

THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

M.C.A.D. & TALIA LAURIA,
Complainants

v.

DOCKET NO. 09-BEM-00673

ROBERT W. SULLIVAN, INC.,
Respondent

Appearances:

Michael W. Ford, Esq. and Peter Morin, Esq. for Talia Lauria
Jennifer Ellis Burke, Esq. and Lindsey A. Gil, Esq. for Respondent

DECISION OF THE HEARING OFFICER

I. PROCEDURAL HISTORY

On March 11, 2009, Talia Lauria filed a complaint with this Commission charging Respondent Robert W. Sullivan, Inc., with discrimination on the basis of sexual harassment and retaliatory termination. Specifically, Complainant alleges that Respondent terminated her employment after she complained of sexual harassment by a co-worker. The Investigating Commissioner dismissed the sexual harassment claim for lack of probable cause but found probable cause with respect to Complainant's claim of retaliatory termination, which is the sole claim before me. Attempts to conciliate the matter failed and the case was certified for public hearing. A public hearing was held before me on October 2-4, 2013. After careful consideration of the entire record and the post-hearing submissions of the parties, I make the following findings of fact, conclusions of law and order.

II. FINDINGS OF FACT

1. Complainant Talia Lauria resides in Somerville, MA. In 2007, Complainant obtained a B.S. degree in mechanical engineering from Northeastern University, and on July 12, 2007, she was hired by Respondent as an HVAC designer. Her employment was terminated in October 2008. Tr. pp. 104-105.

2. Respondent R.W. Sullivan, Inc. is an engineering firm located at the Schrafft Center in Charlestown, MA, that employs approximately 90 people. Respondent specializes in HVAC, plumbing, and electrical and fire protection. It designs various systems for commercial and residential properties, typically as a sub-contractor for architects. Mark Sullivan is the company's CEO and his brother Paul Sullivan is its president. Mark Sullivan is responsible for generating work, overseeing the technical groups and insuring adequate staffing. He also has some involvement with hiring and firing. As Respondent's president, Paul Sullivan oversees projects, client accounts, finances, department directors, and personnel and engineering matters. Tr. pp. 416-7, 595.

3. Complainant testified that when she began her employment, she was primarily a CAD (computer-aided design) drafter. This task involved translating remedial hand-drawn mark-ups from senior engineers, and project managers into design drawings on a computer. Tr. pp. 109-110.

4. As she became more comfortable with CAD drafting, Complainant would design her own duct layouts and would do her own load calculations to size the systems and design layouts. At some point during Complainant's employment, the HVAC unit was divided into several teams. Complainant was on the "blue team," but might occasionally work for another team as needed. Tr. pp.251-2.

5. Respondent had a workplace policy that the internet is to be used for business only. Employees were permitted to use the internet for personal use only during their lunch breaks and before and after work hours. Tr. pp. 419-20; Jt. Exh. 1.

6. Respondent's policy provided for a 30 minute lunch break, as well as informal breaks throughout the day, as needed. According to Mark Sullivan, these informal breaks were intended to be brief; time enough to get a cup of coffee and return to work. Tr. p. 420; Jt. Exh. 1. Complainant testified that she would typically come to work each morning, have a cup of coffee and begin her work. She would then take a morning break, return to work, eat lunch in the building cafeteria, resume work in the afternoon, take an afternoon break, work until the end of the work day and then go home. Tr. p.106. Complainant testified that she checked her emails throughout the day and chatted with co-workers via Gchat. She left Gchat open and minimized on her computer throughout the day but stated that she did not constantly chat. Tr. pp. 107-108

