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NOT FOR PUBLICATION

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

Josephine Borchardt,  
Plaintiff,  
v.  
Harkins Fashion Square LLC,  
Defendant.

No. CV-17-01727-PHX-DJH  
**ORDER**

This matter is before the Court on Defendant’s Motion for Summary Judgment.<sup>1</sup> (Doc. 39). Plaintiff filed a Response and Defendant filed a Reply. (Docs. 45 and 47). The parties stipulated to, and the Court approved, a 90-day extension for Plaintiff to file her Response. (Doc. 43). Notwithstanding that lengthy extension, the Court notes that Plaintiff was late in filing her Response.

**I. Background**

Plaintiff was originally represented by Joshua Carden, who filed the Complaint. The Court granted Mr. Carden’s Motion to Withdraw as Counsel, citing irreconcilable differences, on October 1, 2018. (Doc. 41). Plaintiff filed a Notice to Proceed Pro Se on November 15, 2018. (Doc. 44). Plaintiff asserts two causes of action in her Complaint, both alleging violations of Title VII of the Civil Rights Act of 1964. (Doc. 1). Count One alleges that Defendant failed to stop sexual harassment of Plaintiff by co-workers, and

<sup>1</sup> Oral argument was requested on the Motion. The Court denies the request because the issues have been fully briefed and oral argument will not aid the Court’s decision. *See* Fed.R.Civ.P. 78(b) (court may decide motions without oral hearings); LRCiv 7.2(f) (same).

1 Count Two alleges that Defendant retaliated against Plaintiff initially by reducing her hours  
2 and subsequently by terminating her after she complained about the alleged harassment  
3 and filed an EEOC claim. (*Id.*)

4 Plaintiff commenced employment with Defendant Harkins as a barista at the  
5 Harkins Movie Theater in Fashion Square Mall in January 2016. (DSOF ¶¶1-2). Plaintiff  
6 started working as a bartender about a month later. (*Id.*) Plaintiff alleges that she was  
7 harassed by a few different individuals at work. Mikyle Calovich (“Calovich”), a fellow  
8 bartender, allegedly told Plaintiff she should not do inventory because she is a woman.  
9 (DSOF ¶17). Plaintiff reported this comment to General Manager Patty McHale  
10 (“McHale”) in April 2016. (DSOF ¶18; Doc. 1 at 2). Although Plaintiff alleges that  
11 McHale dismissed the concerns about Calovich, Plaintiff acknowledges that Calovich was  
12 terminated in July 2016. (Doc. 1 at 3).

13 Plaintiff also alleges that bartender Luis Banuelos (“Banuelos”) made sexual  
14 gestures toward her, massaged her neck and back on multiple occasions, and made  
15 comments of a harassing nature directly to her and through text messages. (Doc. 1 at 4).  
16 Plaintiff acknowledges that she did not report any of this behavior to her supervisor or to  
17 anyone else in management. (Doc. 40-1 at 32). Moreover, Plaintiff never asked Banuelos  
18 to stop massaging her back on the dozens of occasions he allegedly massaged her. (*Id.*)

19 Plaintiff also alleges harassment stemming from a confrontation with a male  
20 bartender after he failed to ID a customer purchasing alcohol. (Doc. 1 at 3). Plaintiff  
21 reported that conduct to a co-worker, who told supervisor Caroline Kaiser (“Kaiser”). (*Id.*)  
22 Plaintiff alleges that Kaiser told her that questioning the male employee in front of  
23 customers was “emasculating” and “essentially chopping off his balls.” (DSOF ¶ 17).  
24 Plaintiff alleges that this comment was made in September 2016, but that she did not report  
25 it until November 15, 2016. (DSOF ¶ 19). Plaintiff alleges that her hours were reduced  
26 following this incident. (Doc. 1 at 4).

