STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

MID-MICHIGAN COMMUNITY COLLEGE,
Public Employer - Respondent,

Case No. C11 A-015

-and-

AFT MICHIGAN, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Labor Organization - Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Martha J. Marcero, for Respondent

Law Offices of Mark H. Cousens, by Gillian H. Talwar, for Charging Party

DECISION AND ORDER

On May 16, 2012, Administrative Law Judge Julia Stern issued her Decision and Recommended Order in the above matter finding that Respondent did not violate Section 10 of the Public Employment Relations Act, 1965 PA 379, as amended, and recommending that the Commission dismiss the charges and complaint.

The Decision and Recommended Order of the Administrative Law Judge was served on the interested parties in accord with Section 16 of the Act.

The parties have had an opportunity to review the Decision and Recommended Order for a period of at least 20 days from the date of service and no exceptions have been filed by any of the parties.

ORDER

Pursuant to Section 16 of the Act, the Commission adopts the recommended order of the Administrative Law Judge as its final order.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

_____
Edward D. Callaghan, Commission Chair

_____
Nino E. Green, Commission Member

_____
Christine A. Derdarian, Commission Member

Dated: _____

STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM
EMPLOYMENT RELATIONS COMMISSION

In the Matter of:

MID-MICHIGAN COMMUNITY COLLEGE,
Public Employer-Respondent,

Case No. C11 A-015

-and-

AFT MICHIGAN, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,
Labor Organization-Charging Party.
_____/

APPEARANCES:

Thrun Law Firm, P.C., by Martha J. Marcero, for Respondent

Law Offices of Mark H. Cousens, by Gillian H. Talwar, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Lansing, Michigan on May 19 and May 20, 2011, before Administrative Law Judge Julia C. Stern of the Michigan Administrative Hearing System (MAHS) for the Michigan Employment Relations Commission. Based upon the entire record, including post-hearing briefs filed by the parties on or before August 12, 2011, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

AFT Michigan, American Federation of Teachers, AFL-CO, filed this charge against Mid-Michigan Community College on January 24, 2011 on behalf of Jason Liptow, who was discharged by Respondent from his position as an adjunct instructor on December 15, 2010. On October 21, 2010, Liptow and four other part-time adjunct faculty members met with a member of Charging Party's staff to discuss organizing Respondent's part-time adjuncts. On November 1 and 2, Liptow sent emails to adjunct faculty, and to Respondent President Carol Churchill, announcing the beginning of an organizing drive. According to Respondent, Liptow's employment was terminated because of comments he had posted on his Facebook page on December 1, 2010 about one of his students. The charge alleges that the reason given for

Liptow's discharge was a pretext, and that Liptow was discharged for his union activities in violation of §§10(1)(a) and (c) of PERA.

Findings of Fact:

Liptow's Employment as an Adjunct

Respondent's forty-three full-time faculty are represented by the Michigan Education Association, which also represents a unit of Respondent's support employees. Adjunct instructors, whose numbers fluctuate between about 200 and 225, are not represented by a union. Adjuncts are employed on an "at-will" basis and are given contracts that cover only a single semester. The adjunct contract states that adjuncts are not guaranteed continuing employment beyond one semester and that Respondent reserves the right to cancel or reassign the classes assigned to them for that semester.

Liptow began working for Respondent as an adjunct faculty member teaching computer information classes in the fall of 2007. Liptow has masters' degrees in education and in business administration. Liptow regularly taught business information systems and also taught business English, economics, and business management.

Adjunct instructors are restricted to a maximum of 29 "contact hours" for the fall and winter semesters, or about nine classes. Each semester, adjuncts submit "wish lists" indicating the classes they would like to teach the next semester. Whether they are assigned these classes, depends on administrative discretion as well as enrollment; the adjuncts have no control over what or how many classes they are assigned. However, Liptow taught a total of eight classes during the fall and winter semesters of the 2007-2008 academic year, eight during the 2008-2009 academic year, and nine during the 2009-2010 academic year. During the fall 2010 semester, after which he was discharged, Liptow taught four classes. In addition, Liptow supervised an average of one independent study student per semester. In addition to his paid work, Liptow also served without pay on advisory committees for three departments and was an unpaid faculty advisor for two student clubs.