7. George MacKenzie was Respondent's director of mechanical engineering from 2003 to August 2008. MacKenzie supervised the HVAC group of 20 to 25 employees, including Complainant. MacKenzie testified that about 25 per cent of the team excessively used instant messaging and it was unfair to single out Complainant as a frequent user. Tr. pp. 63,74, 78. However, MacKenzie recalled asking Respondent's IT person to remove instant messaging from Complainant's computer and recalled discussing the matter with Paul Sullivan. MacKenzie stated that Complainant played Sudoku during work hours. He acknowledged that in April 2008, he and project manager John Lasofsky considered meeting with Complainant to discuss the issue of her failure to seek out additional work when she was done with a task and Respondent's intent to administer a final warning to her if her performance did not improve by June, although no such meeting ever took place. Tr. pp. 58-9, 67. I credit MacKenzie's testimony. Paul Sullivan

testified credibly that MacKenzie complained to him about Complainant's poor performance, lack of motivation and excessive internet usage. Sullivan told MacKenzie that as her supervisor MacKenzie should discuss the matter directly with Complainant. Tr. pp. 599-600.

8. John Lasofsky was a project manager for Respondent from 2004 to 2009. He directly supervised the majority of Complainant's work. Tr. pp. 78-9. Lasofsky reported to George MacKenzie. Lasofsky testified that Complainant's work was good, but she was not self-sufficient and was unmotivated. Tr. p. 79, 93. He frequently admonished Complainant to stay off the computer for personal matters and informed MacKenzie that Complainant was using the computer for non-work related matters. On several occasions he told MacKenzie he was reluctant to assign tasks to Complainant because of her lack of motivation. I credit his testimony. Tr. pp. 96-98. Paul Sullivan testified credibly that Lasofsky told him that he was having trouble completing jobs because of Complainant's performance and at one point Lasofsky asked him to remove Complainant from his team and replace her. Tr. p. 601-2.

9. Christian Scourletis is the owner of TCom, a company that has provided IT support to Respondent since 2005. Scourletis testified that TCom installed "content-filtering" software programs at Respondent that monitored employees' internet usage and determined whether web content should be blocked or permissible for employees to view. All internet traffic was monitored and logged and it was possible to determine which employees were the "top talkers." The content-filtering program used by Respondent during Complainant's employment, Websense, blocked gambling and social media sites such as Gmail messenger and Facebook. Tr. p. 467.

10. Respondent employed an on-site IT person who was trained by TCom on the use of its software programs and who monitored employees' internet use and created reports showing the amount of internet use by certain employees upon request. Tr. p. 421-3.

11. At some time during Complainant's employment, Respondent limited employees' access to Facebook and Gchat to lunch time and before or after work hours. Complainant testified that she left Gchat open on her computer but because of the restrictions, she was unable to access it during work hours. Tr.pp.108-9, 131-2. Gmail was not blocked and Complainant left Gmail open and minimized throughout the work day. Tr. p. 132-3.

12. In September 2007, Complainant met with MacKenzie and Paul Sullivan. At the meeting, MacKenzie told Complainant that she appeared to have no interest in her job and he instructed her to actively seek out work from him or senior engineers when she had completed assigned tasks. Tr. pp. 63-4, 252-253.

13. Complainant continued to use the internet excessively and in January 2008, MacKenzie asked to have instant messaging blocked from Complainant's computer because she was web chatting. Tr. p. 58-9.

14. On May 13, 2008, Paul Sullivan and MacKenzie met with Complainant in order to discuss concerns about her work performance. MacKenzie and Sullivan testified credibly that they told Complainant that her excessive internet usage and lack of dedication to her profession were problematic, that she was functioning below the level expected of an engineering graduate and they expected her to show more interest in her job and more progress in design work. MacKenzie again advised Complainant to seek out work after completing a project. Complainant indicated that she understood and agreed to work on these issues. Tr. pp.63-4, 261; Exh. J-3. Complainant acknowledged that such a meeting occurred sometime in 2008. In her

version of the meeting, MacKenzie and Sullivan “mentioned” but did not emphasize her internet usage. Tr. pp. 259-265. I do not credit Complainant’s testimony that her internet usage was merely mentioned. Sullivan’s notes from the meeting clearly indicate that she was told internet usage was a problem. Exh. J-3.

