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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Michael Bellesfield,

10 Plaintiff,

11 v.

12 Mountain View Tours Incorporated,

13 Defendant.  
14

No. CV-19-02038-PHX-SMB

**ORDER**

15 Pending before the Court is Defendant Mountain View Tours, Inc.’s Motion to  
16 Dismiss Plaintiff’s Complaint for Failure to State a Claim. (Doc. 12, “Mot.”) The Court  
17 has considered the pleadings, (Doc. 10, “Amended Complaint” or “AC”; Doc. 13, “Resp.”;  
18 Doc. 14, “Reply”), and enters the following Order.

19  
20 **I. BACKGROUND**

21 Michael Bellesfield (“Bellesfield”) drove buses for Mountain View Tours, Inc.  
22 (“Mountain View”), a tour bus company operating out of the Kingman, Peach Springs, and  
23 Grand Canyon West areas of Mohave County, Arizona. Hired on March 21, 2018,  
24 Bellesfield alleges sexually inappropriate behavior directed at him by fellow employees  
25 began shortly thereafter. Among other things, Bellesfield alleges he was inappropriately  
26 touched on three occasions, one in the presence of his supervisor. In the first instance, in  
27 June of 2018, a fellow driver Debbie Selders “slid up to Bellesfield while he sat on a bench”  
28 and made “full contact with [his] body.” (AC ¶ 9.) Selders then grabbed Bellesfield’s arm

1 and rubbed it against her chest. (*Id.*) Pressing her thigh against his, Selders gave  
2 Bellesfield her phone number. (*Id.*) Bellesfield’s supervisor, Joe Maestras, witnessed the  
3 incident, commenting approvingly afterwards, “man, she just gave you her phone number!”  
4 (*Id.*) On the second occasion, Selders—who had since engaged in a widely known extra-  
5 marital affair with a different co-worker, William Brazell—thrust her chest into Bellesfield  
6 while he sat a workbench, saying she “had splattered chocolate on her blouse” while  
7 “running her fingers over her breasts.” (*Id.* ¶13.) Aside from these sexual assault  
8 allegations, Bellesfield alleges numerous instances of sexual harassment, including  
9 unwanted flirtation and sexual advances involving crude sexual innuendo. (*See id.* ¶ 9  
10 (Selders commenting to a cornered Bellesfield: “At least I can do something with my  
11 mouth”); *see also id.* ¶¶ 11-12 (alleging generally “obnoxious, sexually charged” behavior  
12 by Selders and Brazell including yells of “I love you”, comments mocking Bellesfield’s  
13 “virgin ears”, and insinuating comments that Selders “ate [Brazell’s] yogurt” at lunch.)  
14 She repeated this behavior the following day. (*Id.* ¶ 11.) Bellesfield ignored these  
15 advances. (*Id.* ¶ 9, 13), instead reporting the behavior to his supervisor, “but nothing was  
16 done.”<sup>1</sup> Ultimately, Bellesfield complained by letter and email to President of Mountain  
17 View Tours, Inc., Gregory P. Conser, but was told “to endure the antics or resign.” (*Id.* ¶  
18 12.) Mountain View fired Bellesfield the following week. (*See id.*)

19 Plaintiff filed the current lawsuit on March 27, 2019 alleging a Hostile Work  
20 Environment, (42 U.S.C. § 2000e-(2)(a); A.R.S. 41-1464(B)), and Retaliation, (42 U.S.C.  
21 § 2000e-(2)(a)(i); A.R.S. 41-1464(A)), claims under both federal and state law. He seeks  
22 compensatory and punitive damages in addition to injunctive relief. (AC ¶¶ 13-15.)  
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## 24 **II. LEGAL STANDARD**

25 To survive a Rule 12(b)(6) motion for failure to state a claim, a complaint must meet  
26 the requirements of Rule 8(a)(2). Rule 8(a)(2) requires a “short and plain statement of the  
27 claim showing that the pleader is entitled to relief,” so that the defendant has “fair notice  
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<sup>1</sup> The Amended Complaint does not specify the content or timing of this report is report