Immediately prior to coming to work for Respondent, Liptow was a substitute teacher in the middle and high schools in two local school districts. Liptow came to Respondent with enthusiastic references from administrators at these districts. Each semester, Liptow and the students from his business information systems class gave a presentation to faculty and administrative staff. Kelli Butler, the only full-time business information systems faculty member, testified that Liptow's presentations were always very impressive. She also testified that while she frequently receives complaints from students about adjunct faculty, she never received any about Liptow. On student evaluations, Liptow was most often rated "very good."

When Gail Nunamaker was hired as Respondent's new human resources director in May 2008, Respondent was not doing formal evaluations of its adjunct faculty. However, Respondent's enrollment grew by 122% between 2000 and 2010, and its employment of adjuncts increased greatly during this period. Shortly after Nunamaker was hired, Respondent began doing classroom observations of newly hired adjunct faculty and preparing written evaluations

based on these observations. In 2009, Respondent started the process of evaluating all its existing adjuncts, working backward from those most recently hired. As indicated in an internal memo from the human resources department dated September 12, 2010, all adjuncts hired during the 2007-2008 academic year were scheduled to be evaluated during the fall 2010 semester. In accord with this schedule, an administrator conducted a classroom observation of Liptow on November 11, 2010. On December 7, 2010, a week before his termination, Liptow received a copy of the evaluation based on that observation. The evaluation praised Liptow's ability to engage his students and rated him highly in most areas. Liptow was noted as "needing improvement" in only two areas. Next to, "Is fair and consistent with all students," the evaluator criticized Liptow for referring to older students as "wiser." The evaluator also criticized Liptow for twice answering student's question by saying "I don't know," and indicated that Liptow should have told the students that he would research the topics and address their questions at the next class session.

Liptow's Union Activity

As an adjunct instructor teaching nearly the maximum number of classes he was permitted to teach, Liptow received a salary of between $14,000 and $15,000 per year. In the fall of 2010, Liptow and several other adjuncts decided to explore the possibility of organizing. On October 20, 2010, Liptow and four other adjuncts met with Jon Curtiss, a staff member for the American Federation of Teachers, to get information and advice. The group decided to try and gauge the interest of other adjuncts in a union.

On November 1, 2010, Liptow sent an email to Respondent President Carol Churchill from his Respondent email address telling her that he was "heading a group to unionize the adjunct faculty." In his email, Liptow cited the limits on the number of classes adjuncts could teach, and the lack of advance notice of their class schedules before the beginning of the semester, as reasons why the adjuncts needed a union.

Later on the same day that he sent the email to Churchill, Liptow went online to check his class schedule for the upcoming winter semester. His schedule was the same as when he had checked it the week before, i.e., he had only the three business information classes that he was more or less permanently assigned, instead of the five classes that he expected for the winter semester. The previous week Liptow had sent an email to Dave Thomas, Respondent's adjunct faculty coordinator, asking about the additional classes. Thomas had told Liptow that he was working on getting Liptow more classes. After checking his schedule on November 1, Liptow made several phone calls in an attempt to get more classes. He also came to see Thomas at his office. Thomas told Liptow that he would see what he could do. Within a few days after this meeting, Liptow had received two more classes.

Before visiting Thomas on November 1, Liptow sent him an email noting that he had taught nine classes over the winter and fall terms in the past and asking Thomas why he had lost classes to others this semester. According to an email chain made part of the record, Liptow copied several other administrators on this email, one of whom forwarded the email to Respondent's human resources director Nunamaker, with the comment, "I don't know why he sent me this." Nunamaker then forwarded Liptow's email to Churchill with the comment, "FYI … this is what is really at the root of Mr. Liptow's efforts." Nunamaker also sent Liptow a

response to his email in which she reminded him that Respondent could not guarantee that every adjunct received the number of courses and course preferences he desired. Nunamaker sent Churchill a blind copy of her response to Liptow.

