

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

<b>GEMMA SAWA, et al.</b>  v. <b>RDG-GCS JOINT VENTURES III, et al.</b>	<b>CIVIL ACTION</b>  <b>NO. 15-6585</b>
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**MEMORANDUM RE: DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Baylson, J.

July 14, 2017

**I. Introduction**

In this employment discrimination and retaliation action, Defendants RDG-CGS Joint Ventures III (“RDG”) and Walter Paul Kelley (“Kelley,” and collectively, “Defendants”) move for summary judgment on Plaintiffs Gemma Sawa (“Gemma”) and Jacqueline Sawa’s (“Jacqueline,” and collectively, “Plaintiffs”) sexual harassment and retaliation claims, alleging:

- (1) Sexual Harassment of both Plaintiffs, in violation of Title VII of the Civil Rights Act of 1964, § 703, 42 U.S.C.A. § 2000e-2 (“Title VII”);
- (2) Retaliation against both Plaintiffs, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* (“ADA”);
- (3) Retaliation against both Plaintiffs, in violation of the Family and Medical Leave Act, 29 U.S.C. § 2611, *et seq.*, (“FMLA”); and
- (4) Retaliation against both Plaintiffs, in violation of the Pennsylvania Human Relations Act, 43 P.S. § 951, *et seq.*, (“PHRA”); and
- (5) “wrongful termination” of Jacqueline only, in “violation of Pennsylvania public policy.

(ECF 1, Complaint, “Compl.” ¶¶ 50-71). Plaintiffs, who are sisters, were employees of RDG before they were each terminated for allegedly egregiously violating RDG’s computer use policy by spending a significant portion of on-the-clock time completing coursework at the URL “Walden.edu,” an online educational platform for attaining collegiate and post-collegiate degrees. Plaintiffs contend that Defendants subjected them to a hostile work environment and

sexual harassment, and that their termination was either in retaliation for complaining about the sexual harassment, or, alternatively, in retaliation for their use of authorized medical leave time. Defendants seek summary judgment on the ground that Plaintiffs have failed to make out a *prima facie* case for any of their claims, and that even assuming, *arguendo*, they had established *prima facie* evidence of their claims, they have failed to show that Defendants' proffered reasons for Plaintiffs' terminations are pretextual.

For the reasons discussed below, Defendants' motion will be GRANTED in its entirety.

## **II. Factual Background**

The following is a fair account of the factual assertions at issue in this case, as taken from, *inter alia*, RDG's Statement of Undisputed Facts, and not genuinely disputed by Plaintiff. (See ECF 47-1, "DSOF"; ECF 49-3, Plaintiffs' Response to Defendants' Statement of Undisputed Material Facts, "Pls.' Resp. DSOF").

### **A. General Facts of Plaintiffs' Employment**

RDG is under contract to the U.S. Department of Homeland Security ("DHS"), Federal Protective Service ("FPS"), and manages and operates DHS's emergency management and emergency communications program charged with maintaining a safe and secure environment for federal employees, contractors and visitors at federal facilities. (Defs.' Mot., Ex. 3, Declaration of Sheila McCombs, "McCombs Decl.," ¶ 5; DSOF ¶ 3). RDG's operations include dispatch and alarm monitoring, radio and telephone communications, information technology services, coordination and support of law enforcement, fire and other emergencies, and emergency response and medical communications. (DSOF ¶ 6).

RDG operates on a nationwide basis, twenty-four hours per day, seven days per week, at four sites known as MegaCenters, one of which is located in Philadelphia, Pennsylvania. (Id. ¶¶

6-7). In March 2013, the Philadelphia MegaCenter (“PMC”) was awarded a new federal government contract, RDG, and both Plaintiffs thereafter became RDG employees. (Id. ¶¶ 9-10).

Each Plaintiff’s title at RDG was, for a time, “Alarm Monitor/Telecommunicator (Dispatcher),” which involved “protect[ing] federal facilities, from any crime that was committed, on behalf of the government dispatching services where required, and coordinating emergency services and communications.” (Id. ¶¶ 11-13). Their responsibilities included “coordination of inter-agency communications in cases where FPS is tasked with working with state and local emergency service agencies.” (Id. ¶¶ 12).

During the course of her employment, Jacqueline was promoted to “Telecommunications (Dispatch) Supervisor,” which involved “supervis[ing] 7-8 employees who were taking emergency response calls, monitoring alarms and dispatching and acting as lead to the other employees.” (Id. ¶¶ 15-16).

Incident to their employment at RDG, Plaintiffs received copies of RDG’s employee handbook, which details, *inter alia*, its computer use, anti-discrimination, anti-harassment, and anti-retaliation policies, as well as the DHS handbook, which also details a computer use policy. (Id. ¶¶ 17-18). Both Gemma and Jacqueline read these policies and understood that, pursuant to them, only limited personal use of RDG computers was permitted. (Id. ¶ 18-20, ¶ 90; see Defs.’ Mot., Ex. 10, DHS Handbook, at 36 (“I understand that I can only use Government systems for official Internet activities and email, with **limited personal use allowed.**”) (emphasis added)).

The record reflects that when RDG employees had “down time”—i.e., they were not answering the phones or responding to alarms—they were permitted to, and did, engage in activities such as reading books and magazines, playing computer games, and watching TV.

(See ECF 49-4, Plaintiffs' Statement of Facts of Record, "PSOF," ¶ 57). As far as internet use was concerned, RDG also tolerated employees' use of the internet to "check[] a score on ESPN" or "look up online menus to order foods, stuff of that nature." (Defs.' Reply, Ex. 1, Deposition of Walter Paul Kelley, "Kelley Dep.," at 38-39).

The undisputed record evidence shows that taking online courses (and completing tests, assignments, and quizzes associated with that course), however, exceeded the permissible "limited" use of the internet at RDG. (DSOF ¶ 90; Pls.' Resp. DSO F¶ 90) (admitting that "taking online courses and completing coursework during work hours, on RDG computers, might be a violation of the write policy," yet maintain that "the rule was not enforced."). This is because completing coursework is, by nature, more distracting than the other types of "down time" activities. (*Id.*). Specifically,

"when you're taking tests . . . it's set to time-out after a certain amount of time. So if you just don't answer questions, you just get marked wrong on those questions and the test will end. So you have to pay attention to the test when you're doing it. And if the phone's ringing and you're trying to pay attention to a test, then usually you might miss the time period and pay more attention to the program. If you're reading a book and the phone rings, you put it down and start up again. That's the difference."

(PSOF ¶¶ 58-60; Kelley Dep. at 50, 52). There is no evidence in the record that suggests that Walden.edu—the online course website that Plaintiffs used in this case—did not have this type of "time-out" functionality.

### **B. FMLA Leave**

During the course of their employment, both Plaintiffs applied for and took FMLA leave on several occasions. (DSOF ¶ 21). Gemma first applied for intermittent FMLA leave in October 2012 due to a serious illness, which was granted. (*Id.* ¶ 22) Gemma's FMLA leave was recertified twice during the course of her employment—on October 29, 2013, and again on

February 28, 2014—and she was never denied any leave she requested. (DSOF ¶¶ 21-27). The last day on which Gemma exercised her FMLA leave was May 28, 2014, due to dizziness caused by “a flare-up of Hashimoto’s—a disability.”<sup>1</sup> (DSOF ¶¶ 26; PSOF ¶ 26).

Jacqueline also applied for, and was granted, intermittent FMLA leave, in her case in order to care for her mother. (DSOF ¶ 28). Jacqueline, like Gemma, was never denied any leave she requested. The last days on which Jacqueline exercised her FMLA leave were July 19 and 20, 2014.<sup>2</sup> (DSOF ¶ 30).

### **C. Cyber-Stalking Complaints and Initial Investigation**

#### **i. 2013 Cyber-Stalking Activity**

The record evidence, summarized below, provides a detailed account of the highly-unusual cyber-stalking situation that began to unfold at RDG in 2013.

In early 2013, Michael Berardis, an RDG employee with the title of Shift Supervisor (“Berardis”), started receiving unwanted anonymous emails and texts, some of which were sexual in nature. Over the next few months, the texts increased and the sender of the texts would show Berardis that he or she was able to access his online bank and tax accounts and find his passwords. (DSOF ¶ 33).

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<sup>1</sup> Gemma also used her FMLA leave on November 28, 2012, January 23, 2013, January 24, 2013, February 7, 2013, February 20, 2013, March 2, 2013, March 21, 2013, April 9, 2013, May 6, 2013, May 29, 2013, June 3, 2013, June 4, 2013, August 3, 2013, August 7, 2013, August 16, 2013, August 17, 2013, August 30, 2013, September 5, 2013, September 10, 2013, September 14, 2013, October 7, 2013, October 21, 2013, November 18, 2013, November 19, 2013, December 3, 2013, December 7, 2013, December 16, 2013, December 21, 2013, December 30, 2013, January 3, 2014, January 23, 2014, January 26, 2014, February 1, 2014, March 5, 2014, March 19, 2014, March 24, 2014, March 25, 2014, April 8, 2014, April 21, 2014, and April 25, 2014 (Def. Mot., Ex. 13 at 46-86).

<sup>2</sup> Jacqueline also used her FMLA leave on March 30, 2013, May 22, 2013, December 23, 2013, May 19, 2014, June 2, 2014, July 19, 2014, and July 20, 2014 (Id., Ex. 15 at 89-99; DSOF ¶ 30)

In May 2013, Plaintiffs and another RDG employee named Jennifer Jackson also started receiving anonymous, graphic messages to their personal electronic devices, including sexual comments and comments relating to their workplace and people that they knew.<sup>3</sup> (DSOF ¶ 34).

In July 2013, Jackson, on behalf of herself, Berardis, and Plaintiffs made a “collective report” to Sheila McCombs, the Director of Contract Administration and Human Resources (“McCombs”), and to Walter Paul Kelley, the Contract Manager at the PMC, who also served as Plaintiffs’ supervisor (“Kelley”). (DSOF ¶ 35). McCombs advised that she would conduct an investigation. (Id.).