15. Mark Sullivan testified that he discussed Complainant’s excessive internet usage with his brother Paul on numerous occasions in 2007, but did not discuss it with Complainant until her termination in 2008. Sullivan testified credibly that Lasofsky, MacKenzie, Pat Curran and others complained about Complainant’s performance and that Lasofsky and MacKenzie felt Complainant was performing below the expected level of a graduate and Lasofsky said he had to watch over her. Tr. pp. 426-7.

16. In the spring of 2008, several HVAC department employees left Respondent and Complainant became the primary junior engineer on a large project for CVS, which involved the redesign of former Rite Aid stores that were being converted to CVS pharmacies. Paul Sullivan stated that an engineer who had worked on the project before resigning in May 2008 complained about Complainant’s work performance. Tr. p. 427. I credit his testimony. Complainant stated that tension during the transfer of CVS work to her from that engineer was unrelated to her work performance. I do not credit her testimony. Tr. pp. 109-110; 265-266, 275.

17. In June 2008, Complainant met with Paul Sullivan for an annual salary review. Sullivan warned her about her excessive internet usage, socializing with co-workers and her poor work ethic and she was again advised to seek out work when she had completed tasks. Complainant and Sullivan agreed that Complainant would to re-take the EIT¹ exam in the next 12 months. She told Sullivan that she was happy with work and enjoyed the CVS job. Sullivan testified credibly that Complainant received a raise because of the need to retain her on the CVS

¹ Engineer in Training

project pending the hiring of more employees in the HVAC department, but that this did not signify that her performance was satisfactory. Tr. p. 269-70; Exh. J-3.

18. In August 2008, McKenzie took a position at another firm and was replaced by Pat Curran as heard of Respondent's HVAC division. Curran testified that although Complainant usually completed work assignments in a timely manner, he had to push her and monitor her to make sure she was performing her work. He stated that Complainant was less productive than other members of his team and that Lasofsky and some of the other engineers complained to him about the timeliness and quality of Complainant's work. Curran testified that he told the Sullivan brothers several times about the complaints he received regarding Complainant's use of the internet and playing Sudoku on work time. Tr. pp. 377-82. I credit his testimony.

19. Paul Sullivan testified credibly that Curran complained to him more than once about Complainant's lack of timeliness and poor performance. Sullivan advised Curran to document his concerns in writing and place the written document in Complainant's file. Tr. pp. 427-8.

20. Curran testified that on Monday, September 8, 2008 he spoke to Complainant about her excessive internet usage, her apparent lack of interest in her work and her lack of professionalism. After their discussion, Curran wrote a memorandum summarizing the meeting and provided a copy to Respondent's HR representative the same day. Curran stated that after the discussion, Complainant's internet usage declined slightly but she continued to play Sudoku. I credit Curran's testimony. Tr. pp. 384-87; Jt. Exh. 3.

21. Complainant acknowledged that Curran addressed her inappropriate internet usage and her work ethic, although she testified that the discussion occurred on September 15, 2008. Complainant testified that she told Curran that she had down-time between CVS assignments

and used the internet only when she had no assignments. Tr. pp. 278, 281; Jt. Ex. 3. I do not credit Complainant's testimony with respect to the date of the meeting.

22. Paul and Mark Sullivan testified credibly that within two or three days after reading Curran's September 8 write-up, on September 9 or 10, 2008, they decided to terminate Complainant's employment and began to discuss when the termination would be least disruptive to the company. Tr. pp. 432-3, 612-13.

23. Complainant testified that during the week of September 8, 2008, while eating lunch in the cafeteria with co-workers, a male co-worker commented on a woman's buttocks. Complainant gave him a disapproving look and as her group left the cafeteria the co-worker said to Complainant, "You have a better one anyway." Complainant told him that the comment was inappropriate and not to talk to her like that again. She mentioned the incident to a female co-worker, who in turn reported it to Respondent's human resources manager² who contacted Complainant about the matter. Complainant told the HR manager that she did not want to pursue the matter and did not reveal the co-worker's name. Tr. pp. 120-123. The matter was not investigated and there was no reference to this matter in Complainant's personnel file and the Sullivans had no knowledge of this incident. Tr. pp. 444; 580.