On November 2, Liptow sent an email intended for other adjunct faculty from his Respondent email address. In this email, Liptow announced that that he and other adjuncts had spoken to Charging Party, were in the process of forming a union, and would be collecting signatures on union cards. The email indicated that a meeting would be scheduled in a few weeks with a union representative, and asked those interested to contact him. Liptow also included arguments for why the adjuncts should consider a union. Liptow later learned that this email had gone to administrators, including President Churchill, who taught as adjuncts, and to the administrators responsible for scheduling adjunct classes. A number of adjunct faculty used "reply all" to comment on Liptow's email. Churchill testified that she received and read Liptow's November 2 email and responses to that email expressing both prounion and antiunion views. She also testified that no one other than Liptow specifically identified him or herself as taking an active role in the organizing effort.

On November 3, Churchill sent Liptow a response to his November 1 email. She thanked him for informing her of his role and stated that her door was "always open for further dialogue about any issue affecting MMCC employees, our students, or the communities we serve."

Liptow and the original group of adjuncts met again with Charging Party representative Curtis in November. In the interim between the two meetings, Liptow received a number of responses from adjuncts to his November 2 email.

Liptow's Termination

On either December 8 or December 10, Liptow was called into a meeting with Nunamaker and Respondent dean Chris Goffnett. As dean of business and liberal arts, Goffnett was Liptow's immediate supervisor. Nunamaker told Liptow that Churchill had received an anonymous letter purporting to be from a faculty member and a student complaining that Liptow had used Facebook to insult and invite others to make fun of a student who was failing his class, to make fun of the college itself, and to mock its student body for making use of food stamps/bridge cards. The anonymous letter stated that Liptow's Facebook page, with the allegedly offensive comments, was viewable to over 1,000 of Liptow's "Facebook friends," which, according to the letter, included hundreds of past and present students and students in the same class as the student who was the subject of the Facebook posting.[1] Attached to the letter were printouts which purported to be from Liptow's Facebook page. One of the two printouts from Liptow's Facebook contained a conversation in which Liptow joked with his Facebook friends about Respondent building an "hourly motel on campus," and included a comment about student use of bridge cards. The other, a conversation about a student which took place on December 1, was as follows:

[1] Liptow testified that in December 2010 he had about 1,000 Facebook friends, that several hundred were students of Respondent, and that the Facebook page with the discussion could be accessed by all of his friends. It was not clear whether he told Nunamaker and Goffnett this at their meeting. However, as indicated below, Respondent accessed Liptow's page, including its privacy settings and list of friends, before it terminated him.

Liptow: Student emailed me to say he hasn't had a book all semester so that's why he's failing since exams are open book. I laughed and told him to use notes and powerpoints I upload but he would have to actually show up to get notes lol.

SK: Like you're going to email him back and say "ohh poor lad. I understand, here's an A" Lol. Some people . . .

AP: I would have told him to stop being dumb and buy the book 18 hours ago.

Liptow: I bet he has missed all but three classes. He is complaining about doing bad on a take home exam hahahah. He asked me when the research paper was due. There isn't one in my class. Bahahahahahahaha.

AP: I wish I knew people like that …. I would look so good.

SK: He just sobered up from a 3 month binge and went "sh---t, I forgot I'm in college…

JG: I'm with AP, but I probably would have slapped him too.

SM: Idiot.

Liptow: I asked why he hadn't brought it to my attention sooner. Another student did but he did every assignment and showed up every week so I helped him with the book issue. Communication and work ethic are the key.

Liptow: I would use the word DUMBASS. Funny part is their last exam is due tomorrow at 6 pm. They had two weeks becuz of Thanksgiving and he wanted to know if I could give him a book tomorrow bahahahahahahahahahaha.

JA: Pretty please Mr. Liptow … lol

Liptow: Lmao.

ML: Everybody wants something for nothing, and no accountability anymore. But its like they say, not everyone can be successful in school, we still need fast food employees and garbagemen to make society work.

