff never filed a complaint about Mr.
12 Stevens that would have triggered an investigation pursuant to its policy. *Id.* at 5.
13 Defendant further argues that it nonetheless addressed Plaintiff’s voicemail at a meeting
14 on September 3. *Id.* Because Plaintiff did not file any more complaints, Defendant
15 argues, this meeting successfully stopped any discrimination or harassment. *Id.* at 5-6.

16 The Court finds disputes of material fact as to whether Defendant exercised
17 reasonable care in the implementation of its anti-discrimination policies. Defendant
18 relies on cases from another circuit for the proposition that the mere existence of a policy
19 is sufficient to show reasonableness. Doc. 47 at 5. The Ninth Circuit has found that the
20 existence of such a policy is relevant, but not determinative. *See Nichols*, 256 F.3d
21 at 877-78. In *Nichols*, the Ninth Circuit held that a company exercised reasonable care to
22 prevent sexual harassment with its company-wide policy and training program. *Id.*
23 at 877. But the court found it unreasonable that the employer failed to implement its
24 policy to correct harassing behavior. *Id.* at 877-78. This distinction requires a resolution
25 of material facts related to Ms. Jordan’s response. A reasonable jury could find that the
26 two voicemails conveyed a routine personnel complaint that warranted a deferral to local
27 management, but the same jury might find that Ms. Jordan acted unreasonably by failing
28 to determine the nature of the issue before passing it to Mr. Zimmerman. What is more,

1 there is a dispute as to whether Ms. Jordan ever met with Plaintiff to discuss his
2 complaint. Doc. 42-1 at 55; Doc. 50-1 at 58, 62. The Court cannot determine at this
3 stage whether Defendant acted unreasonably.

4 Plaintiff next argues that Defendant cannot establish that he acted unreasonably.
5 Doc. 43 at 13. Specifically, Plaintiff contends that his voicemail for Human Resources
6 precludes any attempt to establish that he unreasonably failed to take advantage of
7 preventative or corrective opportunities. *Id.* Defendant counters that Plaintiff acted
8 unreasonably because his voicemail was too vague to constitute a serious complaint, and
9 he failed to use alternative reporting channels when his initial voicemail was unanswered.
10 Doc. 47 at 6-7. The Court also finds disputes of material fact as to whether Plaintiff
11 acted reasonably.

12 The critical issue here is the September 4 meeting with Mr. Stevens. Defendant
13 characterizes it as a respectful effort to address and rectify Plaintiff's concerns, but
14 Plaintiff characterizes it as an interrogation in which he was told not to contact Human
15 Resources again. Depending on its resolution of this issue, a reasonable jury could find
16 that Plaintiff unreasonably failed to file an additional complaint with Human Resources.
17 The Court will not displace the decision of a jury on this issue.

18 **C. Retaliation.**

19 Title VII prohibits retaliation against an employee for opposing an unlawful
20 employment practice or participating in a Title VII proceeding. 42 U.S.C. § 2000e-3(a).
21 A successful retaliation claim must establish that (1) the employee engaged in a protected
22 activity, (2) the employer took an adverse employment action against the employee, and
23 (3) the employer would not have taken the adverse employment action but for a design to
24 retaliate. *Nilsson v. City of Mesa*, 503 F.3d 947, 953-54 (9th Cir. 2007); *see Univ. of Tex.*
25 *Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (clarifying that employee must
26 show "but for" causation).

1 **1. Protected Activity.**

2 An employee engages in a “protected activity” when the he complains about or
3 protests conduct that he reasonably believes constitutes an unlawful employment
4 practice. *See* 42 U.S.C. § 2000e-3(a) (describing “protected activity”); *Trent v. Valley*
5 *Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir. 1994). Defendant contends that Plaintiff
6 never engaged in such activity. Doc. 41 at 10-11. Specifically, Defendant argues that
7 even if Plaintiff made a request for accommodation, that request is legally insufficient to
8 constitute a complaint or opposition to discriminatory conduct. *Id.* Plaintiff counters that
9 the express refusal to carry out a discriminatory policy constitutes protected activity
10 under Title VII. Doc. 51 at 12-13. The Court agrees with Plaintiff. When he openly
11 protested Mr. Stevens’s order to make unsolicited calls on a Sunday, he protested conduct
12 that he believed to be an unlawful employment practice. *See Moyo v. Gomez*, 40 F.3d
13 982, 984 (9th Cir. 1994) (“Opposition can, of course, consist of a refusal to carry out an
14 order or policy.”). A reasonable jury could find that this was protected activity.²

15 **2. Adverse Employment Action.**

16 Title VII’s anti-retaliation provision protects against “materially adverse”
17 employment actions – actions that might dissuade a reasonable worker from making or
18 supporting a charge of discrimination – but not against “petty slights or minor
19 annoyances that often take place at work and that all employees experience.” *Burlington*
20 *N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). The Court’s role at the summary
21 judgment stage is limited to determining whether there is evidence in the record that
22 would support a reasonable jury in finding that the action complained of was materially
23 adverse. Where the evidence would permit no such finding, the Court may grant
24 summary judgment. *See, e.g., Johnson v. Fed. Express Corp.*, No. CV-14-02428-PHX-
25 DGC, 2016 WL 1593811, at *4 (D. Ariz. Apr. 21, 2016) (citing *Sillars v. Nevada*, 385 F.
26 App’x 669, 671 (9th Cir. 2010) (affirming grant of summary judgment because employee

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28 ² Defendant’s motion does not address, and the Court does not consider, whether Plaintiff’s attempt to contact Human Resources constitutes protected activity for the purposes of Title VII.