27 At all times during Plaintiff’s employment, Defendant had a no-tip policy, which  
28 discouraged customers from tipping. (DSOF ¶ 5). If a customer insisted on leaving a tip,

1 the bartenders were to type the tip amount into the system and place the money into the  
2 register. Defendant donated the tips to charity. (DSOF ¶ 6). Plaintiff was unclear as to  
3 where the tips went after they were put into the cash register, but understood that she was  
4 not allowed to keep tips. (DSOF ¶ 7). On November 20, 2016, Plaintiff's cash register  
5 was \$14 short, prompting a review of surveillance video footage. (DSOF ¶¶ 8-9). Kaiser  
6 observed Plaintiff and another bartender, Kathryn Sensibaugh, pocketing cash tips that day.  
7 (DSOF ¶¶ 10-11). In her deposition, Plaintiff admitted to violating the tip policy by  
8 pocketing cash tips on "two or three" occasions around November of 2016. (Doc. 40-1 at  
9 17).

10 Plaintiff filed an EEOC claim of sex discrimination on December 2, 2016, shortly  
11 after Defendant began its investigation into the stolen tips. (Doc. 1-1; DSOF ¶ 14).  
12 Defendant terminated Plaintiff on December 15, 2016, for violating the company's policy  
13 on tips, which is defined as "theft" in the employee handbook.<sup>2</sup> (DSOF ¶ 15). Plaintiff  
14 filed a second EEOC claim for retaliation and this case followed. (Doc. 1).

## 15 **II. Summary Judgment Legal Standards**

16 The Court must grant summary judgment "if the movant shows that there is no  
17 genuine dispute as to any material fact and the movant is entitled to judgment as a matter  
18 of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323  
19 (1986); *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994). The  
20 materiality requirement means "[o]nly disputes over facts that might affect the outcome of  
21 the suit under the governing law will properly preclude the entry of summary judgment."  
22 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Substantive law determines  
23 which facts are material. *Id.* The dispute must also be genuine, meaning the "evidence is  
24 such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 242.  
25 The Court determines whether there is a genuine issue for trial but does not weigh the  
26 evidence or determine the truth of matters asserted. *Jesinger*, 24 F.3d at 1131.

27 The moving party bears the initial burden of identifying the portions of the record,

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28 <sup>2</sup> Employee Sensibaugh, also caught on tape stealing tips, was also terminated. (Doc. 40-1 at 71-73).

1 including pleadings, depositions, answers to interrogatories, admissions, and affidavits that  
2 it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp.*, 477  
3 U.S. at 323. If the moving party meets its initial burden, the opposing party must establish  
4 the existence of a genuine dispute as to any material fact. *See Matsushita Elec. Indus. Co.*  
5 *v. Zenith Radio Corp.*, 475 U.S. 574, 585-586 (1986). There is no issue for trial unless  
6 there is sufficient evidence favoring the non-moving party. *Anderson*, 477 U.S. at 249. “If  
7 the evidence is merely colorable or is not significantly probative, summary judgment may  
8 be granted.” *Id.* at 249-250. However, the evidence of the non-movant is “to be believed,  
9 and all justifiable inferences are to be drawn in his favor.” *Id.* at 255.

### 10 **III. Sexual Harassment Claim**

11 In Count One, Plaintiff claims that Defendant failed to stop harassing behavior of a  
12 sexual nature, which cultivated a hostile work environment.

13 Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of  
14 sex, which includes sexual harassment. 42 U.S.C. § 2000e-2(a)(1). “A plaintiff may  
15 establish a violation of Title VII by proving that discrimination based on sex has created a  
16 hostile or abusive work environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66  
17 (1986). “To survive summary judgment, the respondent must submit cognizable evidence  
18 sufficient to establish a jury question on whether the victim (1) was subjected to verbal or  
19 physical conduct of a sexual nature, (2) that was unwelcome; and (3) that was sufficiently  
20 severe or pervasive to alter the conditions of the victim’s employment and create an abusive  
21 working environment.” *E.E.O.C. v. Prospect Airport Servs., Inc.*, 621 F.3d 991, 997 (9th  
22 Cir. 2010). To satisfy the third element, a plaintiff must prove that her workplace was  
23 “both objectively and subjectively offensive, one that a reasonable person would find  
24 hostile or abusive, and one that the victim in fact did perceive to be so.” *Nichols v. Azteca*  
25 *Rest. Enterprises, Inc.*, 256 F.3d 864, 871-72 (9th Cir. 2001) (citing *Faragher v. City of*  
26 *Boca Raton*, 524 U.S. 775, 787, (1998). Where an employee is allegedly harassed by a co-  
27 worker, an employer may be liable if they knew of the harassment but failed to take action  
28 “reasonably calculated to end the harassment.” *Nichols*, 256 F.3d at 875.