Gemma expressed concern that her complaints about the cyber-stalking situation were being discounted by RDG because, in response to complaints to Kelley made in the Spring of 2013, Kelley called Plaintiffs, Jackson, and Berardis “babies,” and Jackson told Gemma that Kelley was “getting pretty mad” about their complaints and “didn’t want to hear about it anymore at work.” (DSOF ¶ 70; Defs.’ Mot., Ex. 4, Deposition of Gemma Sawa, “Gemma Dep.,” at 109-110).

At some point, Colonel John F. McClay (“McClay”)—who was not an employee of RDG—was informed by RDG about the cyber-stalking situation because of his role as Law Enforcement Program Manager for the DHS at the PMC. On July 15, 2013, McClay sent an email to all PMC staff, explaining that several employees were receiving harassing messages, and that based on the type of information being released it is apparent that there is an internal source feeding information to this individual/s.” (DSOF ¶ 36; Defs.’ Mot., Ex. 17). He explained that he had “deferred the matter to the [FPS] Criminal Investigation Branch and to the

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<sup>3</sup> Additionally, McClay and Trooper Sembler were minor targets of the cyber-stalking. (DSOF ¶¶ 53-55)

ICE Forensic Unit to investigate,” and invited any employees to contact either him or Kelley with any information regarding the cyber-stalking situation. (DSOF ¶¶ 37-38).

On July 16, 2013, McClay forwarded emails that Berardis had received to, among others, George Rossner, the Network Engineer and Information Systems Security Officers for RDG (“Rossner”), for the recipients to investigate. (DSOF ¶ 40; Defs.’ Mot., Ex. 18).

Also that day, Jacqueline received a forwarded version of an email, signed by Rossner, which was originally drafted to send to DHS’s Joint Intake Center, and was intended to serve as the “official statement” and summary of the cyber-stalking situation. (DSOF ¶ 41-42; Defs.’ Mot., Ex. 19). In the statement, Rossner states that “not only are these happenings a concern to the victims themselves, but also [for] . . . the loss of confidentiality when it comes to the everyday SBU/LES/PII information we handle as an operation on an everyday basis.” (*Id.*). In a subsequent email to McClay and others, Rossner explained that he included this and other detail in the statement to “demonstrate urgency” and to “bring about a prioritized investigation by this organization.” (*Id.*).

On July 18, 2013, McClay sent an email to all PMC employees explaining that all pertinent information regarding the cyber-stalking situation had been forwarded to DHS for investigation, and instructing that electronic devices “are not to be directly or indirectly connected to any PMC computer[.]” (DSOF ¶ 44; Defs.’ Mot., Ex. 20).

On August 1, 2013, Plaintiffs, Berardis and Jackson also reported the cyber-stalking activity to the New Jersey State Police (“NJSP”), and between August 1, 2013 and September 30, 2013, the NJSP—while coordinating with McClay—conducted a thorough investigation of the situation. (DSOF ¶¶ 49-51). The investigation entailed, *inter alia*, numerous interviews, service of multiple subpoenas on internet and email providers, forensic review of computers and

other electronic devices, surveillance and background research on suspects, and executing a search warrant. (Id.).

Because McClay was coordinating with the NJSP, McClay—rather than RDG personnel—became Gemma’s point of contact as to the progress of the investigation. (Id. ¶ 52). Gemma contends that when she spoke with someone at the NJSP on the phone during this investigation, they “weren’t very nice” to her. (Gemma Dep. at 109)

By mid-August 2013, McClay had also become a target of the cyber-stalking, and on September 10, 2013, Gemma reported to McClay that she had received a photograph of him with his wife from the unknown stalker. (DSOF ¶¶ 54, 56).

On September 12, 2013, McClay emailed Plaintiffs, cc’ing Kelley, indicating that the investigation was ongoing, and instructing them to (1) cease discussing the cyber-stalking situation in the workplace, and (2) avoid “finger pointing” regarding the identity of the cyber-stalker. (Id. ¶ 57; Defs.’ Mot., Ex. 23).

On September 13, 2013, in the course of its investigation, the NJSP executed a search warrant on the home of Joseph Mandi, an RDG employee (“Mandi”), who had become a suspect in the New Jersey Police’s investigation. Mr. Mandi was terminated from RDG, though he was ultimately not identified as the stalker. (DSOF ¶¶ 58, 60).

## **ii. 2014 Cyber-Stalking Activity**

After Mandi’s termination, from December 7, 2013 until at least March 2014, the cyber-stalking temporarily ceased. (DSOF ¶¶ 60, 61). When it resumed in, at the earliest, March 2014, the targeted individuals were, once again, Plaintiffs, Berardis and Jackson. All targeted employees again complained to McCombs and Steven Schrimpf, the Director of Security at RDG (“Schrimpf”). (Id. ¶¶ 62-63).

This time around, Schrimpf conducted an internal investigation into the cyber-stalking situation, which included conducting interviews with Plaintiffs, Berardis, and Jackson about the messages they were receiving. (Id. ¶ 64). Schrimpf compiled the information he learned from the interviews into a summary, which he circulated to McCombs and Albert Gonzales, the President of Gonzales Consulting Services, and Member of RDG (“Gonzales”), on May 19, 2014. (Defs.’ Mot., Ex. 24). The May 19, 2014 summary indicated that Gemma was “convinced by the number and content of the text messages [sent by the stalker] that [Berardis] is the primary impetus for all of the harassing messages.” (Id., DSOF ¶ 67). Accordingly, Schrimpf’s summary concluded that “[Berardis] appears to be the nexus to all of these events, as the majority of texts are sexually motivated towards him.” (DSOF ¶ 68).

At the end of the summary, Schrimpf made certain recommendations, including, *inter alia*, that (1) RDG should “coordinate with the assigned FPS Investigator and relay information obtained through employee interviews;” (2) “further investigation and interviews should be conducted with Dana Scott and K. Mustafaa,” since Gemma told Schrimpf that she suspected them of the cyber-stalking conduct; (3) RDG should “coordinate safety escorts for affected employees;” (4) RDG should “[ensure Kelley] is fully aware of the scope of the complaints[.]” and (5) RDG should “coordinate contact with the NJ law enforcement agency investigating the Mandi case[.]” (Id. ¶ 68; Defs.’ Mot., Ex. 24).

On May 20, 2014, the day after Schrimpf sent his summary, Schrimpf emailed Plaintiffs, Jackson and Berardis stating that Kelley was aware of all the complaints and concerns regarding the cyber-stalking situation, and instructing them to report any further incidents to their “on-site supervisor or [Kelley].” He indicated that they would “let [them] know when FPS completes their investigation into the matter and what the resolution is.” (Id. ¶ 69; Defs.’ Mot., Ex. 25).

#### **D. Gemma's May 9, 2014 Altercation**

On May 9, 2014, Gemma got into an altercation with Khajeefah Mustafaa, another RDG employee/dispatcher (“Mustafaa”), while at work. (DSOF ¶ 72). Essentially, the telephone rang, Mustafaa said to Gemma, “Don’t you answer the phone anymore,” and an argument escalated from there over who would answer the phone. (Id.). During the argument and in its aftermath, both women accused each other of doing homework online while at work. (Id. ¶ 77). Gemma admitted that if she had had an internet browser open when the phone rang and did not answer it, “that would be reason [for Mustafaa] to be ticked off.” (Id. ¶ 76; Gemma Dep. at 144). She further admits that doing homework requires concentration and can, in some instances, be distracting from work. (DSOF ¶ 78; Gemma Dep. 149-150). During the course of the argument, Mustafaa also asked Gemma, “Don’t you come to work anymore?[,]” which Gemma believes “thr[ew] her FMLA out on the dispatch floor.” (DSOF ¶ 74).

After the altercation, Kevin Kline, the dispatch supervisor (“Kline”), issued a “Corrective Action Notice” to (1) Gemma, based on Berardis’ first-hand account of the incident, (DSOF ¶ 72; Defs.’ Mot., Ex. 26), and (2) Mustafaa, based on Mustafaa’s own description of the incident. (Id. ¶ 73). While Gemma believes that Mustafaa’s comment about coming to work had “thrown her FMLA out on the dispatch floor,” (id. ¶ 74), Gemma concedes that Mustafaa, who was not her supervisor, did not have any authority to affect the terms of her employment, and her comment had no bearing on whether or not she was *permitted* to take FMLA leave. (Id. ¶ 75).

Also after the altercation, RDG separated the women’s workspaces, by temporarily moving Gemma to Region 2, and keeping Mustafaa in Region 3. (Id. ¶ 79). According to RDG, the decision to move Gemma, rather than Mustafaa, was due to Mustafaa’s seniority, but Gemma thought that it was not fair to move her rather than Mustafaa because Gemma considered Region

3 “home base” and because she believed Mustafaa had been the bad actor in the altercation. (Id. ¶ 80; Gemma Dep. at 158-160).

On May 12, 2014, Kelley sent an email to all PMC employees instructing that “[d]ue to recent incidents . . . no dispatcher shall be working on homework during work hours. A violation of this policy could result in suspension and or termination. It is unfortunate that these policies had to be put into place by the abuse of the few.” (Id. ¶ 81; Defs.’ Mot., Ex. 29).<sup>4</sup>

On May 14, 2014, Gemma emailed Kelley requesting to be moved back to Region 3, because “it is unjust that [her] work assignment [has] been altered as a result of the confrontation,” given that “[Mustafaa] attacked [her] and [she] feel[s] as though [she is] being unfairly punished[.]” (Id. ¶ 82; Defs.’ Mot., Ex. 30).

That day, Kelley responded that Gemma would remain in Region 2 “until such time as a complete investigation can be conducted.” He continued, “[t]here is also the allegation of working on school work on a government computer and that is a government violation. [McClay] will need to be involved and he is currently on vacation. Once this is all complete a determination will be finalized.” (DSOF ¶ 83; Defs.’ Mot., Ex. 30).