24. On Friday, September 12, 2008, Respondent sponsored an end-of-the-summer party for employees at a Charlestown restaurant that included hors d'oeuvres and an open bar. The Sullivans closed the bar at 7:15 and left the restaurant. Complainant and a group of work friends remained at the restaurant. Complainant testified that she jokingly grabbed some money from a male co-worker and put it down the front of her sweatshirt; she then quickly removed the money, placed it briefly in the back pocket of her pants and returned the money to the co-worker, whom she considered a friend. Sometime later, Complainant was leaning on a table talking on the

² The HR director did not testify at the public hearing.

telephone when that same male co-worker came up behind her and grabbed her left buttock. Complainant immediately turned, pushed him away and told him to never do that again. She exited the restaurant and ran to her car and went home. The co-worker attempted to call her over the weekend but they did not connect. Tr. p.112-116.

25. Complainant testified that when she returned to work the following Monday, September 15, 2008, she overheard two employees talking and laughing about the incident. Complainant told them it was not a laughing matter. The co-worker was present and attempted to apologize to her but Complainant refused to discuss the matter in the workplace. Tr. pp. 116-117.

26. The same day Complainant sent an email describing the incident to the human resources manager, who called Complainant into her office to discuss the matter and told Complainant that the Sullivans would need to speak with her about the incident. Tr. pp.116-118. The human resources manager then informed the Sullivans about the incident and they arranged to meet with Complainant the next day. Tr. p. 435-6.

27. On September 16, 2008, Complainant met with Mark and Paul Sullivan, who told her that they did not tolerate sexual harassment and would meet with her male coworker and then meet again with her. Complainant told them that she did not want her coworker to lose his job and wanted to move on from the incident. Tr. p.436-43; Jt. Ex. 3.

28. On September 18, 2008, Mark and Paul Sullivan met with the co-worker, who admitted slapping Complainant's buttocks. He informed the Sullivans that Complainant had already accepted his apology and agreed that they would work together in a professional manner from then on. The Sullivans believed that he had committed an error in judgment and was

sincerely sorry. They warned him not to retaliate in any way against Complainant for her having reported the incident. Tr. pp.440-441; Jt.Exh. 3.

29. On September 22, 2008, Mark and Paul Sullivan met again with Complainant and informed her of their discussion with the co-worker. They offered to move his desk, but Complainant declined because she thought the matter would blow over.³ Tr. p.441-4; Jt. Exh. 3.

30. Respondent had a practice of planning any necessary termination of an employee on a schedule that served the best interests of the company. Their practice was to terminate employees on Friday afternoons when jobs were usually completed, so as to avoid interruption in work flow. Tr. p. 434. Having decided on September 9 or 10, 2008 to terminate Complainant's employment, Respondent did not act immediately for several reasons. First, they chose not to terminate Complainant that week because they had planned a party for the staff on September 12, 2008, and terminating an employee then would have been contrary to the spirit of the gathering which was to recognize employees' hard work. They also wanted to ensure that there was no further fall-out from the incident between Complainant and her co-worker. Most importantly, they needed to ensure that other HVAC employees were up to speed on the CVS project and ready to take over for Complainant. Tr. pp. 434,445-6. I credit their testimony that these were the reasons they did not act to terminate Complainant immediately after deciding to do so on September 9 or 10.

31. Meanwhile, Respondent had continued to monitor Complainant's personal internet usage. Their IT employee ran a report of Complainant's internet usage for the month of September and another report for October 15, 2008. Each report showed a high volume of

³ Complainant testified that after September 15, several of her friends stopped talking to her and no longer ate lunch with her. I do not credit her testimony.

personal internet usage during work hours. The decision was made to terminate Complainant's employment on October 17, 2008. Tr. pp. 445-6; Exhs.R-3, R-4.