Liptow: Definitely ML, but even those jobs might require a degree down the road if too many degreed people have to take those jobs as unemployment stays high. He might be lucky enough to join a cult.

ML: The attendance policy would rule him out of a cult… they are pretty strict from what I hear. They don't allow you to be part of the mass suicide event if you miss more than 2 meetings a cycle.

Liptow: ROFLMAO ML

TB: Shaking my head here. Mr. Liptow, I didn't even enroll this semester but can I have an A anyway???????

JG: No, TB LMAO

EH: I'm not going to college right now but can I have an A anyway.

SH: I was hoping this was someone from our class then I saw the exam was due at 6 and knew exactly who it was. Brilliant.

Liptow: Def from your class haha

SH: Haha yeah I definitely got asked to help with that but "my phone wasn't working"…. Whoops.

Liptow: Heartless.

Nunamaker showed Liptow the letter and the printouts, and Liptow confirmed that they were from his Facebook page. Nunamaker said that Respondent was taking the complaint seriously. According to Nunamaker, she told Liptow that Respondent was concerned that Liptow had written about a student using such a public forum and had essentially confirmed to another student who the initial student was. Nunamaker said that this was inappropriate behavior for an adjunct instructor. Nunamaker also testified that she asked Liptow why he had done this, and that he replied that he was frustrated and venting. Liptow and Nunamaker agree that Liptow asked about Respondent's social networking policy, and that Nunamaker admitted that Respondent had none, but said that the posting was covered by the broader policy of student confidentiality or "treatment of students." Liptow testified that there was also discussion about whether faculty should have students as Facebook friends. According to Liptow, Nunamaker insisted that they should not, and Liptow told her that this was pretty common. Nunamaker and Goffnett denied telling Liptow that he should not have students as Facebook friends. According to Nunamaker, she told Liptow that he needed to be a role model for students and to conduct himself in a professional manner on Facebook. Goffnett testified that he told Liptow that faculty on Facebook should set appropriate boundaries with students and should recognize what those boundaries are.

During the meeting, Liptow asked Nunamaker for a copy of the anonymous letter. Nunamaker refused to give him a copy. According to Nunamaker, Liptow had expressed so much dismay over the fact that one of his Facebook friends must have sent the letter that Nunamaker was afraid that Liptow would try to track down the author of the letter. Nunamaker told Liptow that they were not making any decisions about his employment status that day, but, at Liptow's urging, promised to get back to him by early the following week.

Immediately after the meeting, Nunamaker drafted a memo memorializing her impressions and sent the memo to Churchill. Nunamaker wrote that Liptow did not express any

remorse for the posting, offer an apology, or offer to take other remediation efforts. She also wrote that Liptow seemed very upset that one of his Facebook friends had apparently written the letter, and that she told Liptow that one of the problems with Facebook was that you could easily lose control over how the information was shared. Goffnett also drafted a memo which he sent to Churchill. Goffnett stated in his memo that Liptow seemed focused on the fact that the student did not come to him until the end of the semester about not having a book and did not seem remorseful about his own conduct.

On the evening of December 10, Liptow made a posting on Facebook which he titled, "To the Friend Who Betrayed Me for Nothing." The posting read as follows:

> One should rather die than be betrayed. There is no deceit in death. It delivers precisely what it has promised. Betrayal, though … betrayal is the willful slaughter of hope. To the individual who sent a copy of a post I made on FB to the President of MMCC in hopes of getting me fired, thank you for reminding me about trust. The person who sent the post stated they were a faculty member. Only my friends have access to my FB. The post concerned an issue about a student asking how he could improve his grade. I stated that he couldn't. The "Friend" made a copy of the post and sent it to the President citing how inappropriate it was and I should be fired. That may happen. I'm not sure what your intent was except to get me fired. But I know that I have done more good in the time I have taught than I have had a bad lapse in judgment. I am human and make mistakes but I treat my students like real people, hoping to inspire them so that they will be all that they can be! I will not and did not list the things I do everyday to be a good teacher. My REAL friends and students know the truth and that is all that matters. The Friends I choose to be on my Facebook are people I greatly care about and trust – a trust that you have betrayed. You will be found out. Since you didn't put a name on the envelope or sign the letter, I will trust that you surely will have the courage to speak up now. The decision on my employment will be made on Monday. Till then, may God have mercy on your soul.

