STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EDNA LEE LONG,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 08-4797
	)	
CHIPOLA COLLEGE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to proper notice, this cause came on for proceeding and hearing before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The final hearing was conducted in Marianna, Florida, on May 19, 2009. The appearances were as follows:

APPEARANCES

For Petitioner: Marva A. Davis, Esquire
Marva A. Davis, P.A.
121 South Madison Street
Post Office Drawer 551
Quincy, Florida 32353-0551

For Respondent: Robert E. Larkin, III, Esquire
Jason E. Vail, Esquire
906 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent discriminated against the Petitioner as

to her race and age, and by retaliation, by terminating the Petitioner from her employment.

PRELIMINARY STATEMENT

This cause arose when the Petitioner, Edna Lee Long, (Petitioner) filed a complaint of employment discrimination on December 17, 2007. In her complaint to the Florida Commission on Human Relations (Commission) she contends that she was terminated by Chipola College (Respondent) (College) because of her race, age, or because of retaliation from having earlier engaged in "protected conduct" by bringing a discrimination claim against the College.

The Commission conducted an investigation of the issues raised by the Petitioner and entered a finding of "no cause." Thereafter, the Petitioner chose to file a Petition for Relief and have the matter referred to the Division of Administrative Hearings for adjudication, which was done.

The case was assigned in due course to the undersigned Administrative Law Judge and initially set for hearing on December 30, 2008. In view of the agreement of the parties, the matter was continued and set for final hearing on May 19, 2009.

The cause came on for hearing on that date. The Petitioner testified on her own behalf and presented four other witnesses' testimony, as is reflected in the transcript of the proceeding. The Petitioner also introduced into evidence 28 exhibits and

proffered one exhibit which was not admitted. The Respondent presented two witnesses and introduced three exhibits into evidence. Upon conclusion of the proceeding, a transcript was ordered and the parties availed themselves of the right to submit proposed recommended orders. For unknown reasons, the transcript was delayed for some few months after the hearing. After several inquiries, it was ultimately filed on August 14, 2009. Thereafter, by Motion for Extension of Time for Submission of Proposed Recommended Order, an extension was granted the Petitioner, without objection, such that proposed recommended orders were timely-filed on September 15, 2009. The Proposed Recommended Orders have been considered in the rendition of this recommended order.

FINDINGS OF FACT

1. The Petitioner, Edna Lee Long, was a long-time employee of Chipola College. She was employed for approximately 35 years by the College until her resignation on or about November 1, 2007. Her resignation was the alternative she selected to avoid termination.

2. Chipola College, the Respondent, is a public higher education institution located in Marianna, Florida. It employed the Petitioner as a "Department Associate, Library Services" at the time of her resignation. She was hired in 1972 to be

employed in the library and was employed there since that time, until she left employment.

3. The College maintains a policy governing its information networks and use of the internet. The policy governs all computer and internet usage by College employees, using College facilities and networks. The policy prohibits the viewing of sexually explicit material by employees. The intent of the policy is to avoid harmful viruses that could pose a security risk from third party access to secure information, including confidential student records. It is inferred from the evidence that the policy is also intended to assist and maintain a certain moral standard in employees employed in positions of trust, and in helping to prevent violations of law in connection with what might be potentially viewed or downloaded as sexually explicit material.

4. While violations of this policy by students carries disciplinary implications, those measures are essentially designed to remove a student's internet or College network use privileges, on College computers, if it is violated, rather than more severe consequences. With regard to faculty and staff policy violations, however, a zero tolerance policy is in effect. Employees are held responsible for confidentiality of their computer user-name, access to their computer user account and keeping their assigned passwords confidential.

5. The Petitioner acknowledged receipt of and understanding of this policy and agreed to abide by it as to use of networks and the internet. The policy provides that all individual computer accounts are for the sole use of the single individual for whom the account was approved. Users of the network, internet or other online services are responsible for protecting the network's security by keeping their passwords confidential, not using another's account, nor letting their own accounts be used by another. They are required to report all security violations, or policy violations, to the management of the College, in the person of its network administrators.