1 of what the . . . claim is and the grounds upon which it rests.” *Bell Atl. Corp. v. Twombly*,  
2 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Dismissal  
3 under Rule 12(b)(6) “can be based on the lack of a cognizable legal theory or the absence  
4 of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police*  
5 *Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that sets forth a cognizable legal  
6 theory will survive a motion to dismiss if it contains enough factual matter, which, if  
7 accepted as true, states a claim to relief that is “plausible on its face.” *Ashcroft v. Iqbal*,  
8 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Facial plausibility exists if  
9 the pleader sets forth “factual content that allows the court to draw the reasonable inference  
10 that the defendant is liable for the misconduct alleged.” *Id.* “Threadbare recitals of the  
11 elements of a cause of action, supported by mere conclusory statements, do not suffice.”  
12 *Id.* Plausibility does not equal “probability,” but requires “more than a sheer possibility  
13 that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are  
14 ‘merely consistent’ with a defendant’s liability, it ‘stops short of the line between  
15 possibility and plausibility of entitlement to relief.’” *Id.* (quoting *Twombly*, 550 U.S. at  
16 557).

### 18 **III. DISCUSSION**

#### 19 **a. Hostile Work Environment Claims**

20 A hostile work environment claim under Title VII requires a plaintiff allege: (1) that  
21 he was subjected to verbal or physical conduct of a harassing nature; (2) that this conduct  
22 was unwelcome; and (3) that the conduct was sufficiently severe or pervasive to alter the  
23 conditions of the victim’s employment and create an abusive working environment.  
24 *Arizona ex rel. Horne v. Geo Grp., Inc.*, 816 F.3d 1189, 1206 (9th Cir. 2016) (quoting  
25 *Kortan v. Cal. Youth Auth.*, 217 F.3d 1104, 1109–10 (9th Cir.2000)). “Conduct must be  
26 extreme to amount to a change in the terms and conditions of employment.” *Id.* (quoting  
27 *Montero v. AGCO Corp.*, 192 F.3d 856, 860 (9th Cir.1999)). To determine whether an  
28 environment is sufficiently hostile or abusive, courts look “at all the circumstances,

1 including the frequency of the discriminatory conduct; its severity; whether it is physically  
2 threatening or humiliating, or a mere offensive utterance; and whether it unreasonably  
3 interferes with an employee’s work performance.” *Kortan*, 217 F.3d at 1110 (quoting  
4 *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998)) (internal quotation marks  
5 omitted). While “simple teasing, offhand comments, and isolated incidents (unless  
6 extremely serious) are not sufficient to create an actionable claim under Title VII . . . the  
7 harassment need not be so severe as to cause diagnosed psychological injury.” *Fuller v.*  
8 *Idaho Dept. of Corr.*, 865 F.3d 1154, 1161-62 (9th Cir. 2017) (citing *Reynaga v. Roseburg*  
9 *Forest Prods*, 847 F.3d 678, 687 (9th Cir. 2017) (internal quotation marks omitted).

10 Plaintiff must demonstrate that the work environment was both subjectively and  
11 objectively hostile. *See Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872. Bellesfield  
12 does neither. The conduct alleged is too isolated and insufficiently severe to support a Title  
13 VII hostile work environment claim. And although Bellesfield characterizes his co-  
14 workers conduct as “extremely offensive and unwelcome,” he does not allege that he was  
15 physically threatened, humiliated, or identify any interference with his job performance.  
16 (AC ¶ 12); *see also Kortan*, 217 F.3d at 1110.

17 Although Maestras apparent blindness to alleged instances of sexual assault and  
18 tacit approval of the outwardly sexual nature of Selder and Brazell’s professional  
19 relationship is worrying, much of the alleged conduct primarily involves the relationship  
20 of Bellesfield’s co-workers. Generally, alleging an affair between co-workers creates a  
21 sexually charged atmosphere is insufficient to qualify as a hostile work environment. *See*  
22 *Candelore v. Clark Cty. Sanitation Dist.*, 975 F.2d 588, 590 (9th Cir. 1992). Brazell and  
23 Selder public professions that they love and kiss each other, and their coordination of leave  
24 is insufficiently severe to create a hostile work environment. *See Arizona ex rel. Horne v.*  
25 *Geo Grp., Inc.*, 816 F.3d at 1206. Further, outside of the incidents of alleged physical  
26 contact from Selders, the alleged conduct are examples of “simple teasing, offhand  
27 comments, and isolated incidents” of insufficient severity to create an actionable claim  
28 under Title VII. *Reynaga*, 847 F.3d at 687 (quoting *Faragher*, 524 U.S. at 788, 118 S.Ct.