1 Plaintiff's sexual harassment claim is based on the following allegations: (1) co-  
2 worker Calovich stated that Plaintiff shouldn't have to do inventory because she is a  
3 woman; (2) with respect to Plaintiff's request that her co-worker ID customers, Kaiser told  
4 Plaintiff that she was "essentially chopping off his balls;" and (3) co-worker Banuelos  
5 made sexual comments and gestures to Plaintiff and massaged her neck and back. (Doc. 1).  
6 In her Response, Plaintiff also states that she was a victim of racial discrimination from  
7 Calovich. (Doc. 45). While there is a single mention of racial comments being made in  
8 the Complaint, there is no claim for race-based discrimination, and therefore the Court will  
9 not consider this argument.

10 As an initial matter, Plaintiff did not directly respond to any of Defendant's  
11 statements of fact, rather submitting a document in response that restates the allegations in  
12 her Complaint. (Doc. 46). Nor did Plaintiff provide any admissible evidence or declaration  
13 to rebut any of Defendant's facts. Therefore, the Defendant's Statement of Facts that are  
14 supported by evidence must be accepted as true. *See* LRCiv. 56.1(b).<sup>3</sup> Likewise, Plaintiff  
15 did not cite any legal authority in her Response.

16 **A. Allegations against Calovich**

17 Plaintiff alleges that Calovich made a demeaning remark to Plaintiff, that McHale  
18 did not take her concerns seriously, and that those actions created a hostile work  
19 environment. However, it is undisputed that as a result of Plaintiff's complaint, Calovich  
20 was initially suspended from employment by McHale. (DSOF ¶ 26). Moreover, Plaintiff  
21 agrees that she made a second complaint regarding Calovich on June 23, 2016, and  
22 acknowledges that Calovich was terminated soon thereafter. (Doc. 1 at 3; Doc. 45 at 2).

23 There is no evidence in the record to establish that the events related to Calovich

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25 <sup>3</sup> "Any party opposing a motion for summary judgment must file a statement, separate from  
26 that party's memorandum of law, setting forth: (1) for each paragraph of the moving party's  
27 separate statement of facts, a correspondingly numbered paragraph indicating whether the  
28 party disputes the statement of fact set forth in that paragraph and a reference to the specific  
admissible portion of the record supporting the party's position if the fact is disputed; and  
(2) any additional facts that establish a genuine issue of material fact or otherwise preclude  
judgment in favor of the moving party. Each additional fact must be set forth in a separately  
numbered paragraph and must refer to a specific admissible portion of the record where  
the fact finds support."

1 created a hostile work environment that was not addressed by Defendant. It is undisputed  
2 that Calovich was terminated shortly after Plaintiff made a complaint to HR.<sup>4</sup> *See Nichols*,  
3 256 F.3d at 875. Plaintiff has not established the existence of a genuine dispute as to any  
4 material fact for trial as to the allegations against Calovich and McHale.

5 **B. Allegations against Kaiser**

6 Plaintiff alleges that after confronting a co-worker about his failure to ID customers,  
7 her supervisor, Kaiser, told her that questioning the male employee in front of customers  
8 was “emasculating” and “essentially chopping off his balls.” (DSOF ¶ 17). Plaintiff states  
9 that this comment was made sometime in September 2016, but she did not report it until  
10 November 15, 2016. (DSOF ¶ 19). Plaintiff argues that Kaiser’s comments contributed to  
11 a hostile work environment.