6. Matthew White is the College's Network Coordinator and has responsibility to monitor internet usage on College computers. This is accomplished through the policy by the use of computer monitoring software and protocols. The software is designed to search for certain keywords, terms or phraseology which might characterize a violation of the above-referenced policy. If any of the keywords or terms surface from any website addresses, a report is generated which is reviewed by Mr. White at least once per week. If the report indicates that a computer at the College accessed unauthorized websites with certain of the keywords contained in the software and protocol, Mr. White convenes an investigation to learn which computer and which person accessed the objectionable site or material. Once

the investigation is concluded, an incident report is prepared by Mr. White and he submits his findings to his supervisor. Eventually it is submitted to the Human Resources departmental office for further attention.

7. On October 23, 2007, the Petitioner was scheduled to work the night shift at the library. She left work and picked up her son at his high school and returned with him to the library. He was going to stay with her at the library while she finished her work that evening, during which time he was to study and take a practice ACT college entrance exam.

8. He was to take the practice test online and so he had to access the internet to do so. By her own admission, the Petitioner used her user name and password to "log him in" to the required website, using her office computer which had been assigned to her. The Petitioner admitted that she knew that this was violative of College policy. The evidence does not reveal that her password had been disclosed to any other person.

9. After the Petitioner logged her son onto her computer, she returned to the circulation desk to continue her work. Her son thus had access to and operated her computer for approximately one and one half hours. During a significant portion of this time the Petitioner was not able to view her computer where her son was sitting.

10. During this time period, many sexually explicit materials and pornographic materials were viewed on the College network from the Petitioner's computer, by a person logged in under the Petitioner's username and password.

11. There is no dispute that significant numbers of sexually explicit and pornographic images were viewed by this means. Evidence presented by the Respondent demonstrates a complete list of the internet sites and usage from the Petitioner's computer, during the relevant time period when the Petitioner's son had access to the computer and the pornographic sites were viewed. The computer website use history also indicates that the college preparatory practice examination was accessed during the same general time period as the pornographic websites.

12. The Petitioner was unable to explain the presence of the graphic websites on the website history of her computer. Her son denied any such use or viewing of such websites, according to the Petitioner. Clearly however, the ACT test site and the pornographic websites were viewed on the same computer, at the exact times when the Petitioner's son was admittedly logged on to the Petitioner's computer, with use of her password, on the College network. The explanation that the Petitioner's son may have viewed the pornographic materials in question played no part in the employment decision involved in

this case, however. There was no evidence presented that the Petitioner, or any other person, ever told her supervisors, or College administrators of the explanation for the presence of the pornographic images and materials viewed prior to this hearing. The Petitioner simply denied her own involvement.

13. The automatic monitoring software referenced above, resulted in the generation of a report concerning the referenced internet usage for October 23, 2007, which was triggered by certain keywords which showed potential violations of the referenced policy. Mr. White became aware of this monitoring report and conducted an investigation, with the resulting incident report, at the conclusion of the investigation. Under the subject policy, this is a standard procedure for handling suspected violations of the policy. Respondent's Exhibit 2, in evidence, shows the keyword that initiated the investigation which led to procedures being followed which enabled Mr. White to determine which computer had been used to access illicit images or materials. Thereafter, Mr. White researched the Petitioner's computer and searched for internet files. He created a log of the internet files from the Petitioner's computer, printed evidence of that usage, and confirmed the user name and password used for the Petitioner's computer and entered that information into his report.

14. The website and pornographic images shown in that report are not simply spam e-mail received randomly or accidently from a third party. This is because Respondent's Exhibit 1, in evidence, shows actual internet usage and website traffic, originated from the Petitioner's computer and not merely received from a third party. The incident, in effect, involved active searching by the user of the computer during that relevant time period. The log, for example, shows illicit material was searched with the keywords "anime" and "porn" and the resulting websites that were viewed from that computer, derived from that search. There is no question that the items shown in Respondent's Exhibit 1 are very graphic and are not random "popup" images which appeared without being searched for.

15. Mr. White also established that the Petitioner's password was used in accessing the sites. He concluded that an individual was actively looking at pornographic sites for about 45 minutes on the Petitioner's computer, using her user name which also required her password to access. In the absence of further explanation, the College administrators believed that the Petitioner had accessed the sites herself.

16. Mr. White informed his supervisor, Dennis Everett, of the situation and submitted his report. It was soon thereafter brought to the attention of Karan Davis, the Associate Vice-President for Human Resources. Both White and Everett came to

Ms. Davis with the incident report and the usage log for the Petitioner's computer and informed her of the inappropriate use of that computer with the Petitioner's username and password. Ms. Davis then determined that the Petitioner was working during the times in question, in the library, when the sites were viewed and her account thus accessed. She therefore determined that a violation of the subject policy had occurred.