After receiving some supporting comments on his Facebook page, Liptow asked his Facebook friends to email their positive comments to Churchill. In his postings that evening Liptow also stated that he believed that he was the victim of "an anti-union witch hunt." Liptow did not remove the December 1 conversation about the student from his Facebook page, and a student subsequently republished it by sharing it with his or her Facebook friends.

On December 11 or December 12, Respondent's director of distance education, Anthony Freds, forwarded a copy of Liptow's December 10 Facebook conversation to Goffnet. Freds also told Goffnett how many Facebook friends Liptow had, and that he had eight student friends from his current classes. According to Goffnett, Freds, who has information technology expertise, told Goffnett that he had found the postings himself although did not explain how he had done so. Goffnett, and a number of other people, forwarded a copy of the December 10 posting to Churchill. Over the next few days, Churchill received about twenty-five to thirty emails from students and faculty members about Liptow. Churchill testified that she was concerned about what she felt was Liptow's hostile tone toward the person who made the complaint in his

December 10 posting and also that she was displeased that Liptow had involved students in what she saw as a personnel matter.

Sometime between December 11 and December 15, Churchill, Nunamaker, Goffnett, and Respondent's vice-president for academic services, Mike Jankoviak, made a joint decision to terminate Liptow based on their conclusion that Liptow had been guilty of unprofessional conduct and had failed to appreciate the seriousness of what he had done. However, it decided to inform Liptow that he might be rehired in the future if he successfully demonstrated that he recognized the consequences of his conduct. A memo was drafted, and signed by Goffnett, that stated that Liptow would not be permitted to teach during the winter 2011 semester, but that he would be "considered for rehire in the future" if he met these contingencies:

> 1. A demonstrated understanding of what appropriate social media interaction between students and an adjunct instructor should consist of, and how it can be leveraged for classroom use in a manner which benefits students but does not breach student confidentiality or disparage student(s) in any way.
>
> 2. Recognition or, and sensitivity to, the unintended consequences for students of posting on Facebook, especially considering the recent suicides profiled in the media as being related to social media posts.
>
> 3. Explicit agreement to adhere to the policies and procedures set forth by the Board of Trustees, and all provisions outlined in the Adjunct Faculty Handbook.

The memo, dated December 14, stated that Liptow had posted derogatory information concerning a student in one of his classes and engaged in a dialogue with other students about this particular student's circumstances. It also noted that at one point Liptow had acknowledged that the subject of the conversation was in the same class as one of the participants in the dialogue. The memo stated that Liptow had violated Board Policy 306.1, which stated "The College shall provide an environment conductive to learning in which students, faculty and staff interact in a manner that creates and sustains mutual respect," and the code of ethics which is part of the adjunct faculty handbook. The memo cited two sections from the code of ethics. The first read, "In fulfilling his/her obligation to the student, the educator shall conduct professional business in such a way that he/she does not expose the student to unnecessary embarrassment or disparagement." The second stated that an educator "shall keep in confidence information that has been obtained in the course of professional service, unless disclosure serves professional purposes or is required by law."

After Liptow received the memo terminating his employment on December 15, he posted a message about the memo on his Facebook page. His Facebook friends responded with indignation and/or regret. One of these was Jamie Dinkins, who at the time was a student at Respondent with a work study job. Shortly thereafter, Dinkins' work study supervisor, Tammy Alvaro, approached Dinkins and told her that an instructor, Liptow, had been let go by the college and that there were some students commenting on his Facebook page about it. Alvaro said that she was not specifically naming Dinkins, but that "all work studies should stay out of the matter."