12 While Plaintiff does not provide any evidence to establish that Kaiser made this  
13 remark, the Court will presume the statement was made for purposes of this Motion.  
14 Taking Plaintiff’s allegation as true with respect to the crude comment made by Kaiser,  
15 this statement on its own, while inappropriate, does not create a hostile work environment  
16 for purposes of a harassment claim. *See Faragher v. City of Boca Raton*, 524 U.S. 775,  
17 788 (1998) (“A recurring point in these opinions is that simple teasing, offhand comments,  
18 and isolated incidents (unless extremely serious) will not amount to discriminatory changes  
19 in the terms and conditions of employment.”) (internal citations omitted). Plaintiff has not  
20 provided any evidence to raise a question of material fact as to Kaiser. This isolated  
21 incident does not support Plaintiff’s claim for sexual harassment.

22 **C. Allegations against Banuelos**

23 Plaintiff alleges that bartender Banuelos made sexual gestures toward her while at  
24 work. (Doc. 1 at 4). In her deposition, she further alleged that Banuelos massaged her  
25 neck and back on multiple occasions, and that he made comments of a harassing nature to  
26 her and through text messages. (Doc. 40-1 at 20). Plaintiff acknowledged in her deposition

27 <sup>4</sup> In her Response, Plaintiff also argues that Calovich “referred to Ms. Borchardt’s racial  
28 identity, Mexican, as having said worse because of her racial and ethnic background.”  
(Doc. 45 at 1). As stated previously, there is no claim for racial discrimination in the  
Complaint.

1 that she did not report any of the behavior related to Banuelos. (Doc. 40-1 at 32).  
2 Moreover, Plaintiff stated that she did not ever ask Banuelos to stop massaging her back  
3 or neck. (*Id.*) Importantly, Plaintiff has not presented any evidence that Defendant was  
4 aware of the alleged conduct of Banuelos.

5 To survive summary judgment, Plaintiff must submit evidence sufficient to establish  
6 that she was subjected to unwelcome verbal or physical conduct of a sexual nature  
7 sufficiently severe or pervasive to alter the conditions of her employment. *See E.E.O.C. v.*  
8 *Prospect*, 621 F.3d at 997. To satisfy the third element, a plaintiff must prove that her  
9 workplace was “both objectively and subjectively offensive, one that a reasonable person  
10 would find hostile or abusive, and one that the victim in fact did perceive to be so.”  
11 *Nichols*, 256 F.3d at 871–72.

12 Taking the facts in the light most favorable to Plaintiff, the Court assumes that  
13 Banuelos did subject Plaintiff to verbal or physical conduct of a sexual nature. However,  
14 there is no evidence in the record to establish the conduct was unwelcome. Conceivably,  
15 the alleged conduct of Banuelos would be objectively harassing to a reasonable person.  
16 However, Plaintiff has not presented evidence that she was subjectively offended by his  
17 conduct, rather she conceded that she never asked Banuelos to stop massaging her. (Doc.  
18 40-1 at 32). Moreover, there is no evidence that the conduct was pervasive enough to alter  
19 the conditions of her employment. Plaintiff has not argued or presented evidence that  
20 Defendant was or should have been on notice about the alleged harassment. Rather,  
21 Plaintiff stated in her deposition that she did not report the conduct. In her Response,  
22 Plaintiff argues *for the first time* that she made an assistant manager aware of Banuelos’s  
23 conduct. (Doc. 45 at 5). Even if this argument was supported with a sworn declaration  
24 from Plaintiff, which it is not, this statement is in direct contradiction to her own sworn  
25 deposition testimony. *See Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) (“[A]  
26 party cannot create an issue of fact by an affidavit contradicting his prior deposition  
27 testimony.”).

28 Plaintiff has not presented “cognizable evidence sufficient to establish a jury

1 question” as to any of the above claimed instances of sexual harassment. Nor has Plaintiff  
2 established a “severe or pervasive” alteration of the conditions of her employment, or  
3 contested any of Defendant’s facts or evidence. Therefore, there is no dispute of material  
4 fact and Plaintiff’s Title VII sexual harassment claim fails as a matter of law.