17. Ms. Davis then conferred with the College president who made the decision to either terminate the Petitioner or give her an opportunity to resign or retire. Ms. Davis approached Ms. Long on November 1, 2007, with the incident report, a sample of the internet usage from her computer, and a termination letter from the president. The Petitioner decided to accept retirement from her position rather than termination and is thus receiving retirement benefits at this time.

18. Contrary to the Petitioner's belief, expressed in her testimony, there is no persuasive evidence that the Petitioner was targeted or that there was any conspiracy related to use of her password by others, possibly in the College administration, to, in effect, "plant" illicit materials or images on her computer in order to generate a reason for her termination. There is no persuasive evidence that her computer was accessed by a third party (other than her son) or that her password-protected security with regard to her computer was breached.

19. The monitoring process used by Mr. White and the administration to monitor the College network, or the evidence regarding it, does not show evidence of a virus or a mistake made in that process. There is no credible evidence to show that the Petitioner's password was used by Mr. White or any other person in or out of the College administration. Only the Petitioner knew, or should have known, her password. If the password had been re-set by a third person using her computer, she would have known about it the next day.

20. Moreover, even if Mr. White or others in the administration had access to her password, the un-refuted evidence shows, by her own admission, that the Petitioner used her password to give her son access to her computer and the internet on October 23, the day in question. It is very unlikely that, had Mr. White or others in the College administration intended to "frame" her or "plant material" on the Petitioner's computer for nefarious reasons, they fortuitously and coincidently selected that same day, and one and one-half hour time period to do so. If they knew her password, and intended to use it for such purposes, they could have done so anytime over a period of days, weeks, months or years. Ms. Davis's testimony is uncontradicted in showing that the College was not conducting any investigation of the Petitioner until Mr. White and Mr. Everett approached Ms. Davis

concerning the violations shown on the Petitioner's computer history for October 23, 2007. In fact, the Petitioner was given consistently good employee evaluations by the College for the entire time period between the 1997 discrimination complaint, related to salary, and 2007.

THE RETALIATION CLAIM

21. The Petitioner has contended that she is being retaliated against by the employment action taken because of a 1997 charge of discrimination that she filed against the College, while she was an employee, with the Florida Commission on Human Relations. That controversy stemmed from her perceived pay inequity. It was resolved, however, by an agreed-upon settlement, which resulted in her receiving an appropriate pay raise at the time. Since that time, although she has met with and discussed salary issues with her superiors or supervisors, she has made no other formal complaints concerning salary issues or other issues. The Petitioner has conceded that her complaints or requests about pay, during the interim period of time since 1997, were not based on age or race issues and admits that she never filed any charge of discrimination concerning any salary issues since 1997. Ms. Davis was not shown to have retaliated against the Petitioner and had no knowledge of the 10-year-old complaint at the time the subject employment action was taken, or at least she had no recollection of it. Mr. White

was not employed at the College in 1997 and had no knowledge of the previous complaint to the Commission.

22. The Petitioner received favorable employment evaluations between 1997 and 2007 and received the regular cost of living salary increases in the same manner as other employees during that period of time. None of the evidence presented by the Petitioner showed any race or age-related issue concerning salary or pay grade treatment. Some employees were hired who were assigned some of the Petitioner's duties, but those were employees with more qualifications than the Petitioner. The Petitioner, at the time of the hearing, did not have a degree.

23. The Petitioner contends that the results of a pay study, conducted by the College, were discriminatory. She apparently raised a concern about purported pay inequity sometime during the period 1999 through 2000 (and reiterated by her later). She sought pay equity and upgrading of her position in discussions with her supervisors. She was told to wait while a third-party consultant, hired by the College, completed a pay and salary range study. Ms. Davis told her that no position would be re-classified until after the study was completed. As a result of this study the "Department Associate" position was approved in October 2000 and the Petitioner was moved into that position with that job title in 2001. She did not receive a salary increase, however, at that time.

24. The salary consultant's study developed revised position descriptions and included a market study for ascertaining appropriate pay or pay ranges for those positions. The consultant set ranges for those positions at the College and the recommendations were apparently adopted by the College. It was determined that if a particular employee was earning a salary which fell within the approved range then the employee was deemed to be appropriately paid. The Petitioner did not demonstrate that she was outside of an approved pay range for her duties and did not establish that the study, nor any of Petitioner's objections to her pay grade amount, had anything to do with the employment action taken on November 1, 2007, at issue in this case. It is noteworthy that only College employees who were receiving salaries below the minimum pay range for their job descriptions received any salary increases. There were also white males at this time who did not receive pay increases for that same reason, because they were already earning salaries at or above the minimum of their pay range for their job descriptions, as was the Petitioner.