In support of its decision to terminate Liptow, Respondent presented testimony that many of its students, and particularly those at its Harrison campus, are students from disadvantaged backgrounds and/or from families with low educational attainment. According to the witnesses, many of Respondent's students are academically unprepared for college and have financial and personal problems that present barriers to completing their college plans. Respondent expects its instructors to be sensitive to these difficulties. Several administrators testified that they were disappointed or shocked that Liptow would criticize a student on Facebook as he did in his December 1 posting and expressed their opinion that this was unprofessional behavior on behalf of an instructor. Respondent admitted that in December 2010 it had no policies specifically addressing internet usage or the use of social media by faculty. However, its administrators testified that until the incident with Liptow, there had been no complaints about improper internet behavior by Respondent's employees. Respondent also presented testimony that Liptow had taught classes that addressed acceptable behavior online, and presented an excerpt from a textbook from a class that Liptow had taught in which the author warned that "[e]ven privacy settings [on social network sites] do not guarantee complete protection from prying eyes."

Nunamaker testified, in response to a question from me, that Respondent had received complaints about adjuncts making disparaging comments about or criticism of students within the classroom. She stated that these complaints had been routed to the dean to do follow up with the faculty member, and that she was not aware of any adjunct whose contract had not been renewed because of this type of complaints. However, the record contained nothing else about these incidents, including whether Respondent had concluded that the adjunct had in fact made the comment.

Discussion and Conclusions of Law:

The elements of a prima facie case of unlawful discrimination under PERA are, in addition to an adverse employment action: (1) union or other protected concerted activity; (2) employer knowledge of that activity; (3) anti-union animus or hostility to the employees' protected rights; and (4) suspicious timing or other evidence that the protected activity was a motivating cause of the allegedly discriminatory action. *Waterford Sch Dist*, 19 MPER 60 (2006). Where it is alleged that an employer is motivated by anti-union animus, the burden is on the party making the claim to demonstrate that protected conduct was a motivating or substantial factor in the employer's decision. *MESPA v Evart Pub Sch*, 125 Mich App 71, 74 (1983); *Southfield Pub Schs*, 25 MPER 36 (2011). It is only after a prima facie case has been established that the burden shifts to the employer to produce credible evidence of a legal motive and that the same action would have been taken even absent the protected conduct. *Wright Line, a Division of Wright Line, Inc*, 662 F2d 899 (CA 1, 1981).

Anti-union animus can be established either by direct evidence or circumstantial evidence, including evidence of suspicious timing or pretext that fairly support the inference that the employer's motive was unlawful. *City of Royal Oak*, 22 MPER 67 (2009). Although anti-union animus may be proven by indirect evidence, mere suspicion or surmise will not suffice. *City of Grand Rapids (Fire Dep't)*, 1998 MERC Lab Op 703, 707. Rather, the charging party must present substantial evidence from which a reasonable inference of discrimination may be

drawn. *Michigan Employment Relations Commission v Detroit Symphony Orchestra*, 393 Mich 116, 126 (1974).

The charge does not assert, and Charging Party does not argue in its brief, that Liptow's December 1 or December 10 Facebook postings constituted activity protected by the Act. However, Liptow's efforts to organize his fellow adjunct instructors, beginning in October 2010, were clearly protected. When it discharged Liptow in December 2010, Respondent knew, through emails sent to its administrators, that Liptow was taking an active role in organizing the adjuncts. It also knew that adjuncts had already met with a union representative, and that Liptow and others were preparing to collect signatures for a union petition.

As discussed above, direct evidence of anti-union animus is not necessary; both anti-union animus and a causal link between it and the adverse employment action may be shown by circumstantial evidence. The timing of the adverse employment action in relation to the employee's union activity is circumstantial evidence of unlawful motive, and the closer the employer's action follows upon its learning of the union activity, the stronger that evidence becomes. However, suspicious timing is not sufficient, by itself, to establish that the employee's union activity was a motivating factor in the employer's decision. *City of Detroit (Water & Sewerage Dep't)*, 1985 MERC Lab Op 777, 780; *Macomb Twp. (Fire Dep't.)*, 2002 MERC Lab Op 64, 73. There must be other circumstantial evidence which supports the conclusion that the temporal relationship was not mere coincidence.[2]