#### 5 **IV. Retaliation Claim**

6 To succeed on a retaliation claim under Title VII, a plaintiff must prove “that his or  
7 her protected activity was a but-for cause of the alleged adverse action by the employer.”  
8 *Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 362 (2013). Initially, the burden  
9 rests with the plaintiff to establish a *prima facie* case of retaliation. *McDonnell Douglas*  
10 *Corp v. Green*, 411 U.S. 792, 802 (1973). To establish a *prima facie* case, a plaintiff must  
11 show “(1) a protected activity; (2) an adverse employment action; and (3) a causal link  
12 between the protected activity and the adverse employment action.” *Cornwell v. Electra*  
13 *Cent. Credit Union*, 439 F.3d 1018, 1034–35 (9th Cir. 2006). An action is cognizable as  
14 an adverse employment action if it is based on a retaliatory motive and is reasonably likely  
15 to deter employees from engaging in protected activity. *Ray v. Henderson*, 217 F.3d 1234,  
16 1243 (9th Cir. 2000). In other words, only “non-trivial” employment actions can ground a  
17 retaliation claim at the *prima facie* stage. *See Brooks v. City of San Mateo*, 229 F.3d 917,  
18 928 (9th Cir. 2000); *see also Kunzler v. Rubin*, 2001 WL 34053243, at \*7 (D. Ariz. Sept.  
19 27, 2001).

20 If the plaintiff establishes a *prima facie* case, “the burden shifts to the defendant ‘to  
21 articulate some legitimate, [nonretaliatory] reason’ for the adverse action.” *Texas Dep’t of*  
22 *Cnty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (quoting *McDonnell Douglas*, 411 U.S.  
23 at 802). The defendant need not prove the absence of retaliatory intent or motive; it simply  
24 must produce evidence sufficient to dispel the inference of retaliation raised by the  
25 plaintiff. *Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). If the defendant  
26 does so, “the plaintiff must show that the articulated reason is pretextual ‘either directly by  
27 persuading the court that a discriminatory reason more likely motivated the employer or  
28 indirectly by showing that the employer’s proffered explanation is unworthy of credence.’”



1 *Chuang v. University of California Davis*, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting  
2 *Burdine*, 450 U.S. at 256). The goal of the pretext inquiry is not to determine whether  
3 defendant made the best employment decisions or even well-considered ones. *See Green*  
4 *v. Maricopa County Cmty. Coll. Sch. Dist.*, 265 F. Supp. 2d 1110, 1128 (D. Ariz. 2003).  
5 Rather, the goal is to determine the extent to which defendant’s explanation of its actions  
6 is a guise for unlawful retaliation. *See Ekweani v. Ameriprise Fin., Inc.*, 2010 WL 481647,  
7 at \*8 (D. Ariz. Feb. 8, 2010). In this final analysis, the plaintiff “must do more than  
8 establish a *prima facie* case and deny the credibility of the [defendant’s] witnesses.”  
9 *Schuler v. Chronicle Broadcasting Co. Inc.*, 793 F.2d 1010, 1011 (9th Cir. 1986).

10 Plaintiff alleges that she was retaliated against while still working at Harkins,  
11 because her supervisors had a poor attitude and reduced her hours, and because she was  
12 terminated for filing an EEOC claim.

13 **A. Allegations of Adverse Treatment**

14 Plaintiff alleges that following the incident related to the failure to ID customers,  
15 Kaiser spoke to her with “more of a harsh tone.” (DSOF ¶ 25). However, this type of  
16 action does not rise to the level of unlawful retaliation, as Plaintiff does not allege that this  
17 action dissuaded her from making a report of discrimination. *Burlington N. & Santa Fe*  
18 *Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (“a plaintiff must show that a reasonable employee  
19 would have found the challenged action materially adverse, which in this context means it  
20 well might have dissuaded a reasonable worker from making or supporting a charge of  
21 discrimination.”) (internal citations omitted). As Plaintiff filed an EEOC complaint *after*  
22 this alleged adverse treatment, the Court finds that Plaintiff was not materially affected by  
23 the alleged conduct. Therefore, the Court finds this to be a “non-trivial” employment  
24 action. *See Brooks*, 229 F.3d at 928.