25. The Petitioner maintains that the facts surrounding a Southern Association of Colleges (SACS) accreditation study showed discriminatory motives on the part of the College directed at her. In essence, she contends that the SACS study showed that the College had misrepresented to SACS that the

library was fully staffed when it was not. There were only five employees when the accreditation standards called for seven employees, under the circumstances prevailing at the time. The College then added the necessary number of employees and, upon receiving its accreditation, apparently in late October 2007, immediately thereafter terminated the Petitioner.

26. That subjective belief on the part of the Petitioner has not been supported or corroborated by any persuasive evidence, however. There was no demonstrated relationship between the employment action taken against the Petitioner and the accreditation or results of the study. Although the Respondent has not hired for the Petitioner's position as yet, it still has a larger library staff than it did when the fault was found by SACS as to library staffing, during the accreditation study.

27. There is no proven relationship between the Petitioner's announced and contemplated entry into the DROP program and the subject employment decision. There was no convincing proof that the employment decision had anything to do with her announcement about entering the DROP program versus the investigation made by the College concerning the Petitioner's computer usage or use of a password to allow another to use her computer wrongfully.

28. The Petitioner has not established persuasive evidence which would show that the policy concerning computer and internet usage was discriminatorily applied. The Petitioner has shown that no similarly-situated comparator employees, outside her protected class were treated more favorably, either because of race or age. There were three similar instances shown by the evidence to have occurred at the College. No employee in those instances was treated differently than the Petitioner. Ms. Davis investigated and enforced a policy as to the similar violations in the same manner. All three comparator employees involved were given the opportunity to resign, retire, or be terminated. None of them was given a warning on a first offense. Those three comparators were not within the Petitioner's protected class because they were Caucasian. Two were Caucasian males and one was a Caucasian female. The males were, respectively, 46 and 61 years of age and the female was 28. None of those comparators was given a second chance before termination or constructive termination. The Petitioner's belief otherwise was based upon hearsay and unsubstantiated rumor. Ms. Davis was directly involved in the employment actions taken against those comparator employees and established that no warning was given to any of them before they were terminated.

29. No employee outside the Petitioner's protected class has been hired to replace her in her former position. In fact, her former position is still vacant.

30. In summary, there is no preponderant, persuasive evidence to show that the Petitioner's resignation or retirement, which was a constructive termination, was based on age, race, or retaliation for engaging in earlier protected activity as envisioned in Chapter 760, Florida Statutes. There is no persuasive evidence that discrimination of the type complained of was committed by the Respondent against the Petitioner.

31. It does appear, from the facts established by the evidence in this case, that the termination decision was a harsh one. The Petitioner had a consistently favorable employment record with the College and, certainly, if any employee was entitled to a warning before the ultimate penalty was exacted by the College, given the facts of this case, she should have been so entitled. It is true that, at the time of the termination, the College administrators apparently did not know that the Petitioner's son had been using the computer at the time in question. However, in the de novo context of this proceeding, since the discrimination claim was filed, the College has become aware of the fact that, although the Petitioner used her password wrongfully to log her son onto the College computer

system and Internet, that the Petitioner herself had nothing to do with accessing the illicit websites at issue. This fact, coupled with the Petitioner's long-time good employment record with the Respondent shows, based upon the facts of record at least, that the employment decision was unduly harsh. No actionable discrimination of the type raised in this case was proven, however.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.57(1) and 120.569, Fla. Stat. (2009).

33. The Petitioner is an "aggrieved person" and the College is an "employer" as defined in Section 760.02(1), Florida Statutes (2007).[1/]

34. Pursuant to Subsection 760.10(1), Florida Statutes, it is an unlawful employment practice to discharge or otherwise discriminate against an individual upon the basis of race or age. Pursuant to Subsection 760.10(7), Florida Statutes, it is an unlawful employment practice for an employer to discriminate against a person because that person has "opposed any practice which is an unlawful employment practice" or because that person "has made a charge . . . under this subsection."