32. Christian Scourletis testified that a WebSense report of Complainant's internet usage for the month of September 2008 indicated that Complainant's computer had 30,964 hits to internet websites during that month. Scourletis testified that the large number of hits did not represent the actual number of separate visits to websites and could indicate the websites were refreshing or were advertising websites. Scourletis testified that the September 2008 report reflected that Complainant visited the same or similar sites on a daily basis during that month. He detected constant communication to Gmail and daily communication to Facebook, rock-climbing, sporting and athletic sites. Scourletis testified that Complainant could not maintain this high volume of web traffic if she were confining her personal internet usage to the hours before and after work, or during her lunch break. Tr. p. 502; Exh.R- 4. I credit his testimony.

33. Scourletis also testified that the report of Complainant's internet usage for October 15, 2008 was more detailed than the monthly report. He stated that the report showed Complainant checking email or Gmail and Facebook during work hours. She also used Gchat for much of the hour from 12:00 p.m. to 1:00 p.m. when web chatting was allowed, despite her lunch break being only thirty minutes long. The reported revealed multiple hits to Facebook and a website called rockclimbing.com.⁴ From 1:00 p.m. until 4:30 p.m., Complainant's Websense report recorded traffic from both Gmail and Facebook and a high amount of email traffic using Gmail from 4:04 to 4:24 p.m. Tr. pp. 502, 523-4; Exh. R-3. I credit his testimony.

34. Scourletis testified credibly that based on the two reports, he recognized certain patterns: Complainant checked Gmail and Facebook throughout the day and initiated frequent

⁴ Complainant is an enthusiastic rock climber.

daily communications with rock-climbing and other athletic web-sites and visits to REI, a store specializing in sporting goods. Tr. p. 500-502.

35. On October 17, 2008, Paul Sullivan called Complainant into his office. Mark Sullivan was also present. According to Complainant, Paul Sullivan began “ranting” about her internet usage and terminated her employment. Mark Sullivan showed her the September 2008 and October 15, 2008 internet usage reports, the May 13, 2008 notes from her meeting with MacKenzie and Paul Sullivan, the June 2008 notes from her annual review with Paul Sullivan and the September 8, 2008 note from Pat Curran. Sullivan accused her of being on Facebook at 3:00 p.m., which Complainant said was impossible because internet access to Facebook was blocked at that time of day. She told the Sullivans that she did not use the internet more than other employees. Mark Sullivan also noted that Pat Curran had warned her about her poor work ethic. Complainant denied that Curran had spoken to her about her work ethic and stated that she had never received a written warning. Tr. pp. 126-8; 446-49.

36. Complainant testified after receiving notice of her termination, she was sent to the human resources office for an exit interview and signed a termination form. Tr. pp. 140-141. She subsequently filed the instant complaint alleging she was terminated in retaliation for complaining about sexual harassment.

37. In 2005, Respondent had terminated an employee for excessive internet usage and lack of focus. This employee was not given a written warning but the Sullivans had met with him on numerous occasions regarding his lack of focus following complaints by engineers who would not give him work because of his poor performance. Respondent had run reports on his internet usage and decided to terminate his employment. Tr. pp. 449-452; Exh. R-6.