Gemma subsequently emailed McCombs to complain about the way Kelley was handling the altercation between her and Mustafaa. (DSOF ¶ 84, Defs.’ Mot., Ex. 31). She closed the email by saying, “I just want you to know how grateful I am that you are taking things seriously.” (DSOF ¶ 85). On May 15, 2014, Gemma emailed McCombs again, in which she

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<sup>4</sup> Given this email was sent three days after the altercation between Gemma and Mustafaa, it is presumable that it was sent in connection with their respective accusations about the use of the internet to complete homework during work time. The record does not indicate, however, whether the email was sent as a result of these accusations, or whether, by May 12, 2014, RDG had pulled and reviewed Gemma’s internet browser history and seen that she had spent a significant amount of work time completing homework. In any event, the distinction is immaterial.

restated her dissatisfaction with the way Kelley was handling the altercation and subsequent move to Region 2. Gemma said “[t]he appropriate thing to do would have been to make us both take turns working in different regions.” (Id. ¶ 84; Defs.’ Mot, Ex. 31).

#### **E. RDG’s Discovery of Gemma’s Violations of the Computer Use Policy**

Sometime after the altercation between Gemma and Mustafaa, Kelley instructed Rossner to pull the internet histories for Gemma and Mustafaa for May 9, 2014, the date of the altercation. (Id. ¶ 86). Upon review, it appeared that Gemma had logged in for two hours to complete online coursework at Walden.edu that day, while Mustafaa had not logged in at all. (Id. ¶ 87, Def.’s Mot., Ex. 28). Kelley subsequently asked Rossner to pull each of their internet browsing histories for the past year, which again revealed that Gemma had been frequently completing homework and taking tests while on duty, and Mustafaa had not. (Id.). Gemma’s browser history revealed that, between March 16, 2014 and May 9, 2014, she had spent 41.08 hours logged into Waldenu.edu while at work. (DSOF ¶ 88).

On June 3, 2014, Kelley submitted a Recommendation for Termination of Gemma to Rudy Garcia, President of RDG (“Garcia”), and Gonzales, who decided to terminate her that day. (DSOF ¶ 91, Def.’s Mot., Ex. 28).

#### **F. RDG’s Discovery of Jacqueline’s Violations of the Computer Use Policy**

Notwithstanding the incidents related to Gemma altercation with Mustafaa, RDG continued its ongoing investigation into the cyber-stalking situation, as indicated in Schimpf’s May 19, 2014 summary.

On June 11, 2014, Schimpf emailed Plaintiffs, Jackson and Berardis to update them on the “status of what is occurring regarding your complaints/concerns[,]” namely, that “FPS has taken over this inquiry into what had been occurring, and “[t]o avoid duplicating efforts or

interfering with their investigation, we have essentially suspended any further internal query into this matter.” (DSOF ¶ 94; Defs.’ Mot., Ex. 33). He advised that “FPS is speaking with different persons, gathering evidence, and trying to draw some conclusions as to who may be responsible.” He added that, in the meantime, they should “continue to directly notify [McCombs and Schrimpf] of any further concerns you may have or addition events that occur.” (Id.).

On June 18, 2014, Schrimpf circulated an email to Gonzales, McCombs and Garcia, providing an update on the investigation. (DSOF ¶ 95; Def.’s Mot, Ex. 34). He stated that, because they caught Gemma “in a few lies” and because “one of the messages from last year originated from Gemma’s neighbor’s IP address,” the “NJSP Investigator feels that Gemma may be responsible for this entire series of events and that is where their investigation is starting to focus.” (Id.).

Sometime in June 2014, Agent Anthony Fuscellaro, a special agent with FPS (“Fuscellaro”), requested to review the internet browser histories from all employees complaining of cyber-stalking; namely Plaintiffs, Jackson and Berardis. (DSOF ¶ 96). Based on that review, on July 1, 2014, an FSP officer advised RDG’s President Garcia that “[o]n June 30, 2014, it was brought to [his] attention by [McClay] that. . . Jacqueline Sawa . . . had been completing on-line college courses on a Government computer during work hours.” (DSOF ¶ 96, Ex. 36). The FPS officer requested that RDG immediately address the problem because such activities were routinely occurring and it was the “third such instance over the past year and a half in which an RDG employee engaged in activities during work hours.” (DSOF ¶ 98). Jacqueline’s browser history revealed that she had spent 26.5 hours completing online college courses during working time. (Id. ¶¶ 97, 100). RDG had to refund Jacqueline’s salary for this

time to FPS, but Jacqueline never had to refund her wages earned for this time to RDG. (Id. ¶ 100).

On July 24, 2014, Jacqueline was suspended. (Id. ¶ 99). On July 30, 2014, she was terminated from RDG, pursuant to a Recommendation for Termination submitted by Kelley to Garcia and Gonzales. (Id. ¶ 101).

McCombs told Jacqueline that the reason she was being terminated was because she had spent time doing online educational coursework during work hours. (Id. ¶ 102).

Plaintiffs were not the first RDG employees to be terminated for completing coursework online during work time. On March 20, 2013, Ms. Terry Woods-Phillips, an RDG employee who worked in data entry, was terminated for completing coursework for Kaplan University during work hours. (Id. ¶ 103, Defs.’ Mot., Ex. 38).

### **III. Procedural History**

On December 11, 2015, Gemma filed a Complaint against Defendants (ECF 1) alleging:

- (1) Sexual Harassment, in violation of Title VII<sup>5</sup>
- (2) Retaliation, in violation of the ADA
- (3) Retaliation, in violation of the FMLA
- (4) Retaliation, in violation of the PHRA

That same day, Jacqueline filed an almost identical complaint, except it contained one additional Count of “wrongful termination,” in “violation of Pennsylvania public policy.” (Defs.’ Mot., Ex. 2, ¶ 70-78). On February 2, 2016, Defendants filed Answers to each Complaint. (ECF 5; 15-cv-6586, Dkt. No. 6). On July 18, 2016, the Court granted the parties’ joint motions to consolidate the two cases and extend deadlines. (ECF 22).

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<sup>5</sup> Despite some initial confusion (see Defs.’ Mot. at 10 n.1; Pls.’ Opp’n at 8 n.3), Plaintiffs confirmed at Oral Argument that it was not pursuing a claim for gender discrimination.

On March 24, 2017, Defendants filed a motion for summary judgment (ECF 47, “Defs.’ Mot.”), to which Plaintiff responded on May 5, 2017 (ECF 49, “Pls.’ Opp’n”), and Defendants filed a Reply on May 12, 2017 (ECF 51). On May 19, 2017, Plaintiff moved for leave to file a Surreply, and attached a proposed Surreply (ECF 53), to which Defendants’ filed an objection on May 22, 2017 (ECF 55).<sup>6</sup>

Oral argument was held on June 6, 2017 regarding the pending summary judgment motion. (ECF 56, “Oral Argument”).

#### **IV. Legal Standard**

A district court should grant a motion for summary judgment if the movant can show “that 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). A dispute is “genuine” if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A factual dispute is “material” if it “might affect the outcome of the suit under the governing law.” Id.

A party seeking summary judgment always bears the initial responsibility for informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the moving party's initial burden can be met simply by “pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case.” Id. at 325. After the moving party has met its initial burden, the adverse party's response must, “by citing to particular parts of materials in the record” set out specific facts showing a genuine issue for trial.

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<sup>6</sup> Plaintiff’s motion to file a Surreply will be GRANTED, and Plaintiffs’ proposed Surreply was considered for purposes of the instant memorandum and corresponding Order.

Fed. R. Civ. P. 56(c)(1)(A). “Speculation and conclusory allegations do not satisfy [the non-moving party’s] duty.” Ridgewood Bd. of Educ. V. N.E. ex rel. M.E., 172 F.3d 238, 252 (3d Cir. 1999) (superseded by statute on other grounds as recognized by P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 730 (3d Cir. 2009)). Summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing “that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor.” Id. Under Rule 56, the Court must view the evidence presented on the motion in the light most favorable to the opposing party. Anderson, 477 U.S. at 255.

## **V. Discussion**

### **A. Both Plaintiffs’ Title VII Sexual Harassment/Hostile Work Environment Claims**

In Count One of their complaints, Plaintiffs respectively allege that sexual harassment at RDG created a hostile work environment for Plaintiffs, in violation of Title VII.

Under Title VII, an employer may not “discharge . . . or . . . discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment because of such individual’s . . . sex [.]” 42 U.S.C. § 2000e-2(a)(1). “A plaintiff may further establish that an employer violated Title VII by proving that sexual harassment created a hostile work environment.” Huston v. Procter & Gamble Paper Prod. Corp., 568 F.3d 100, 104 (3d Cir. 2009); see also Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65-67 (1986) (The term “sexual harassment” embodies both *quid pro quo* harassment as well as claims for a hostile work environment.). To prove a hostile work environment claim against an employer, a plaintiff must prove the following elements:

- (1) the employee suffered intentional discrimination because of their sex;
- (2) the discrimination was pervasive and regular;
- (3) the discrimination detrimentally affected the plaintiff;

- (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position; and
- (5) the existence of *respondeat superior* liability.

See Kunin v. Sears Roebuck & Co., 175 F.3d 289, 293 (3d Cir. 1999).<sup>7</sup> For purposes of the instant motion, Defendants dispute Plaintiffs' ability to prove only the first and fifth elements of the test. (Defs.' Mot. at 10 n.2)

#### **i. Discrimination because of Sex**

Title VII does not prohibit all verbal or physical harassment in the workplace; rather, it is directed only at “discriminat[ion] . . . because of... sex.” Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998). “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.” Id. at 80 (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (Ginsburg, J., concurring)). “The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual derogatory language is implicit, and thus should be recognized as a matter of course. A more fact intensive analysis will be necessary where the actions are not sexual by their very nature.” Andrews v. City of Philadelphia, 895 F.2d 1469, 1482 n.3 (3d Cir. 1990).