35. The Florida Civil Rights Act, Chapter 760, Florida Statutes, is patterned after Title VII of the Federal Civil

Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. Florida Courts have determined that federal decisions apply to claims arising under Chapter 760, Florida Statutes, in the same manner as they are employed in resolving claims under Title VII. Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205 (Fla. 1st DCA 1991); Florida State University v. Sondel, 685 So. 2d 923 (Fla. 1st DCA 1997); and George v. City of Leesburg, case No. 03-3144 (DOAH May 3, 2004) (applying Federal decisional law regarding age discrimination in employment, specifically the Age Discrimination in Employment Act (ADEA) 29 U.S.C. § 623 to age claims arising under the Florida Civil Rights Act).

36. The Petitioner has the ultimate burden of persuasion in a discrimination case such as this. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed. 2d 207 (1981); Earley v. Champion Int'l Corp., 907 F.2d 1077, 1081 (11th Cir. 1990). The Petitioner's burden is to establish that the employment action contested was due to discriminatory reasons and the discriminatory reasons alleged in the complaint and petition. There is no basis to second-guess a business decision of an employer, however harsh, in terminating such a Petitioner, unless there is evidence of discriminatory intent of the type alleged and which resulted in that

termination. As stated by the court in Chapman v. A1 Transport, 221 F.3d 1012, 1031 (11th Cir. 2000):

> [C]ourts do not sit as a super personnel department that re-examines an entity's business decisions. No matter how mistaken firm's managers, the (Civil Rights Act) does not interfere. Rather, our inquiry is limited as to whether the employer gave an honest explanation of its behavior (citations omitted). An employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.

AGE AND RACE CLAIM

37. The Petitioner must meet her burden of proving intentional discrimination by either direct evidence of such intent or through circumstantial evidence. Hamer v. Shoreline Transportation, Inc., Case Nos. 08-4550, 08-4574 (DOAH June 16, 2009).

38. The Petitioner presented no direct evidence of discriminatory intent in this case. Direct evidence is that evidence which would prove the existence of a fact in issue without any resort to inference or presumption. Burrell v. Board of Trustees of Georgia Military College, 125 F.3d 1393-94 (11th Cir. 1997). See also Carter v. City of Miami, 870 F.2d 578, 582 (11th Cir. 1989).

39. The Petitioner presented no direct evidence of discrimination in this proceeding and therefore circumstantial

evidence must be applied to analyze the Petitioner's claim under the McDonnell-Douglas standard of proof framework, for both her age and racial discrimination claims.

40. In order to establish a prima facie case of discriminatory discharge the Petitioner must show that (1) she was a member of a protected class; (2) she was qualified for the job from which she was discharged; (3) she was discharged; and (4) she was replaced by a person outside her protected class, meaning a person of another race or a younger employee, or that she was treated less favorably than similarly situated individuals outside her protected class. See Morris v. Emory Clinic, 402 F.3d 1076, 1082 (11th Cir. 2005).

41. If the Petitioner meets her burden of proving a prima facie case of discriminatory discharge then the burden would shift to the employer to articulate a legitimate, nondiscriminatory reason for the employment action taken in order to rebut the presumption of discrimination raised by the prima facie case. If the employer meets the burden of producing evidence that a legitimate, nondiscriminatory reason for the employment action existed, then the Petitioner must show that that proffered reason is really a pretext for unlawful discrimination and was not the true reason for the employment action. The Petitioner must also, in the context of this case, demonstrate that race or age actually did play a role in the

decision-making process. See Equal Employment Opportunity Commission v. Joe's Stone Crabs, Inc., 296 F.3d 1265, 1272 (11th Cir. 2002); Chapman v. A1 Transport, supra. A petitioner must show pretext by the employer/respondent by showing that the explanation given for the employment action is not an honest explanation. Id. (citing Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1363 n.3 (11th Cir. 1999).

42. The Petitioner herein did not establish a prima facie case for discriminatory termination. The Petitioner did not establish that she was replaced by a person outside of her protected class or was treated less favorably than a similarly-situated individual outside her protected class. In fact, the Petitioner has not been replaced in her former employment position by any person as of the time of the hearing. The Petitioner was unable to identify any "comparative" employee who was accused of the same or similar conduct and was treated more favorably than she was, whether a person of a different race or of a different age. See Silvera v. Orange County School Board, 244 F.3d 1253, 1259 (11th Cir. 2001). In order to demonstrate that she was treated less favorably than a similarly-situated individual outside her protected class, the Petitioner must show that a "comparative" employee was "similarly-situated in all aspects," meaning that the employee was involved in or accused of the same or similar conduct but was not disciplined as