38. In November 2007, Respondent terminated another employee for excessive internet usage and poor attendance. The second employee received written warnings before his termination; however Respondent stated his warnings were in writing because he was deaf and it was otherwise difficult to communicate with him. Paul Sullivan testified credibly that he could not recall another instance where Respondent had used a written warning form as it had with this employee. Tr. p. 449-452, 571

III. CONCLUSIONS OF LAW

Complainant has alleged that Respondent terminated her employment in retaliation for having made an internal complaint of sexual harassment. In order to establish a prima facie case of retaliation, Complainant must show that she engaged in a protected activity, that Respondent was aware of the protected activity, that Respondent subjected her to an adverse action, and that a causal connection existed between the protected activity and the adverse action. Mole v. University of Massachusetts, 58 Mass.App.Ct. 29, 41 (2003). In the absence of any direct evidence of retaliatory motive, as in this case, the Commission follows the three-part burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973). Abramian v. President & Fellows of Harvard College, 432 Mass 107,116 (2000); Wynn & Wynn v. MCAD, 431 Mass 655, 665-666 (2000). Once Complainant has established a prima facie case of retaliation, the burden of production shifts to Respondent to articulate and produce credible evidence to support a legitimate, nondiscriminatory reason for its actions. Abramian, 432 Mass at 116-117; Wynn & Wynn, 431 Mass. at 665. If Respondent meets this burden, then Complainant must show by a preponderance of the evidence that Respondent acted with retaliatory intent, motive or state of mind. Lipchitz v. Raytheon Company, 434 Mass 493, 504 (2001); see, Abramian, 432 Mass at 117. Complainant may meet this burden through

circumstantial evidence including proof that "one or more of the reasons advanced by the employer for making the adverse decision is false." Lipchitz, 434 Mass at 504. However, Complainant retains the ultimate burden of proving that Respondent's adverse action was the result of retaliatory animus. Id.; Abramian, 432 Mass at 117.

Under M. G. L. c. 151B, s. 4 (4), a plaintiff has engaged in protected activity if "he has opposed any practices forbidden under this chapter or . . . has filed a complaint, testified or assisted in any proceeding under [G. L. c. 151B, s. 5]." In this case, Complainant made an internal complaint of sexual harassment to Respondent when she reported her coworker's after work conduct to HR.⁵ This was protected activity within the meaning of the statute.

Within a month after Complainant's report of sexual harassment, Respondent terminated her employment. While proximity in time is a factor, "the mere fact that one event followed another is not sufficient to make out a causal link." MacCormack v. Boston Edison, 423 Mass. 652, 662, n. 11(1996), citing Prader v. Leading Edge Products, Inc., 39 Mass. App. Ct. 616, 617(1996). That Respondent knew of a discrimination complaint and thereafter took some adverse action against the complainant does not, by itself, establish causation, however, timing may be a significant factor in establishing causation. Where, as here, problems with the employee's performance predate the protected activity, there cannot be a presumption of causality. Mole v. Univ. of Massachusetts, 442 Mass. 582, 594-95 (2004). I conclude that there is no credible evidence of a causal connection between the Complainant's complaint of sexual harassment and her termination. Instead there was ample evidence of Respondent's prior

⁵ Respondent immediately conducted a prompt, neutral investigation into the allegations. See, Massachusetts Commission Against Discrimination, Sexual Harassment in the Workplace Guidelines, §VI. para. B (2003). Respondent interviewed Complainant and the alleged harasser, who acknowledged engaging in the complained of activity. Respondent offered to move the alleged harasser's work station, but Complainant asked only that the alleged harasser refrain from similar activity in the future and for workplace relations to return to normal. There were no further incidents of harassment.

dissatisfaction with her performance, numerous verbal warnings and suggestions for improved performance, a recent report of ongoing supervisor's concerns, and a decision to terminate her employment made prior to her reporting the alleged act of harassment. The fact that Respondent had not acted on its decision does not alter the fact that the decision to terminate had been already been made and was not motivated by retaliatory animus.

However, even assuming that Complainant has established a prima facie case of retaliation based on the timing of her termination, the burden of production would shift to Respondent to articulate and produce credible evidence of a legitimate, nondiscriminatory reason for its actions.