Defendants contend that Plaintiffs, as a matter of law, cannot prove that they were subject to harassment *because of* their sex—i.e. because they are females—because Berardis, a male, was also a target (indeed, the prime target) of the harassment, and was sent messages which were

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<sup>7</sup> Unlike Plaintiffs' other claims, hostile work environment claims are not subject to burden shifting under the familiar McDonnell-Douglas framework. See, e.g., Ogilvie v. N. Valley EMS, Inc., 07-cv-485, 2008 WL 4761717, at \*7 (E.D. Pa. Oct. 29, 2008) (explaining that the Third Circuit has “strongly suggested” that McDonnell Douglas does not apply to hostile work environment claims). Accordingly, the Court must determine only whether Plaintiffs have presented sufficient evidence to create a dispute of material fact in order to avoid summary judgment.

equally sexual in nature. (Defs.' Mot. at 11). Similarly, they point to some additional evidence in the record that McClay and Trooper Sembler, both male, were also recipients of harassing messages. (Id. at 11-12).

Plaintiffs, by contrast, argue that because the harassing messages they were sent were “sexual by their very nature,” that is enough to prove that they were sent *because* of their sex, notwithstanding the fact that similar messages were also sent to members of the opposite sex. (Pls.' Opp'n at 9). They further argue that Defendants cannot insulate themselves from liability on the basis that the harassment was not “because of” Plaintiffs' female sex because the harassment was also directed towards male employees.

Here, because of the sexually explicit nature of the messages sent by the harasser, it is clear that Plaintiffs were being harassed because they are females, notwithstanding the fact that Berardis may also have been harassed because he is male. Many of the messages directed at Plaintiffs reference their female genitalia, or their participation in heterosexual intercourse. (See PSOF ¶ 14). The fact that other messages, obviously directed at Berardis, were also sexual in nature does not negate the reason for the harassment of Plaintiffs. In fact, it is not clear based on the messages that the same individual was sending messages to both Plaintiffs and Berardis because the harasser indicated his/her own gender in the texts, which is even more suggestive of the fact that the harassment was based on gender. (Id.).

In their brief, Plaintiffs point to two instructive cases in sister Circuits where the courts rejected arguments that alleged harassment could not be legally viable *because* the plaintiffs were female because similar conduct was directed towards men. In Steiner v. Showboat Operating Co., 25 F.3d 1459, 1463 (9th Cir. 1994), the Court held that “the district court erred in endorsing [the defendant's] argument that [the harasser's] conduct was not sexual harassment

because he consistently abused men and women alike.” While the Court held that the harassment was, in fact, different in nature, it went on to say that, even assuming the harasser “used sexual epithets equal in intensity and in an equally degrading manner against male employees, he cannot thereby ‘cure’ his conduct toward women.” *Id.* at 1464. Accordingly, the Court continued, “we do not rule out the possibility that *both* men and women working at [Defendant’s company] have viable claims against [the harasser] for sexual harassment.” *Id.*

In McDonnell v. Cisneros, the Seventh Circuit similarly cast doubt on any bright-line rejection of sexual harassment claims where the harassment was directed at both male and female employees. 84 F.3d 256, 260 (7th Cir. 1996) (“It would be exceedingly perverse if a male worker could buy his supervisors and his company immunity from Title VII liability by taking care to harass sexually an occasional male worker, though his preferred targets were female.”).

The Court agrees with the analysis in these cases, and finds that a reasonable jury could find that Plaintiffs were subjected to sexual harassment by the cyber-stalking because of their gender, notwithstanding the fact that Berardis may also have been subject to sexual harassment based on his gender. Therefore, Defendants are not entitled to summary judgment based on this factor of Plaintiffs’ sexual harassment claims.

## **ii. Prompt Remedial Action**

The Court must still consider whether Plaintiffs have satisfied the fifth element of their hostile work environment claim, which establishes the basis on which to hold the employer liable. The basis of an employer’s liability for sexual harassment depends in part on whether the harasser is the victim’s supervisor or merely a coworker. Huston v. Procter & Gamble Paper Products Corp., 568 F.3d 100, 104 (3d Cir. 2009); see Faragher v. City of Boca Raton, 524 U.S.

775 (1998). In the present case, the identity of the alleged harasser is unknown, yet Plaintiffs do not allege that the harasser was a supervisor.

An employer will be liable for the harassing conduct of the alleged victim's coworker if the employer was "negligent or reckless in failing to train, discipline, fire or take remedial action upon notice of harassment." Andreoli v. Gates, 482 F.3d 641, 644 (3d Cir. 2007) (quoting Bonenberger v. Plymouth Twp., 132 F.3d 20, 26 (3d Cir. 1997)). An employer is negligent if it "knew or should have known about the harassment, but failed to take prompt and adequate remedial action."<sup>8</sup> Jensen v. Potter, 435 F.3d 444, 453 (3d Cir. 2006) (internal quotations omitted). "In most cases, the focus will be on the timing and nature of the employer's response." Andreoli, 482 F.3d at 644. Even if the remedial action does not stop the alleged harassment, it is "adequate" if it is "reasonably calculated" to end the harassment. Id. (quoting Knabe v. Boury Corp., 114 F.3d 407, 412-13 (3d Cir. 1997)).

The parties dispute whether the remedial actions taken by RDG after Plaintiffs (and Jackson and Berardis) complained about the alleged cyber-stalking were prompt and adequate as a matter of law. Defendants argue that, after the first complaint in July 2013, and beginning on July 15, 2013, RDG engaged in a "multi-faceted, extensive investigation" into the situation, involving the DHS, FPS, Ice Computer Forensic Unit, and NJSP. (Defs.' Mot. at 14-16; DSOF ¶ 36; see supra pp. 5-9). They further argue, "[t]hat RDG and the other agencies were unable to definitively identify the stalker is irrelevant to RDG's liability[]" given how thorough the investigation was. (Defs.' Mot. at 16).

Plaintiffs, by contrast, argue that RDG's remedial action "was neither prompt, nor sufficient" with respect to the 2014 cyber-stalking activity. (Pls.' Opp'n at 11). In support, they

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<sup>8</sup> The parties agree that this is the appropriate standard.

argue that, (1) they “complained to Kelley and McClay in March of 2014, and RDG took no action whatsoever in response to these complaints until mid-May”; (2) upon complaining, Kelley told Plaintiffs to “just ignore it” (PSOF ¶ 39); and (3) Kelley and McClay generally “hinder[ed] the progress of any actual investigation.” (Pls.’ Opp’n at 12).

For the following reasons, the Court finds that the record evidence does not support Plaintiffs’ characterization of Defendants’ conduct in response to the cyber-stalking situation.

First, by Plaintiffs’ own admission, when Plaintiffs initially complained to RDG about the cyber-stalking situation, RDG—with the coordination of several other federal agencies and the NJSP—undertook a prompt and thorough investigation into the cyber-stalking situation. (See DSOF ¶ 46 (Gemma testified that by sending an email to the Joint Intake Center, Rossner “was trying to get someone’s attention to deal with the situation posed by the anonymous messages. Gemma further agreed that her complaints and the complaints of her co-workers, including her sister, were being taken seriously”); *id.* ¶ 47 (“Gemma [] testified it was reasonable that if the matter was referred to DHS, then her employer would reasonably defer to DHS to investigate the issues. Gemma further agreed that doing so would not be any indication that her employer does not care about the ongoing issue relative to the known person stalking RDG employees electronically”); *id.* ¶ 50 (“From August 1, 2013 through September 30, 2013, the New Jersey State Police conducted a thorough investigation[.]”); *id.* ¶ 61 (“Gemma [] agreed that, as of December, 2013, since the stalking had died down and DHS, FPS and the New Jersey State Police were doing their jobs, there really was “not much for [her] employer to do relative to the stalking activities.”).

Moreover, Gemma admitted that her gripe, with respect to the handling of the cyber-stalking situation, was with “the way [Kelley] handled the situation” as opposed to how RDG, as an employer, handled the situation. (Reply, Ex. 8, “Gemma Dep,” at 110; see DSOF ¶ 85).

The parties dispute whether the stalking activity resumed in March, April or May 2014. (DSOF ¶ 62). While Plaintiffs contend that it resumed in March, the only documentary evidence to which they point is Schrimpf’s summary, which states that the activity resumed “approximately 2-3 months” after Mandi was terminated, in December 2013. (Defs.’ Mot, Ex. 24). There is no evidence that Plaintiffs complained before April, and, in fact, Gemma testified in her deposition that “approximately sometime in April [2014], I did make a telephonic complaint to Sheila McCombs . . . and Steven Schrimpf.” (Gemma Dep. at 140). Moreover, the record indisputably shows that Schrimpf circulated a detailed summary of his internal investigation in mid-May 2014, which was clearly the product of a serious investigation that began well in advance of the date of circulation. (Defs.’ Mot., Ex. 24). Accordingly, there is simply no evidence in the record to suggest that RDG’s response to Plaintiffs’ complaints about the cyber-stalking situation was anything but ignored, regardless of whether Kelley may have, in a single instance, told Plaintiffs to “just ignore it.”

At Oral Argument, Plaintiffs’ counsel argued that RDG primarily failed to take prompt remedial action when the cyber-stalking activity resumed for the second time, in April 2014. However, as Defendants note, Plaintiffs’ complaints in the spring of 2014 were not “about anything different or new relative to the stalking incidents, but instead, [were] about the same allegations that had been investigated in 2013. (Defs.’ Reply at 12). And, in any event, the record shows that RDG’s response to the new wave of complaints was prompt and robust.

Additionally, there was also reason to believe that the investigative efforts had been effective, since after firing Mandi, a suspect in the investigation, there was a brief reprieve from the stalking activity. (DSOF ¶¶ 60-63). As Defendants argue, however, the adequacy of RDG’s remedial action—including the considerable amount of time, resources and coordination among entities involved—is not undermined by the fact that RDG was never able to conclusively determine the identity of the harasser. (Defs.’ Mot. at 13); see Austin v. Norfolk Southern Corp., 158 Fed. App’x 374, 377-8 (3d Cir. 2005) (reversing district court’s denial of motion for summary judgment where employer was never able to determine who wrote offensive graffiti at workplace but took “immediate and appropriate corrective action” by, *inter alia*, meeting frequently with the plaintiff, posting notices of the employer’s sexual harassment policy, interviewing the employees the plaintiff identified as suspects, and removing the graffiti).