25 Plaintiff also alleges that her work hours were reduced after she complained about  
26 Calovich. However, this allegation is contradicted by Plaintiff’s deposition testimony,  
27 where she stated she was dissatisfied with the number of hours she was scheduled to work  
28 prior to the time she made any complaints to management. (Doc. 40-1 at 44). She further

1 stated, referencing her co-workers, that “everybody at this time was upset over the  
2 scheduling.” (*Id.*) There is also evidence to support that Plaintiff’s hours were reduced  
3 because her availability decreased, due to attending classes at Arizona State University and  
4 because she was studying for the LSAT. (Doc. 40-1 at 12). Plaintiff does not dispute these  
5 facts. Therefore, as to her allegations of adverse treatment, Plaintiff has not established a  
6 *prima facie* case of retaliation.

7 **B. Termination**

8 Plaintiff alleges, without providing any evidence, that her termination was in  
9 retaliation for her reports to management and for filing an EEOC claim, and that the tip  
10 policy violation was pretextual. Defendant contends that the violation of the tip policy was  
11 the sole reason for Plaintiff’s termination.

12 Plaintiff alleges that she engaged in a protected activity (filing an EEOC claim), that  
13 she received an adverse employment action (termination after filing the EEOC claim), and  
14 that there was a causal link between the two. Plaintiff does not provide evidence of the  
15 causal link, only inferring that the timing of the termination is suspect. However, temporal  
16 proximity, without more, is insufficient to establish pretext. *See Behan v. Lolo’s Inc.*, 2019  
17 WL 1382462, at \*6 (D. Ariz. Mar. 27, 2019) (holding that timing alone “is not enough to  
18 create a triable issue of pretext”), *appeal dismissed*, 2019 WL 3384891 (9th Cir. June 12,  
19 2019). Plaintiff does not provide evidence to rebut the facts established by Defendant, and  
20 therefore, Plaintiff has not established that her EEOC claim was the “but-for cause” of her  
21 termination. *See Nassar*, 570 U.S. at 362.

22 Likewise, even assuming Plaintiff could establish a causal connection, her claim  
23 would fail. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1282 (9th Cir. 2000) (“the  
24 establishment of a *prima facie* case based on the minimum evidence necessary to raise a  
25 presumption of discrimination does not preclude summary judgment.”). If the plaintiff  
26 establishes a *prima facie* case, “the burden shifts to the defendant to articulate some  
27 legitimate, [nonretaliatory] reason for the adverse action.” *Burdine*, 450 U.S. at 253  
28 (internal citations omitted). “The employer’s articulation of a facially nondiscriminatory

1 reason shifts the burden back to the plaintiff to show that the employer's reason was a  
2 pretext for discrimination." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1220 (9th Cir.  
3 1998), as amended (Aug. 11, 1998).

4 Here, Defendant articulated non-retaliatory reasons for terminating Plaintiff.  
5 Although Plaintiff alleges that Defendant's decision to fire her was a "false allegation of  
6 tip theft," Plaintiff admitted to violating company policy and pocketing cash tips. (Doc.  
7 40-1). While Plaintiff alleges in her Complaint that other employees also pocketed tips  
8 and that Defendant "routinely made exceptions" to the tip policy, Plaintiff cites no evidence  
9 to support her argument. (Doc. 1 at 6). Plaintiff does not put forward any admissible  
10 evidence or declarations to rebut Defendant's evidence that her termination was not  
11 pretextual, and there is no evidence in the record to rebut Defendant's non-discriminatory  
12 reason for her termination. Plaintiff's claim fails.


13 **V. Conclusion**

14 Plaintiff has not established a claim for sexual harassment under Title VII of the  
15 Civil Rights Act of 1964. Nor has Plaintiff established a *prima facie* case of retaliation.  
16 Therefore, Plaintiff's claims fail as a matter of law, and Defendant's Motion for Summary  
17 Judgment will be granted.

18 Accordingly,

19 **IT IS HEREBY ORDERED** that Defendant's Motion for Summary Judgment  
20 (Doc. 39) is **granted**. The Clerk of Court shall kindly enter judgment accordingly and  
21 terminate this matter.

22 Dated this 16th day of September, 2019.

23  
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25   
26 Honorable Diane J. Humetewa  
27 United States District Judge  
28