harshly. See Holifield v. Reno, 115 F.3d 1555, 1562-63 (11th Cir. 1997). The Petitioner has not identified a single employee who was accused of the policy violation involved here and not treated in the same manner. In other words, all other such employees were not given any warning and were either terminated or given the option of resigning or retiring in the face of termination, just as the Petitioner was. During her testimony at final hearing, the only such individual the Petitioner was able to name was treated in the same manner as was the Petitioner. Therefore, a prima facie case of discriminatory discharge under Title VII or the ADEA, as well as under Chapter 760, Florida Statutes, has not been established. Moreover, the prima facie case fails also because the Petitioner's position is still vacant and she has not been replaced by a person outside her protected class or an employee of a different race or a younger employee.

43. Even if a prima facie case had been established the Respondent met its burden of showing a legitimate non-discriminatory reason for the Petitioner's termination. Undisputed evidence was presented by the Respondent that the Petitioner's computer was accessed with her password and that pornographic materials were viewed on that computer and the College's network. Only after the fact, during the hearing, did the Petitioner's son's role become an issue. That circumstance

still did not obviate the fact that the Petitioner, by her own admission, had allowed her password to be used, and in fact used it herself, to allow an unauthorized person, even if it was her son, to access the College's computer, network and the internet.

44. The un-refuted evidence shows that the software and monitoring protocol was used in an unbiased way on all computers on the College's network. There was no showing that the Petitioner, or the Petitioner's computer, was singled out for non-routine monitoring. On October 23, certain keywords were used or accessed that triggered the investigation by Mr. White. His investigation was a matter of routine protocol and procedure and resulted in the creation of the incident report and log of pornographic and illicit materials accessed on the Petitioner's computer and on the network. The College then took the same employment action that it had in every comparative case referenced in the evidence. At the time of the employment action, the College took the position, in apparent good faith, that no valid excuse, mistake or evidence of third party tampering had been presented which would justify absolving the Petitioner. The College took the same action it had in all such cases, as referenced above.

45. The employer's burden in articulating and advancing a legitimate, nondiscriminatory reason for taking a disputed employment action has been described as "exceedingly light."

See Meeks v. Computer Assoc. Int'l, 15 F.3d 1013, 1021 (11th Cir. 1994). There has been no persuasive proof which would show that the proffered reason for the College discharging the Petitioner was a pretext for what amounted to unlawful discrimination based on race or age, leaving aside the overly harsh result of the College's adherence to that reason.

46. In proving that an employer's asserted reasoning is merely a pretext:

> [A] plaintiff is not allowed to recast an employer's proffered nondiscriminatory reasons or substitute his business judgment for that of the employer. . . [p]rovided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason.

Chapman v. A1 Transportation, supra.

47. The Petitioner presented no persuasive evidence to show that the Respondent's stated reason for the employment action was a pretext for discrimination. The Petitioner was treated in the same manner as other white and younger and older employees who engaged in similar conduct. They were also terminated. The evidence of discriminatory animus on the basis of race or age is simply not persuasive. There is no substantial evidence that the Petitioner's interest in the DROP program had any relationship to the employment action in question and, if it did, it would not be a race or age-related

discrimination issue in any event. The evidence that somehow the College accreditation report motivated the employment decision in a discriminatory fashion is also unsupported by substantial credible evidence. There has simply been shown no relationship between either event and the employment action at issue.

48. The evidence does not establish any sort of conspiracy on the part of the College to "frame" the Petitioner or retaliate against her for past purported protected conduct. The College's monitoring and actions taken by the College concerning the illicit material being accessed with the Petitioner's computer was in accord with its published policy. The College knew that the Petitioner's user name, the computer and password had been used to access the websites in question and, without further information, acted in accordance with its past practice and its regular policy. There was no evidence which established that any discriminatory animus led to the Petitioner's discharge. There was evidence to the contrary, which showed that the Petitioner violated the policy, or at the very least, the College believed in good faith that she had violated the policy. The College enforced the zero tolerance policy without regard to race or age in three prior instances and did so again in the Petitioner's case. The Petitioner did not tell her superiors of her son's involvement.

49. The Petitioner, for the above-concluded reasons, has not established a prima facie case of discrimination on the basis of either age or race. If she had, the employer's stated non-discriminatory business reason for the employment action taken, however harsh and unfair it may appear, has not been countered by evidence showing that the reason was a pretext for what really amounted to discrimination on the basis of age, race, or retaliation.