1 2275 (internal quotation marks omitted)). The alleged incidents of Selder’s physical  
2 contact with Bellesfield are concerning but too isolated to create a hostile or abusive work  
3 environment.<sup>2</sup> Bellesfield does not allege these incidents or the alleged “sexually charged”  
4 work environment unreasonably interfered with his job performance, or that they were  
5 physically threatening. *See Kortan*, 217 F.3d at 1110.

6 An employer may be held liable for creating a hostile work environment either  
7 vicariously or through negligence. *See McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119  
8 (9th Cir. 2004). Mountain View contends otherwise, arguing that even if Bellesfield’s  
9 allegations supported a hostile work environment claim, they are insufficient to establish  
10 liability. The Court finds otherwise. An employer is vicariously liable for a hostile work  
11 environment created by a supervisor. *Vance v. Ball State Univ.*, 570 U.S. 421, 424, 133 S.  
12 Ct. 2434, 186 L.Ed.2d 565 (2013). Here, taking Bellesfield’s alleged facts as true and  
13 assuming *arguendo* a hostile work environment, Bellesfield’s supervisors condoned or  
14 tacitly approved of employee misconduct that created the hostile work environment. An  
15 employer is also liable for a hostile work environment created by a plaintiff’s co-worker if  
16 the employer “knew, or should have known, about the harassment and failed to take prompt  
17 and effective remedial action.” *E.E.O.C.*, 621 F.2d at 882. Bellesfield identifies multiple  
18 instances where supervisors had direct or constructive knowledge of co-worker misconduct  
19 and harassment but failed to take any remedial actions. Thus, the factual allegations  
20 support Mountain View’s liability, but fall short of alleging an actionable hostile work  
21 environment claim under Title VII.

### 22 23 **b. Retaliation Claims**

24 A plaintiff need not prove “that the employment practice at issue was in fact  
25 unlawful under Title VII. *See Trent v. Valley Elec. Ass’n Inc.*, 41 F.3d 524, 526 (9th Cir.  
26 1994) (citing *Sias v. City Demonstration Agency*, 588 F.2d 692, 695 (9th Cir. 1978). So  
27 long as Bellesfield demonstrates a reasonable belief that the employment practice protested

28 <sup>2</sup> Plaintiff alleges three incidents of possible sexual assault over the course of a year’s  
employment, two of which occurred on consecutive days.

1 was prohibited under Title VII, a retaliation claim may lie despite the underlying hostile  
2 work environment claim being unactionable. Here, Amended Complaint demonstrates  
3 Bellesfield held a reasonable belief that employment practices at Mountain View were  
4 prohibited by Title VII. *See Trent*, 41 F.3d at 526. Title VII makes it unlawful for “an  
5 employer to discriminate against [an employee] . . . because he has opposed any practice  
6 made an unlawful employment practice” by Title VII. 42 U.S.C. § 2000e-3(a).<sup>3</sup> To state a  
7 Title VII retaliation claim, Bellesfield must establish that (1) he was engaging in a protected  
8 activity, (2) he suffered an adverse employment decision, and (3) a causal link between his  
9 activity and the employment decision. *E.E.O.C. v. Hacienda Hotel*, 881 F.2d 1504, 1513  
10 (9th Cir. 1989).