Accordingly, notwithstanding Plaintiffs’ ability to establish the existence of sexual harassment in the workplace, Plaintiffs have not raised a disputed issue of material fact sufficient to allow a jury to conclude that RDG failed to take prompt and adequate remedial action in response to the harassment. Therefore, Defendants are not liable to Plaintiffs for Title VII sexual harassment as a matter of law.

### **B. Both Plaintiffs’ Title VII Retaliation Claims<sup>9</sup>**

Plaintiffs also allege that their respective terminations from RDG were in retaliation for complaints they each made about sexual harassment by the cyber-stalker. In order to make out a *prima facie* case for retaliation under Title VII, a plaintiff must demonstrate that

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<sup>9</sup> The analysis required for adjudicating plaintiffs claim under the PHRA is identical to a Title VII inquiry. Scheidemantle v. Slippery Rock Univ., 470 F.3d 535, 539 n.5 (3d Cir. 2006); Goosby v. Johnson & Johnson Medical, 228 F.3d 313 (3d Cir. 2000). Accordingly, the resolution of Plaintiffs’ retaliation claims under Title VII will be dispositive of Plaintiffs’ retaliation claims under the PHRA.

- (1) the employee engaged in a protected employee activity;
- (2) the employer took an adverse employment action after or contemporaneous with the employee's protected activity; and
- (3) a causal link exists between the employee's protected activity and the employer's adverse action.

Farrell v. Planters Lifesavers Co., 206 F.3d 271, 279 (3d Cir. 2000). Unlike hostile work environment claims, the burden-shifting framework established in McDonnell Douglas applies to retaliation claims arising under Title VII. Therefore, if a *prima facie* case is established, then RDG must articulate a legitimate, non-retaliatory reason for the adverse employment action. Smith v. Borough of Wilkinsburg, 147 F.3d 272, 278 (3d Cir. 1998). If RDG offers such a reason for its action, then Gemma must present evidence proving that the reason is a pretext for retaliation.<sup>10</sup>

#### **i. Title VII Retaliation against Gemma: *Prima Facie***

##### **1. Protected Activity**

Defendants first argue that Gemma's complaints are not "protected activity," under the first prong of the *prima facie* test, because her complaints were not based on her membership in a protected class, but rather were complaints about Kelley's handling of the May 9, 2014 altercation between Gemma and Mustafaa. (Defs.' Mot. at 17-18).

Defendants are correct that "Title VII and the ADEA do not protect an employee from the consequences of any and all complaints he or she makes or dissatisfaction he or she expresses." O'Malley v. Fairleigh Dickinson Univ., 10-cv-6193 (KSH), 2014 WL 67280, at \*15 (D.N.J. Jan. 7, 2014) (citing Barber v. CSX Distribution Services, 68 F.3d 694 (3d Cir. 1995)). Here, however, it is clear that Plaintiffs' complaints were at least in part related to the cyber-

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<sup>10</sup> Since many of the Plaintiffs' remaining claims involve the burden-shifting framework, the Court will address the existence of *prima facie* evidence as to each claim first, and address pretext last.

stalking situation (see Pls.’ Opp’n, Exs. M, I, P, Q, K). Specifically, Plaintiffs aver that Gemma’s final protected activity was on May 25, 2014, when she “emailed McCombs and Scrimpf additional graphic sexual messages[.]” (Pls.’ Opp’n at 15). Plaintiff’s complaints about the cyber-stalking situation are “protected activity,” for purposes of Title VII retaliation, so long as they are made based on a belief that the activity they opposed was unlawful under Title VII. See generally, Eldridge v. Municipality of Norristown, 514 Fed. App’x 187, 190 (3d Cir. 2013).

Based on the foregoing discussion regarding Plaintiffs’ allegations that they were the subject of discrimination based on their sex, discussed *infra*, V.A.i, the Court finds that Plaintiffs’ complaints satisfy the “protected activity” element of the *prima facie* test.

## **2. Adverse Employment Action**

It is undisputed that Gemma’s termination, on June 3, 2014, constituted an adverse employment action for purposes of Title VII.

## **3. Causal Link**

The critical component of Plaintiffs’ Title VII retaliation claim (and all of Plaintiffs’ retaliation claims) is the retaliatory nexus or causal link between Plaintiffs’ protected conduct and RDG’s decision to terminate them. Courts consider “a broad array of evidence” in determining whether a sufficient causal link exists to survive a motion for summary judgment. LeBoon v. Lancaster Jewish Cmty. Ctr. Ass’n, 503 F.3d 217, 232–33 (3d Cir. 2007) (quoting Farrell, 206 F.3d at 284. Where the temporal proximity between the protected activity and the adverse action is “unusually suggestive,” it is sufficient standing alone to create an inference of causality and defeat summary judgment. See Clark County School Dist. v. Breeden, 532 U.S. 268, 273–74 (2001) (temporal proximity alone, when “very close,” can in some instances establish a *prima facie* case of retaliation); Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)

(reversing summary judgment in favor of the defendant where the plaintiff had been discharged two days after his employer's receipt of his EEOC claim).

Where the temporal proximity is not “unusually suggestive,” however, courts ask whether “the proffered evidence, looked at as a whole, may suffice to raise the inference.” Farrell, 206 F.3d at 280 (internal citation and quotation marks omitted). Among the kinds of evidence that a plaintiff can proffer are intervening antagonism or retaliatory animus, inconsistencies in the employer's articulated reasons for terminating the employee, or any other evidence in the record sufficient to support the inference of retaliatory animus. Id. at 279–81, see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (“The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.”).

#### **a. Temporal Proximity**

Plaintiffs argue that they can establish causation because the temporal proximity alone between Gemma's “final act of protected activity” on May 25, 2014—when she sent an email to McCombs and Schrimpf attaching some of the graphic sexual messages she received from the cyber-stalker—and RDG's termination of her on June 3, 2014, is sufficient to “satisf[y] the low burden of establishing a *prima facie* case.” (Pls.' Opp'n at 15-16).

Defendants argue, by contrast, that Gemma's relevant complaint was made on May 15, 2015, when she sent an email to McCombs regarding Kelley's handling of the altercation between Gemma and Mustafaa. Since the time between May 15, 2014 and June 3, 2014 is not “unduly suggestive,” they argue, “supplementary evidence of retaliatory motive” is needed to establish a causal link. (Defs.' Mot. at 19).

For purposes of the causal link analysis, the Court will accept as the last date of “protected activity” Plaintiffs’ May 25, 2014 email (which can be construed as a complaint about the cyber-stalking situation) as opposed to Defendants’ May 15, 2014 date (which was a complaint about the way Kelley was handling Gemma’s altercation with Mustafaa). (See Pl.’s Opp’n, Ex. M; DSOF ¶¶ 84-85). Therefore, the time that elapsed between Gemma’s final complaint and her termination was nine days, which under Third Circuit precedent, could be suggestive of retaliatory motive. See Farrell, 206 F.3d at 280 (“the probative value of temporal proximity in retaliation cases. . . [depends] . . . on how proximate the events actually were”); Sowell v. Kelly Services, Inc., 139 F. Supp. 3d 695 (E.D. Pa. 2015) (seven days is “within the realm of what courts have found to be sufficient to establish a *prima facie* case”).

Even if temporal proximity is unusually suggestive of retaliatory motive, however, the “degree of suggestiveness of the time span depends on the particular facts of the situation.” Mascioli v. Arby’s Restaurant Group, Inc., 610 F. Supp. 2d 419, 437 (W.D. Pa. Mar 16, 2009). The suggestiveness of temporal proximity can be diminished by the circumstances surrounding termination. Id. (citing Zelinski v. Pa. State Police, 108 F. App’x 700, 706 (3d Cir. 2004)).

The suggestiveness of the temporal proximity between Gemma’s last complaint and her termination is significantly diminished in this case. Plaintiffs do not dispute—yet neglect to mention in their briefs—that, in the course of the investigation into the cyber-stalking situation, Gemma was involved in an entirely unrelated altercation with Mustafaa on May 9, 2014, as a result of which RDG reasonably decided to review both of their browser histories. Once pulled and reviewed, RDG discovered that Gemma had been spending a significant amount of her working hours taking online education courses, in violation of RDG’s computer use policy. The record indicates that Gemma had been complaining about the cyber-stalking situation since July

2013 (DSOF ¶ 35), yet her employment was never in jeopardy. Once it was discovered, in May 2014, that Gemma had been egregiously violating the computer use policy, however, Gemma was swiftly terminated.

This significant intervening event makes the time span between Gemma's complaints and termination far less suggestive of retaliation, as the far more proximate event was the discovery of her browser history. See Caplan v. L Brands/Victoria's Secret Stores, LLC, 210 F. Supp. 3d 744, 760 (W.D. Pa. Sept. 28, 2016) (finding temporal proximity of 10 days not sufficient to satisfy causation element of *prima facie* retaliation case because the plaintiff's "termination is even more proximate to [the defendant's] receipt of an ethics complaints about her."). There is no dispute that, during the course of this altercation, each accused the other of improper use of the internet while at work. (See DSOF ¶ 77). Indeed, it defies logic to attribute the decision to review her browser history to her complaints about the stalking situation rather than to the immediately preceding incident that put the question of her browser history in issue.

Plaintiffs explicitly state that, other than temporal proximity, the only basis for their Title VII retaliation claim is that Defendants offer "shifting reasons for their terminations" in that they first indicated that Plaintiffs were being fired for "rule violation," and subsequently indicated that they were being fired for "rule violation," "dereliction of duty," and "failing to recognize the gravity and importance of their duties." (Pls.'Opp'n at 17 (citing PSOF ¶¶ 71-72)). The Court recognizes that a plaintiff may establish a causal link by showing that an employer gave inconsistent reasons for terminating an employee. See Waddell v. Small Tube Products, Inc., 799 F.2d 69, 73 (3d Cir. 1986). However, the record evidence here does not support a finding that RDG gave inconsistent explanations for terminating Plaintiffs, as they are all descriptions of the underlying reason: improper use of the RDG computers.