THE RETALIATION CLAIM

50. The Petitioner must establish a prima facie case of retaliation under the McDonnell-Douglas and Burdine decisions supra. In order to do this, she must show: (1) that she was engaged in a statutorily-protected expression or conduct; (2) that an adverse employment action has occurred, directed at her; and (3) that there is a causal connection between the protected expression or activity and the adverse employment action taken against her. See Farley v. Nationwide Mutual Insurance Company, 197 F.3d 1322, 1336 (11th Cir. 1999); Rubin v. Department of Health, Case No. 08-0839, (DOAH Aug. 6, 2008). In addition to showing that the protected activity engaged in and the adverse employment action were related in some way, the Petitioner must show that the decision-maker was aware of the protected conduct engaged in by the Petitioner before the adverse employment action was taken.

51. If a prima facie case of retaliation discrimination is established, the employer then has the opportunity to articulate a legitimate, non-retaliatory reason for the employment action at issue. Stewart v. Happy Herman's Cheshire Bridge, Inc., 117 F.3d 1278 (11th Cir. 1997).

52. In order to prevail on the retaliation claim it must be shown that the employer was aware of the protected conduct or expression at the time the adverse employment action was taken. See Clover v. Total Systems Services, Inc., 176 F.3d 1346, 1354-56 (11th Cir. 1999); Sullivan v. National RR Railroad Passenger Corp., 175 F.3d 1056, 1060 (11th Cir. 1999); Brumgart v. Bell South Communication, Inc., 231 F.3d 791, 799 (11th Cir. 2000). In order to establish a causal link between the activity engaged in by the Petitioner and the employment action at issue, the decision must be shown to have been motivated by knowledge of the protected activity engaged in by the Petitioner. See Grizzle v. Travelers Health Network, Inc., 14 F.3d 261, 267 (5th Cir. 1994). If knowledge by the employer of the Petitioner's protected conduct did not have to be shown, then speculation could support a finding that a decision to terminate was causally connected to any complaints or protected activity an employee had made or engaged in. See Foster v. Solvay Pharmaceuticals, Inc., 160 F. Appx. 385, 389 (5th Cir. 2005).

53. In order to demonstrate a prima facie case of retaliation, the protected activity and the adverse employment action being disputed must have occurred in close, temporal proximity to each other. See Farley v. Nationwide Mutual Insurance Company, supra at 1337. When evaluating a charge based upon retaliation, the court or adjudicator must focus on the actual knowledge of the employer and the actions of the employer's decision-maker. Brown v. City of Opelika, 211 Fed. Appx. 862, 863-64 (11th Cir. 2006), citing Walker v. Prudential Property and Casualty Insurance Company, 286 F.3d 1270, 1274 (11th Cir. 2002).

54. The Petitioner has not established a prima facie case of retaliation. It has not been clearly established that the decision-maker herein had any knowledge of the protected conduct purported engaged in by the Petitioner back in 1997. However, regardless of whether Ms. Davis had any recollection of that conduct, there was no showing that the 1997 charge of discrimination, which was amicably settled, had any bearing on the 2007 action ten years later taken by the College against the Petitioner. There is neither any evidence that the Petitioner complained of or engaged in any protected activity since that time.

55. The Respondent produced credible, un-refuted evidence that neither Mr. White, Ms. Davis nor the College president had

any knowledge of any complaint or, in the case of Ms. Davis, even if she recalled the 1997 complaint, there is no credible evidence that she acted on it.

56. More importantly, the prima facie claim for retaliation has not been established because a requisite element has not been proven by the Petitioner. The Petitioner asserted that she filed a complaint with the Commission in 1997. She concedes that since that time she made no complaint with Ms. Davis or other supervisor related to age or race. The allegations concerning pay disparity and the Petitioner's questioning of the level of her pay from 2000 forward does not indicate any intent to voice a concern related to a protected characteristic. In other words, the Petitioner did not make any remonstrance concerning purported pay disparity based upon age or race or any other protected element of expression or conduct. Therefore, this element of the prima facie case has not been established.