1 “presented no evidence that the position to which she was moved differed in any material
2 way from the position she occupied prior to her complaints”). In determining whether a
3 reasonable jury could find material adversity, the Court must consider the context in
4 which the action occurred. Because “[t]he real social impact of workplace behavior often
5 depends on a constellation of surrounding circumstances, expectations, and
6 relationships . . . an act that would be immaterial in some situations is material in others.”
7 *White*, 548 U.S. at 69 (internal quotation marks and citations omitted).

8 Defendant offers a bare assertion that Plaintiff did not suffer any adverse
9 employment action because he was neither disciplined nor terminated. Doc. 41 at 11. In
10 response, Plaintiff identifies at least three instances of adverse action: (1) Mr. Stevens
11 told Plaintiff that he listened to the voicemail Plaintiff left for Human Resources; (2) Mr.
12 Stevens took Plaintiff off a car deal, depriving him of a shared commission; and (3) Mr.
13 Stevens permitted Mr. Hah to harass Plaintiff. Doc. 51 at 13-14.

14 The Court doubts that informing a subordinate that his supervisor listened to a
15 complaint filed against that same supervisor constitutes an adverse employment action,
16 but the Ninth Circuit has held that decreased compensation can be such an action. *See*
17 *Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 970 (9th Cir. 2002) (reduction in
18 monthly pay is an adverse employment action). And the Court finds that permitting co-
19 worker harassment can be materially adverse because it could affect performance,
20 compensation, and job satisfaction. The Court concludes that a reasonable jury could
21 find that these incidents, as well as Plaintiff’s potential constructive discharge, might
22 dissuade a reasonable worker from making or supporting a charge of discrimination.³

23 **D. Punitive Damages.**

24 Under Title VII, a plaintiff may recover punitive damages if he demonstrates that
25 the defendant “engaged in a discriminatory practice or discriminatory practices with
26 _____

27 ³ Defendant argues for the first time in its reply that Plaintiff has not established
28 “but for” causation for the alleged retaliation. Doc. 52 at 8-10. The Court cannot
consider this argument. *Gadda v. State Bar of Cal.*, 511 F.3d 933, 937 n.2 (9th
Cir. 2007).

1 malice or with reckless indifference to the federally protected rights of an aggrieved
2 individual.” 42 U.S.C. § 1981a(b)(1). The focus is on the defendant’s state of mind.
3 *Christopher v. Spectra Elec. Servs., Inc.*, 637 F. App’x 383, 384 (9th Cir. 2016).

4 Defendant contends that Plaintiff cannot meet this standard because he never made
5 a religious accommodation request, he filed no complaints, he was not subject to adverse
6 employment actions, and he voluntarily quit over an issue unrelated to his religious
7 belief. Doc. 41 at 12. Plaintiff argues that Mr. Stevens’s disrespectful comments and
8 retaliatory behavior are sufficient to create an issue of material fact because they reveal
9 the intent with which Defendant discriminated. Doc. 51 at 16-17.

10 The Court agrees with Plaintiff. In *EEOC v. Wal-Mart Stores, Inc.*, 156 F.3d 989
11 (9th Cir. 1998), the Ninth Circuit emphasized the importance of two facts in finding that
12 punitive damages were available. *Id.* at 992-93. First, the Ninth Circuit noted that a
13 supervisor who had received anti-discrimination training and a handbook nonetheless told
14 a pregnant woman that she would not be hired because of her pregnancy. *Id.* at 992.
15 Here, Defendant has an anti-discrimination policy, yet general sales manager Stevens
16 declared that he did not “give a f--- about your religion.” Second, the Ninth Circuit noted
17 that Wal-Mart managers attempted to cover up the discriminatory conduct. *Id.* at 993.
18 Here, Plaintiff presents evidence that Mr. Stevens directed him file any future complaints
19 with him, not Human Resources. When Plaintiff suggested that those future complaints
20 might be about him, Mr. Stevens smirked and told him to “get out.” A reasonable jury
21 therefore could find facts to support the malice or reckless indifference required for
22 punitive damages.

23 **E. Failure to Mitigate Affirmative Defense.**

24 In his motion for partial summary judgment, Plaintiff recites the requirements of a
25 failure to mitigate affirmative defense, but does not argue that a lack of evidence
26 precludes this defense. Doc. 43 at 13-14. Instead, Plaintiff “invites [Defendant] to make
27 a showing that [Plaintiff] failed to mitigate his damages sufficient to warrant submitting
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1 this issue to a jury.” *Id.* at 14. Because Plaintiff did not make an argument in his motion,
2 the Court will not consider this issue. *Gadda*, 511 F.3d at 937 n.2.

3 **IT IS ORDERED:**

- 4 1. Defendant’s motion for summary judgment (Doc. 41) is **denied**.
5 2. Plaintiff’s motion for partial summary judgment (Doc. 43) is **denied**.
6 3. The Court will schedule a conference call to set a final pretrial conference
7 and trial date by separate order.

8 Dated this 9th day of January, 2018.

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12 David G. Campbell
13 United States District Judge
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