Accordingly, because the temporal proximity between Gemma’s last complaint and her termination is insufficient, and Plaintiffs point to no supplementary evidence sufficient to establish the causal nexus, Plaintiffs have failed to make out a *prima facie* claim of Title VII retaliation.

**ii. Title VII Retaliation against Jacqueline: *Prima Facie***

**1. Protected Activity**

With regard to Jacqueline, Plaintiffs allege that her termination from RDG on July 30, 2014, was in retaliation for (1) complaints about the cyber-stalking situation beginning in March 2014, and (2) a letter she and Gemma sent to Kelley and McCombs, via counsel, on July 23, 2014 (see PSOF ¶ 34; Pls.’ Opp’n, Ex. U), indicating that Gemma is “highly concerned that her sister . . . will be retaliated against” and requesting that she not be retaliated against for her complaints. (Pls.’ Mot. at 16). For the reasons stated *supra*, V.B.i.1, these complaints constitute “protected activity” under Title VII.

**2. Adverse Employment Action**

It is undisputed that Gemma’s termination, on July 30, 2014, constituted an adverse employment action for purposes of Title VII.

**3. Causal Link**

Plaintiffs again rely on the temporal proximity to establish a causal link between Jacqueline’s protected activity, which ended on July 23, 2014, and her termination, which occurred on July 30, 2014. (Pls.’ Opp’n at 16-17).

Here again, however, Plaintiffs’ reliance on temporal proximity is misplaced, since Plaintiffs fail to mention the glaring, intervening event that more reasonably accounts for her termination. That is, because the cyber-stalking situation investigation continued even after

Gemma's termination, at some point in June, Agent Fuscellaro, a special agent with DHS, requested that the internet browser histories of all affected employees be reviewed. (DSOF ¶¶ 95, 96). Thereafter, an FSP officer advised RDG that Jacqueline's browser history showed that she had spent 26.5 hours completing online college courses at Walden.edu during work hours. (DSOF ¶¶ 96, 97). Plaintiffs' joint letter to counsel was in the three-week period between RDG learning of Jacqueline's internet browser history and its decision to suspend and then terminate her.

Therefore, while Jacqueline's termination may have been in close temporal proximity to her complaints, it is clear that the motivation behind its review was to solve the cyber-stalking problem, not to retaliate against Jacqueline for complaining about it. This is made clear by the fact that her browser history was not singled out, but rather was part of a procedure that applied to all complaining employees. At Oral Argument, Plaintiff's counsel even conceded that Jacqueline did not believe that her browser history was targeted for review.

Plaintiffs point to no evidence other than temporal proximity to establish that the reason for Jacqueline's termination was because of her complaints about the cyber-stalking situation. Accordingly, Plaintiffs fail to establish a *prima facie* case for Title VII retaliation against Jacqueline.<sup>11</sup>

### **C. Both Plaintiffs' FMLA Retaliation Claims: *Prima Facie***

Plaintiffs also allege that Defendants discriminated against them for use of their granted FMLA leave time. FMLA retaliation claims are subject to the same burden-shifting analysis as

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<sup>11</sup> Because Plaintiffs cannot establish their Title VII claims, and PHRA claims are subject to the same legal analysis as Title VII claims, there is no unlawful activity that Kelley could have "aided or abetted." (See Compl. ¶ 70). Accordingly, Plaintiffs also cannot establish their PHRA claims alleging individual liability against Kelley.

Title VII claims, outlined above. Betz v. Temple Health Sys., No. 15-CV-00727, 2016 WL 147155, at \*7 (E.D. Pa. Jan. 13, 2016), aff'd, 659 Fed. App'x 137 (3d Cir. 2016).

To make out a *prima facie* case for FMLA retaliation, a plaintiff must show that,

- (1) she invoked her right to FMLA-qualifying leave
- (2) she suffered an adverse employment decision, and
- (3) the adverse action was causally related to her invocation of rights.

Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294, 302 (3d Cir. 2012). Here, it is undisputed that both Plaintiffs were entitled to, and invoked, FMLA leave time, and that both Plaintiffs' termination in 2014 constituted an adverse employment decision. Therefore, the only disputed element of the *prima facie* case is whether there was a causal connection between Plaintiffs' respective invocations of FMLA leave time and RDG's decision to terminate them.

Here, Plaintiffs attempt to satisfy causation based on temporal proximity alone—i.e., they argue that “the single fact that each of them took FMLA leave within a short time of being terminated suffices to defeat summary judgment.”<sup>12</sup> (Defs.' Reply at 5).

In Gemma's case, Plaintiffs argue that the causal connection exists because there was only a six-day separation between the final time that she took FMLA leave, May 28, 2014, and the date of her termination, June 3, 2014. (Pls.' Opp'n at 7). Plaintiffs argue that the existence of a causal connection is also supported by the comment Mustafaa made during their altercation

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<sup>12</sup> There is some suggestion in recent case law that temporal proximity should be measured from the first date on which an employee engaged in protected activity, see, e.g., Blakney, 559 Fed. App'x. at 186 (citing Jalil v. Avdel Corp., 873 F.2d 701, 708 (3d Cir. 1989)), rather than the last. Given that Gemma began taking FMLA leave in November 2012, and Jacqueline, in March 2013, measuring from that point would entirely undermine Plaintiffs' temporal proximity arguments with respect to their FMLA claims. However, because, as Plaintiffs note (Pls.' Opp'n at 7), there is also support for the proposition that temporal proximity is calculated from the most recent time a plaintiff used an FMLA leave day, we will assume that those dates are the appropriate date under which to analyze the claim.

about Gemma coming to work anymore, which Gemma contends “thr[ew] her FMLA out on the dispatch floor.” (DSOF ¶ 74).

Similarly, in Jacqueline’s case, there was a ten-day separation between the last day she took FMLA leave, July 20, 2014, and the date of her termination, July 30, 2016. Plaintiffs argue that “[t]his timing alone is sufficient to establish the causation element.” (Pls. Opp’n at 7).

Defendants contend that while there may be temporal proximity, that proximity is not unduly suggestive of retaliatory animus when considered in context. They argue, “noticeably absent from the facts underpinning Plaintiffs’ argument is that [both Gemma and Jacqueline were] approve for and used FMLA leave beginning in 2012 and through 2014 without incident. In fact, they both testified that they received every day of leave they asked for and both had recertified for FMLA leave without a problem.” (Defs.’ Reply at 6; DSOF ¶¶ 21-32).

Defendants continue, “[a]s for termination, in each instance, the Plaintiffs were terminated for using an inordinate amount of time to pursue their education online at Walden.edu, an internet school.” (Defs.’ Reply at 6). That the independent discoveries of each Plaintiff’s browser histories happened to be in close proximity to one of the several times in which Plaintiffs took FMLA leave is, according to Defendants, sheer coincidence.

As discussed above in the context of Title VII, even if temporal proximity is suggestive of retaliatory motive, the “degree of suggestiveness of the time span depends on the particular facts of the situation,” and the suggestiveness of temporal proximity can be diminished by the circumstances surrounding termination. Mascioli, 610 F. Supp. 2d at 437 (citing Zelinski v. Pa. State Police, 108 Fed. App’x 700, 706 (3d Cir. 2004)). Here, the Court agrees with Defendants that the suggestiveness of the temporal proximity between Plaintiffs’ use of FMLA leave time and their termination is diminished by the fact that their browser histories were independently

discovered in close proximity to each of their termination dates. See, e.g., Caplan, 210 F. Supp. 3d at 760 (“suggestiveness” of 9 day span between plaintiff’s return to work from FMLA leave and termination “diminished . . . because [plaintiff’s] termination is even more proximate to [defendant’s] receipt of an ethics complaint about her.”).

Even if the suggestiveness created by the temporal proximity in this case was not diminished by these circumstances, Plaintiffs’ FMLA retaliation claim suffers from an even more fundamental flaw. In order for either Plaintiff to rely upon temporal proximity to prove the third element of their *prima facie* case, they must produce evidence sufficient to allow a reasonable jury to find that the decision-makers knew about their FMLA-protected activities. McElroy v. Sands Casino, 593 Fed. App’x 113, 116 (3d Cir. 2014) (citing Moore v. City of Philadelphia, 461 F.3d 331, 351 (3d Cir. 2006) (“To the extent that [plaintiff] relies upon the brevity of the time periods between the protected activity and alleged retaliatory actions to prove causation, he will have to show as well that the decision maker had knowledge of the protected activity.” (internal citations omitted))).

Here, the record directly contradicts such a finding. As for Gemma, regardless of Mustafaa’s comment regarding Gemma’s use of FMLA leave time, it is beyond dispute that she had no control over the terms and conditions of her employment, and did not have the authority to terminate her. (DSOF ¶ 27; see Gemma Dep. at 78-80). A “stray remark, unconnected with and remote from the decision-making process which resulted in [Gemma’s] discharge . . . does not provide sufficient evidence from which a rational factfinder could conclude that plaintiff’s termination was causally related to her FMLA activity.” Calero v. Cardone Indus., Inc., 11-cv-3192, 2012 WL 2547356, at \*8 (E.D. Pa. June 29, 2012) (Baylson, J.).

More critically, it is undisputed that the individuals who made the decision to terminate Plaintiffs were Garcia and Gonzales, neither of whom was aware that either Plaintiff had recently taken an FMLA leave day when they made the decision to terminate them. (Defs.' Reply, Ex. 4, "Garcia Decl." ¶ 5; Ex. 5, "Gonzales Decl." ¶ 5).

For all the foregoing reasons, Plaintiffs fails to make out a *prima facie* case of FMLA retaliation because there is no evidence of causation between their FMLA leave time and their termination.

**D. Gemma's ADA Retaliation Claim: *Prima Facie***

Plaintiffs also allege that Defendants discriminated against Gemma by terminating her due to a disability, in violation of the ADA. To establish a *prima facie* case of employment discrimination under the ADA, a plaintiff must be able to establish that he or she

- (1) had a disability,
- (2) is a qualified individual, and
- (3) has suffered an adverse employment action because of that disability.