57. The Petitioner's contention that she was framed by the Respondent, based upon her initial complaint in 1997, ten years later, is not credible. No persuasive evidence was presented of a causal relationship between that ten-year-old complaint and the 2007 employment action. Moreover, a ten-year gap between the protected activity or conduct and the employment action complained of shows that the two were not causally related as a

matter of law. The United States Supreme Court has cited with approval decisions in which a three-to-four-month disparity was found to be sufficient to show lack of causal connection. Clark County School District v. Breeden, 532 U.S. 268, 273; 121 S. ct. 1508; 149 L. Ed. 2d 509 (2001):

> . . . {I}f there is a substantial delay between the protected expression and the adverse action in the absence of other evidence tending to show causation, the complaint of retaliation fails as a matter of law."; Wallace v. Georgia Dept of Transp., 212 Fed.App. 799, 802 (11th Cir. 2006).

The ten-year period of time between the first purported protected activity and the alleged adverse employment action is too lengthy and renders the protected activity relied upon too remote, to establish a causal connection between the two. Thus a prima facie case of retaliation has not been established for this reason.

58. Even had Petitioner established a prima facie case, the Respondent advanced a legitimate, non-retaliatory reason for the termination. The Petitioner was dismissed because she violated the internet policy which was shown to be uniformly applied to all employees regardless of race or age. Once the Respondent employer offers a legitimate, non-discriminatory reason to explain the adverse employment action, the Petitioner must prove that the proffered reason was a pretext for what

actually amounted to discrimination based on retaliation. In the instant situation, the only evidence or testimony concerning discriminatory motives by the Respondent, in terminating the Petitioner, is based upon the Petitioner's unsupported opinion, which cannot constitute competent proof, standing alone, of discriminatory motives. Swanson v. General Services Administration, 110 F.3d 1180, 1188 (5th Cir. 1997).

59. The Respondent articulated a legitimate, nondiscriminatory reason for the employment action and the Petitioner did not offer persuasive evidence to show that there was any protected activity which was causally related to that action. The Petitioner could not demonstrate that she had engaged in protected conduct in less than a decade before the employment action at issue, or that the decision-maker was clearly aware of the conduct occurring in 1997, at the point when the 2007 employment action was taken. The Petitioner, therefore, failed to establish a causal connection between the termination and the purported protected conduct. Thus, a prima facie case was not established.

60. Moreover, even if it had been established, a legitimate, non-discriminatory reason for the termination was shown by the Respondent with no corresponding persuasive proof by the Petitioner that the legitimate reasons the Respondent purported to have for the termination were actually pretext for

discrimination or retaliation. Regardless of how harsh the result of that articulated legitimate reason for the employment action was, there was no persuasive proof that it was based upon retaliation, age or racial discrimination.

61. Accordingly, in consideration of the foregoing findings and conclusions, the Petitioner's claims concerning discriminatory discharge have not been sustained. For the reasons illustrated above, a prima facie case of discrimination based upon age or race has not been demonstrated nor has such been demonstrated with regard to the claim of retaliation. A legitimate, non-discriminatory reason for terminating the Petitioner's employment has been demonstrated by the Respondent. In the face of that reason, no persuasive evidence has been offered to show that the reason was pretextual. Therefore, the claims based upon race, age and retaliation discrimination have not been proven.

62. The articulated reason shown for the discharge based upon the employer's "zero tolerance" policy regarding illicit use of the computer, the network, and the internet was carried out in a non-discriminatory fashion. However, the result of the implementation of that policy, under the circumstances shown by the evidence in this case, was unduly harsh for an employee situated as the Petitioner, with 35 years of good service, who did not herself actually perpetrate the violative conduct, aside

from mis-using her password. Unfortunately, that circumstance, under the holding in the Chapman decision supra, although it may illustrate an employee who was terminated for a "bad reason," is without a remedy in a proceeding such as this.

RECOMMENDATION

Having considered the foregoing findings of fact, the conclusions of law, the evidence of record, the candor and demeanor of the witnesses and pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That the Petition for Relief be dismissed in its entirety.

DONE AND ENTERED this 25th day of November, 2009, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2009.

ENDNOTE

[1/] All statutory references shall be to the 2007 edition of the Florida Statutes unless otherwise noted.

COPIES FURNISHED:

Marva A. Davis, Esquire
Marva A. Davis, P.A.
121 South Madison Street
Post Office Drawer 551
Quincy, Florida 32353-0551

Robert Larkin, Esquire
Jason Vail, Esquire
Allen, Norton & Blue, P.A.
906 North Monroe Street
Tallahassee, Florida 32303

Larry Kranert, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Derick Daniel, Executive Director
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.