Respondent met this burden. It produced ample evidence of its concerns over Complainant's excessive use of the internet for personal matters, poor work ethic, lack of initiative and motivation and apparent lack of interest in the job, all of which were repeatedly discussed with her. There was credible testimony by Complainant's former supervisors and Respondent's owners that Complainant spent an excessive amount of time on the internet, her performance was below that expected of an engineering graduate and that she lacked self-motivation. The testimony indicated that, rather than seeking additional work after finishing a task, Complainant would play Sudoku or use the internet for personal matters. There was uncontroverted evidence that Complainant's supervisors and the company owners met with Complainant on several occasions and expressed concern about Complainant's apparent lack of interest in her work, complaints of co-workers who did not want to work with her and reluctance by supervisors to assign her work, her frequent use of the internet for personal matters and her unwillingness to ask for more work when she had completed a project.

Once Respondent has articulated legitimate non-discriminatory reasons for its conduct, in the absence of direct evidence of retaliatory motive, Complainant may establish causation by proving that Respondent's proffered reasons for her termination were a pretext for retaliation. Abramian, 432 Mass. at 116-7. Complainant offers as evidence of pretext for unlawful retaliation the testimony of Complainant's former manager that she was "singled out" for excessive internet usage when it was a problem with other employees as well; the testimony of Respondent's own expert that the "activity reports" of Complainant's internet usage were unreliable indicators of her actual internet usage and the fact that she received no written warnings during her employment.

With respect to Complainant's former supervisor MacKenzie's testimony that many of his supervisees also used the internet for personal matters and Complainant should not be "singled out" in this regard, this does not negate the evidence that MacKenzie had significant problems with Complainant's work ethic and lack of initiative and motivation. He also testified that he requested that instant messaging be removed from Complainant's computer, that Complainant's work performance was not commensurate with her educational level; that she did not seem to care about her job, that he and project manager Lasofsky contemplated giving her a final warning in April 2008, and that he met with Respondent's owners and Complainant with regard to her poor work ethic. Complainant's direct supervisor Lasofsky frequently observed Complainant using the computer for personal matters, admonished her on many occasions about such conduct and complained to MacKenzie about the issue. Lasofsky testified that Complainant was not self-sufficient and was poorly motivated and because of this he was reluctant to assign projects to her and voiced concerns about these issues to MacKenzie as well.

While the total number of hits to internet websites reflected in the internet activity reports far exceeded the actual number of sites visited by Complainant for the reasons cited by Scourletis, he nonetheless testified credibly that, even discounting the activities not initiated by Complainant, the reports show an amount of internet usage by Complainant far exceeding the time she was allotted for breaks, indicating excessive use of her computer for personal reasons during work hours. Moreover, the reports are not the only evidence of Complainant's excessive use of the internet. In addition to the reports, the record is replete with evidence of complaints about Complainant's personal use of the internet throughout her employment and preceding her complaint of sexual harassment. This was a significant factor in the decision to terminate her employment which predated her complaint.

Finally, while Complainant did not receive a formal "written warning," she was counseled on numerous occasions that her work performance was unacceptable and was well aware of the fact that her employer was unhappy with her performance. Respondent's owners testified credibly that they could only recall one instance where it made use of a formal written warning form when it terminated an employee who was deaf. This employee and one other were terminated for excessive internet use, and the other did not receive a written warning before his termination. Where the Respondent did not typically use a written warning and can demonstrate that this was not its practice, the failure to do so in Complainant's case does not suggest an unlawful motive for her termination.

Despite Complainant's assertions, there is insufficient credible evidence to support a conclusion that the reasons Respondent articulated for its actions were not the real reasons for the termination, or that Respondent was motivated by the intent to retaliate. Lipchitz, 434 Mass. at 503. I conclude that Complainant has failed to establish the Respondent's reasons for

terminating her employment are a pretext for unlawful retaliation and dismiss the complaint in this matter.

IV. ORDER

For the reasons stated above, I hereby order that the complaint in this matter be dismissed. This constitutes the final decision of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review with the Full Commission within 30 days of receipt of this order.

SO ORDERED, this 15th day of May, 2014

JUDITH E. KAPLAN
Hearing Officer