Deane v. Pocono Med. Ctr., 142 F.3d 138, 142 (3d Cir. 1998).

In opposing Defendants' motion to dismiss, Plaintiffs rely on the exact same facts to support Gemma's ADA claim as they do to support her FMLA claim. (See Pls.' Opp'n at 13 ("Gemma Sawa engaged in protected activity under the ADA when she requested an accommodation of her disability on May 28, 2014. She was subjected to an adverse employment action when she was terminated on June 3, 2014, six days later. Finally, Gemma Sawa can establish the third element of her *prima facie* case of ADA retaliation by relying upon the unduly suggestive timing between her request for intermittent leave on May 28, 2014, and her termination that occurred six days later on June 3, 2014.")). Plaintiffs do not point to a single piece of record evidence where decision-makers so much as mentioned her disability, in the

context of her termination or otherwise. Accordingly, Plaintiffs fail to make out a *prima facie* case of ADA retaliation against Gemma for the same reasons they fail to establish a claim for FMLA retaliation against Gemma, *supra*, IV.C.

#### **E. Pretext Analysis**<sup>13</sup>

Although the Court concludes that Plaintiffs have failed to proffer sufficient evidence to establish a *prima facie* case of retaliation under Title VII, the FMLA, and the ADA, the Court will consider Plaintiffs' evidence of pretext in the interest of completeness.

Plaintiffs' Title VII, FMLA and ADA retaliation claims all follow the McDonnell Douglas burden-shifting framework. See Lichtenstein v. University of Pittsburgh Medical Ctr., 691 F.3d 294, 311 (3d Cir. 2012) (FMLA); Shaner v. Synthes, 204 F.3d 494, 500 (3d Cir. 2000) (ADA). Under this familiar framework, if a *prima facie* case of retaliation is established, then the employer must articulate a legitimate, non-retaliatory reasons ("LNRR") for the adverse employment action. See Ross v. Gilhuly, 755 F.3d 185, 193 (3d Cir. 2014).

Here, Defendants' proffered LNRR for terminating both Gemma and Jacqueline was the discovery that they were each in egregious violation of the computer use policy by completing online coursework and tests on Walden.edu during work time. Accepting Defendants' LNRR, the burden then shifts back to Plaintiffs to prove by a preponderance of the evidence that the proffered reason is a pretext for retaliation.

Under the so-called Fuentes test, to demonstrate pretext, an employee must either: (1) offer evidence that casts sufficient doubt upon the legitimate reason proffered by the defendant so that a fact-finder could reasonably conclude that the reason was a fabrication, or (2) present

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<sup>13</sup> In their Surreply, Plaintiffs argue that because Defendants argued in their original motion for summary judgment that Plaintiffs' failed to make out a *prima facie* case for discrimination, they are precluded from arguing in their Reply brief that Plaintiffs' have failed to show that Defendants' LNRR is pretextual. (Pls.' Surreply at 2 n.1). This argument is rejected.

evidence sufficient to support an inference that discrimination was more likely than not a motivating or determinative factor in the termination decision. Fuentes v. Perskie, 32 F.3d 759, 762 (3d Cir. 1994).

Applying the Fuentes test here, however, the Court finds conducting a pretext analysis in this case would not change the ultimate ruling because the totality of the evidence in the record is not sufficient to permit a reasonable jury to conclude that RDG's LNRR for terminating both Gemma and Jacqueline was pretext for retaliation.

**i. Fuentes test: Prong One**

Prong one of the Fuentes test focuses on whether an employee submitted evidence from which a fact-finder could reasonably disbelieve the employer's articulated legitimate reasons for its employment decision. Under this prong, the employee must point to "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them 'unworthy of credence,' . . . and hence infer 'that the employer did not act for [the asserted] non-[retaliatory] reasons.'" Fuentes, 32 F.3d at 765 (internal citations omitted). An employee "cannot simply show that the employer's decision was wrong or mistaken." Id. The fact that an employer made a bad decision does not make that decision retaliatory; an employer can have any reason or no reason for its employment action, so long as it is not a retaliatory reason. See Brewer v. Quaker State Oil Ref. Corp., 72 F.3d 326, 332 (3d Cir. 1995). The question at prong one of the Fuentes test "is not whether the employer made the best, or even a sound, business decision;" it is whether the real reason for the employment decisions is retaliation. Keller v. ORIX Credit Alliance, Inc., 130 F.3d 1101, 1109 (3d Cir. 1997). Evidence undermining an employer's proffered legitimate reasons must be sufficient to "support an inference that the

employer did not act for its stated reasons.” Sempier v. Johnson & Higgins, 45 F.3d 724, 731 (3d Cir. 1995).

Plaintiffs argue that the fact that Kelley was, in their estimation, “hostile” to their complaints about the cyber-stalking activity is evidence that Kelley “used” his discovery of the browser history “as a convenient way to be rid of two of the employees who were raising complaints that [Kelley] felt should be ignored.” (Pls.’ Surreply at 6-7). As evidence of alleged hostility, Plaintiffs point to the fact that Kelley (1) told Plaintiffs to “just ignore it” when they complained in the spring of 2014 about the cyber-stalking (PSOF ¶ 39); (2) emailed McCombs to say, “I think there are issues with Gemma” (PSOF ¶ 40); (3) mocked Jacqueline’s attempt to “provide information for the alleged investigation” by forwarding an email he received to McClay saying “check out this rambling email” (PSOF ¶ 51); and (4) was “dubious” of Plaintiffs’ complaints because they were “critical” of her failure to contact Facebook to fix the problem on her own. (PSOF ¶ 44).

The Court finds, however, that none of the evidence to which Plaintiffs points is truly supplementary evidence of retaliatory motive. See generally Erbe v. Potter, No. 08-cv-0813, 2010 WL 1052947, at \*4 (M.D. Pa. Mar. 22, 2010) (“Among the kinds of evidence that a plaintiff can proffer are intervening antagonism or retaliatory animus, inconsistencies in the employer’s articulated reasons for terminating the employee, or any other evidence in the record sufficient to support the inference of retaliatory animus.”) (quoting LeBoon, 503 F.3d at 232). As for Gemma, regardless of Kelley’s attitude towards Plaintiffs, there is no evidence that anything other than the altercation between Gemma and Mustafaa prompted Kelley to request that their browser histories be reviewed, which led to the discovery of Gemma’s improprieties. (DSOF ¶ 86).

Additionally, based on the record evidence, any skepticism expressed by Kelley towards Gemma regarding the cyber-stalking situation was legitimate, and the record does not indicate that it was motivated by a belief that Plaintiffs' complaints were a nuisance, as a result of which they should be fired. For instance, on May 5, 2014, Gemma reported that her medical records were faxed to RDG without her consent, but Kelley discovered in her internet history that she had "searched how to access Quest Diagnostics records from a cell phone shortly before the incident was reported." (Defs.' Reply, Ex. 10). Additionally, the NJSP determined that at least one of the harassing messages originated from Gemma's neighbor's IP address. (Def.'s Mot., Ex. 34), which led to Gemma being "identif[ied] as a suspect in the stalking matter." (Defs.' Mot., Ex. 21). Additionally, Berardis testified that early on during the stalking incidents, he received a nude photo of Jacqueline in a bathtub at her home, leading him to suspect Gemma "had a hand in the activity." (Defs.' Reply, Ex. 11).

As for Jacqueline, the undisputed evidence in the record shows that it was Agent Fuscillaro—not Kelley—who requested the internet browser histories from all of those employees complaining of harassment, "and "[o]n July 1, 2014, an FPS officer [not Kelley] advised RDG that it was just brought to his attention that Jacqueline Sawa's browser history showed she was completing online college courses during work hours. " (DSOF ¶ 96; Def.'s Mot., Ex. 36). Further, the FPS officer specifically requested that RDG immediately address this problem because this was the "third such instance over the past year and a half in which an RDG employee engaged in activities during work hours." (*Id.*). While Kelley may well have reviewed all four individuals' browser histories in connection with the investigation of the cyber-stalking situation, and came upon Jacqueline's browser activity in the course of that review, there is no evidence that he targeted Jacqueline.

Plaintiffs also argue, as evidence that Defendants' LNRR is pretextual, that RDG's computer use policy was not being enforced as written (see Pls.' Opp'n, Ex. LL, MM) until Kelley's May 12, 2014 email (which was after Gemma's May 9, 2014 altercation with Mustafaa), in which he stated that the policy had to be "followed immediately."<sup>14</sup> (PSOF ¶ 66).

The Court finds that RDG's decision to become more concerned about enforcement of its computer use policy after learning of allegations of breaches of its computer use policy is a logical business decision that the Court will not disturb. See Andersen v. Mack Trucks, Inc., 118 F. Supp. 3d 723, 747 (E.D. Pa. 2015), aff'd, 647 Fed. App'x 130 (3d Cir. 2016) ("It is not the Court's role to second-guess business decisions where there is no evidence of discriminatory animus."). It is not for this Court to determine whether it was fair for RDG to decide to begin enforcing an already-existing computer use policy after the discovery of egregious misuse by employees. It is further not this Court's role to second-guess RDG's recognition of a material distinction, in terms of employment consequences, between different types of "down time" activities while at work.

It was a reasonable business decision to determine that use of the internet to complete coursework—but not surf the internet or look up food menus—was a terminable offense. See Paich v. Nike, Inc., 06-cv-1442, 2008 WL 696915, at \*8 (W.D. Pa. Mar. 12, 2008) (noting that "[i]n a discrimination case, the issue before the court is not the fairness of an employer's decision to terminate the plaintiff, but whether the record raises an issue of fact as to whether the decision was motivated by discriminatory animus") (citing Brokenbaugh v. Exel Logistics N.A., Inc., 174 Fed. App'x 39, 45 (3d Cir. 2006)). Indeed, courts frequently hold that an employee's

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<sup>14</sup> Plaintiffs try to catch Kelley in an inconsistency by arguing that he stated in his deposition that the computer use policy was "put in place" following the discovery of Gemma's browser history as opposed to just enforced. It is clear, and the parties do not dispute, that the written computer use policies were in place all along and both Plaintiffs' were aware of them.

improper use of an employer's computer is a legitimate basis for termination. See, e.g., Twymon v. Wells Fargo & Co., 462 F.3d 925, 935 (8th Cir. 2006) (“gross violation of the company’s computer policy” is legitimate reason for termination); Weber v. Universities Research Ass’n, 621 F.3d 589, 593 (7th Cir. 2010) (same).