11 Bellesfield satisfies each element. A sexual harassment complaint is a protected  
12 activity.<sup>4</sup> *See Tipp v. Adeptus Health Inc.*, No. CV-16-02317, 2018 WL 447256 at 8 (D.  
13 Ariz. Jan. 17, 2018). The parties do not dispute that Bellesfield’s termination is an adverse  
14 employment decision. (*See Mot.* at 13 (citing *Brooks v. City of San Mateo*, 229 F.3d 917,  
15 928 (9th Cir. 2000))). Mountain View does not challenge the presence of a causal link  
16 between Bellesfield’s protected activity and termination. The Court finds the link  
17 sufficiently alleged. *See Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir.  
18 2002) (“[C]ausation can be inferred from the timing along where an adverse employment  
19 action follows on the heels of protected activity.”). Here, the Amended Complaint alleges  
20 Bellesfield was fired one week after filing a sexual harassment complaint with Mountain  
21 View’s President. (AC ¶ 12.) The Ninth Circuit generally requires “temporal proximity  
22 of less than three months between the protected activity and the adverse employment action  
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24 <sup>3</sup> As A.R.S. § 41-1464(A) mirrors Title VII, federal Title VII case law is persuasive in  
25 interpreting § 41-1464 (the “Arizona Civil Rights Act” or “ACRA”). *Bodett v. CoxCom,*  
*Inc.*, 366 F.3d 736, 742 (9th Cir. 2004) (considering the ACRA and Title VII as “generally  
26 identical”).

27 <sup>4</sup> Defendant cited case, *Silver v. KCA, Inc.*, 586 F.2d 138, 141 (9th Cir. 1978), is  
28 distinguishable. The *Silver* court reviewed a solitary instance of a racially discriminatory  
slur used by a co-worker unconnected to the plaintiff’s employer, finding it was “not  
conduct for which [the employer] was responsible.” (*Id.*) Here, Bellesfield alleges conduct  
by co-workers *and* supervisors. Taking the facts as true, Defendant’s supervisors witnessed  
the alleged conduct, received Bellesfield’s report concerning it, and either condoned or  
dismissed concerns regarding inappropriate conduct on multiple occasions.

1 for the employee to establish causation based on timing alone.” *Mahoe v. Operating*  
2 *Eng’rs Local Union No. 3*, No. Civ. 13-00186 HG-BMK, 2014 WL 6685812 at \*8 (D.  
3 Haw. Nov. 25, 2014) (listing case exemplars). Bellesfield’s retaliation claims have enough  
4 factual basis.

#### 6 **IV. LEAVE TO AMEND**

7 “Dismissal is a harsh penalty and is to be imposed only in extreme circumstances.”  
8 *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) (citing *Raiford v. Pounds*, 640  
9 F.2d 944, 945 (9th Cir. 1981). In accordance with well-settled law in the Ninth Circuit, the  
10 Court will grant Plaintiffs leave to amend their complaint because “it is not ‘absolutely  
11 clear’ that [Plaintiffs] could not cure [the amended complaint’s] deficiencies by  
12 amendment.” *See Jackson v. Barnes*, 749 F.3d 755, 767 (9th Cir. 2014) (citations omitted);  
13 Fed. R. Civ. P. 15(a)(2) (“leave to amend should be “freely” given “when justice so  
14 requires[.]”).

15 Accordingly, within thirty (30) days from the date of entry of this Order, Plaintiffs may  
16 submit an amended complaint addressing the deficiencies in counts One and Three.  
17 Plaintiffs must clearly designate on the face of the document that it is the “Second  
18 Amended Complaint.” If Plaintiffs decides to file an amended complaint, they are  
19 reminded that an amended complaint supersedes the original complaint, *see Lacey v.*  
20 *Maricopa Cty.*, 693 F.3d 896 (9th Cir. 2012), and it must be complete in itself and “must  
21 not incorporate by reference any part of the preceding pleading, including exhibits,”  
22 L.R.Civ 15.1.

#### 24 **V. CONCLUSION**

25 Accordingly,


26 **IT IS ORDERED** granting in part and denying in part Defendant Mountain View  
27 Tours, Inc.’s Motion to Dismiss Plaintiff’s Complaint for Failure to State a Claim (Doc.  
28 12). Counts One and Three are dismissed with leave to amend. Counts Two and Four are

1 not dismissed.

2 **IT IS FURTHER ORDERED** that Plaintiffs may file a Second Amended  
3 Complaint within thirty (30) days of this Order. If Plaintiffs fail to file an amended  
4 complaint within thirty (30) days of this Order, the case will proceed solely on counts Two  
5 and Four.

6 Dated this 14<sup>th</sup> day of January, 2020.

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Honorable Susan M. Brnovich  
United States District Judge