Accordingly, Plaintiffs have not raised an inference of pretext under the first prong of the Fuentes test.

**ii. Fuentes test: Prong Two**

Prong two of the Fuentes test permits an employee to survive summary judgment if she can demonstrate that retaliation “was more likely than not a motivating or determinative cause of the adverse employment action.” Fuentes, 32 F.3d at 762. The kinds of evidence relied upon by the Court of Appeals for the Third Circuit under this prong of the Fuentes test are: 1) whether the employer previously retaliated against the plaintiff; 2) whether the employer has retaliated against other persons; and 3) whether the employer has previously treated more favorably similarly situated persons who did not engage in the protected activity at issue. See Simpson v. Kay Jewelers, Div. of Sterling, Inc., 142 F.3d 639, 644-45 (3d Cir. 1998).

Plaintiffs argue that Defendants’ LNRR is pretextual because similarly situated RDG employees (i.e. comparators) used the internet for personal reasons, but were not terminated. It is well established that a plaintiff alleging employment discrimination may establish pretext by showing “that the employer treated other, similarly situated persons not of his protected class more favorably.” Hodczak v. Latrobe Specialty Steel Co., 451 Fed. App’x 238, 242 (3d Cir. 2011) (quoting Fuentes, 32 F.3d at 765). “Comparator analysis normally focuses on an infraction by the plaintiff that led to an adverse employment action and compares that to the

infractions and punishments of other employees[.]” Henry v. City of Allentown, 12-cv-1380, 2014 WL 4652474, at \*2 (E.D. Pa. Sept. 18, 2014).

Here, Plaintiffs point to three RDG employees whom they assert are proper comparators: (1) Andrew Konshak, (2) Kevin Kline, and (3) Brett Buddendorf. The record establishes that Andrew Konshak used the internet while at work to, *inter alia*, research fantasy sports, read sports and other news, browse ESPN.com, and look up dog wallpapers.” (See Pls.’ Surreply, Ex. D). Similarly, Kevin Kline used the internet while at work to, *inter alia*, read online news, read comic books, online shop, and look up pictures of female celebrities. (Id., Ex. G). Third, Brett Buddendorf used to internet while at work to browse sports website, shop online, engage in online dating, look at pictures of female celebrities, and—importantly—complete online coursework. (Id., Ex. F).

The Court finds that these other employees are not similarly situated, and therefore cannot function as comparators relevant to a finding of pretext. The record evidence reflects that the computer use policies in place required that RDG employees make only limited personal use of the computer systems. As previously discussed, the evidence shows that the nature of Plaintiffs’, and Plaintiffs’ colleagues, work at RDG at times included a lot of down time, depending on how busy the call centers were at any particular time. Therefore, it was unsurprising that employees engaged in the type of online activities in which Kline, Konshak, and Buddendorf engaged—internet surfing, checking sports scores, online shopping, etc. However this type of internet use is different in kind from Plaintiffs’ use, which included large percentages of their working time logged into Walden.edu. As discussed, *supra*, the record evidence establishes that use of Walden.edu is a far more distracting use of the internet than others, and is therefore a far more egregious violation of RDG’s “limited” personal use policy.

While the record shows that Budendorf did spend very minimal amounts of time logged into Walden.edu, it is clear from the length of his log-in that he only checked his grades and score, rather than complete assignments and assessment in real time. (Reply, Ex. 12, “Budendorf Dep.,” at 24)

Plaintiffs cannot establish that Defendants’ LNR is pretextual simply because others who committed different and far less egregious transgressions did not suffer the same adverse employment consequences. See Carter v. Midway Slots & Simulcast, 511 Fed. App’x 125, 128 (3d Cir. 2013) (noting dissimilarity of alleged comparators where they violated the attendance policy and plaintiff was terminated for sleeping on the job), cert. denied, — U.S. —, 134 S.Ct. 138, 187 L.Ed.2d 97 (2013); Williams v. Potter, 07-cv-02, 2008 WL 282349, at \*6 (W.D. Pa. Jan. 31, 2008) (“Where an alleged comparator does not engage in the same misconduct for which the plaintiff suffered an adverse employment action, he is not a similarly situated employee for purposes of proving an inference of discrimination.”); Barrouk v. PNC Bank, N.A., 14-cv-1102, 2016 WL 1109487, at \*9 (M.D. Pa. Mar. 22, 2016) (“Barrouk’s efforts to create the impression of similarly situated employees fails, however, because the alleged comparators are not similarly situated to him, and committed different infractions.”).

Plaintiffs’ alleged comparators stand in stark contrast to the one comparator offered by Defendants, Ms. Terry Woods-Phillips. It is undisputed that RDG terminated Ms. Woods-Phillips, an RDG employee, in the recent past for the very same offense in which Plaintiffs were caught, i.e., using the internet at work to complete online coursework. (DSOF ¶ 104). Plaintiffs argue that Ms. Woods-Phillips is not an appropriate comparator because she had a slightly different job description from Plaintiffs, (Pls.’ Surreply at 9 n.6). The Court finds that she is similarly situated to Plaintiffs, however, given (1) the similarity in the type of offense, (2) that

they are members of the same protected class as women, and (3) while they may have different job descriptions, there is no allegation that they are not of the same rank at RDG. RDG's decision to terminate Ms. Woods-Phillips demonstrates its consistency with respect to tolerable use of work computers, and is strong evidence that Defendants' decision to determinate Plaintiffs was neither discriminatory nor retaliatory.

Accordingly, in addition to failing to establish the requisite causal link to make out a *prima facie* case of Title VII retaliation, Plaintiffs have also failed to show that Defendants' proffered LNRR is pretextual.

#### **F. Jacqueline's Wrongful Termination Claim**

Plaintiffs additionally allege that Jacqueline was wrongfully terminated, "in violation of recognized Pennsylvania public policy." (Pls.' Opp'n at 15). Plaintiffs assert that RDG's termination of Jacqueline violated public policy because it was done in retaliation for her decision to testify at a hearing regarding her sister Gemma's unemployment benefits. (*Id.* at 17).

Defendants argue that "while Pennsylvania recognizes a cause of action where an employer retaliated against an employee for filing for employment compensation," it does not recognize a cause of action "for retaliation against an employee who assists another in his or her unemployment compensation claim." (Defs.' Mot. at 25-26 (emphasis added)). Accordingly, Defendants argue they are entitled to summary judgment as to this claim because Jacqueline alleges that she was retaliated against for assisting Gemma in Gemma's exercise of her rights under the Pennsylvania Unemployment Compensation Law, not that she herself was retaliated against for exercising those rights. (*Id.* at 27).

Plaintiffs, by contrast, argue that, notwithstanding the fact that Pennsylvania is an at-will employer, the claim should survive in this case because "the freedom to testify truthfully, under

oath, at an unemployment hearing on behalf of another without fear of retribution for testifying honestly” is an important and recognized public policy. (Id. at 18). They argue further that refusing to recognizing this claim “would place employees who are called to testify at an unemployment hearing in the impossible situation of choosing between lying under oath and subjecting themselves to possible criminal prosecution for perjury[], or losing their job for testifying truthfully.” (Id. at 19).

Generally, there is no common law cause of action for the discharge of an at-will employee. Krajsa v. Key Punch, Inc., 622 A.2d 355, 358 (Pa. Super. 1993); Field v. Philadelphia Electric Co., 565 A.2d 1170, 1179 (Pa. Super. 1989). “The Third Circuit has observed Pennsylvania Courts have construed the public policy exception to at will employment narrowly, lest the exception swallow the general rule. . . . Because the power to formulate public policy rests with the legislature, a court has a sharply restricted power to declare pronouncements of public policy.” Spyridakis v. Riesling Group, Inc., 09-cv-1545, 2009 WL 3209478, \*22 (E.D. Pa. Oct. 6, 2009), aff’d, 398 Fed. App’x 793 (3d Cir. 2010). “Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy.” Clay v. Advanced Computer Applications, Inc., 559 A.2d 917, 918 (Pa. 1989).

Pennsylvania recognizes a cause of action for wrongful discharge in retaliation for an employee filing an unemployment compensation claim. The cause of action focuses on protecting the individual’s substantive right to unemployment compensation benefits that Pennsylvania unemployment compensation law itself creates. See Highhouse v. Avery Transp., 660 A.2d 1374, 1377-78 (Pa. Super. Ct. 1995); Raykovitz v. K Mart Corp., 665 A.2d 833, 835 (Pa. Super. Ct. 1995) (same). This protection, however, extends only to the individual seeking

unemployment compensation. See Highhouse, 660 A.2d 1374, 1378 (Pa. Super. Ct. 1995) (“The right of an employee to receive unemployment compensation is a benefit granted by the Commonwealth.”).

Plaintiffs point to no authority in Pennsylvania where a court has recognized the exception for which they advocate here. And it is not appropriate at this time, and in this posture, for this Court to create or expand a cause of action under Pennsylvania state law, particularly given that Plaintiffs’ federal claims will not proceed, so the Court would be doing so while exercising pendent jurisdiction. See 28 U.S.C. § 1367(c)(3) (authorizing federal courts to decline to exercise supplemental jurisdiction over state law claims once it has dismissed “all claims over which it has original jurisdiction.”)

Moreover, as established extensively throughout this memorandum, the Court is convinced that Jacqueline, like Gemma, was terminated for improper use of the internet during work time at RDG, and not in retaliation for any other activity.

## **VI. Conclusion**

For all of the foregoing reasons, Defendants’ motion for summary judgment as to Plaintiffs’ consolidated complaints is GRANTED.

An appropriate Order follows.