Liptow, after having worked for Respondent for more than three years, was discharged less than six weeks after he announced to Respondent that he was involved in organizing his fellow adjuncts. As indicated above, however, suspicious timing alone is not sufficient to establish a prima facie case of unlawful discrimination. As additional evidence that Liptow's union activity caused his termination, Charging Party argued that after Respondent became aware of Liptow's union activity, he had difficulty, for the first time, in getting a full complement of classes assigned to him for the next semester. It also asserted that Nunamaker and Churchill took an unusual interest in Liptow's complaints about his lack of classes. It points out that on November 11, 2010, shortly after he announced the union drive, Liptow was given his first ever formal evaluation. Then, according to Charging Party, someone decided to monitor Liptow's private Facebook page. As Charging Party points out, it is well established that, absent a legitimate justification, employers are generally prohibited from engaging in surveillance of employees' union activities. According to Charging Party, after discovering Liptow's mildly insensitive Facebook dialogue about an unidentified student, Respondent used this as a pretense to terminate him. After he was terminated, Respondent impliedly threatened its work study students with discipline if they become involved in efforts to pressure Respondent to reinstate him. This threat was, according to Charging Party, additional evidence of Respondent's anti-union animus. Charging Party maintains that the above incidents, coupled with the suspicious

[2] Charging Party's brief cites *O'Neil v Ferguson Construction Co*, 237 F2d 1248, 1253 (CA 10, 2001), a case arising under VII of the Civil Rights Act of 1964, for the proposition that a very short interval between protected activity and an adverse employment action may be sufficient, by itself, to establish causation. The Court in *Ferguson*, however, noted that the plaintiff had presented additional evidence from which a reasonable jury could find causation, and none of the other decisions cited in *Ferguson* relied solely on timing evidence. In any case, the Commission's view on this issue is clear.

timing of Liptow's discharge, is sufficient to establish a prima facie case of unlawful discrimination.

Charging Party's claim that Liptow experienced difficulty getting a full complement of classes for the first time after Respondent discovered his union activity is not supported by the record. On November 1, 2010, after sending an email to Churchill announcing that he was heading a union drive, Liptow checked his schedule of classes for the upcoming winter semester and found it unchanged from the last time he had checked about a week before. Liptow had complained the week before to adjunct faculty coordinator Dave Thomas about the lack of classes on his schedule, and on November 1 he complained again. On both occasions, Thomas told Liptow that he was working on getting him more classes. Shortly after November 1, Liptow did receive the two more classes he expected. Liptow did not testify that November 2010 was the first time he had experienced difficulty getting information about his schedule for the next semester, or even that he usually had his full complement of classes two months before the semester started. In fact, the lack of advance notice of their schedules was an ongoing source of dissatisfaction for adjunct faculty and one of the issues underlying the union campaign.

Charging Party maintains that Nunamaker and Churchill took an unusual interest in Liptow's complaints about his schedule and that this unusual interest in Liptow constitutes indirect evidence of Respondent's anti-union animus. I do not agree. Nunamaker forwarded a copy of Liptow's email complaining about his schedule to Churchill with the comment, "FYI … this is what is really at the root of Mr. Liptow's efforts." However, the email chain shows that Liptow's email was forwarded to Nunamaker by an administrator who said, "I don't know why he sent me this." There is nothing in the record to suggest that Nunamaker had asked for the document, or that Respondent had launched an investigation into Liptow or his activities. The fact that Nunamaker forwarded Liptow's email to Churchill, and her comment on it, suggests that Nunamaker and Churchill had a previous conversation about Liptow's reasons for seeking union representation. However, Churchill had just received an email from Liptow announcing that he was heading an organizing drive. The mere fact that Churchill discussed why employees might want a union with Respondent's human resources director does not raise an inference that Respondent was hostile to the organizing drive or its employees' right to organize. Nunamaker also took the time to respond to Liptow's forwarded email, and to send Churchill a copy of her response. I agree that it seems unlikely that Nunamaker would have bothered to reply to Liptow's forwarded email if Liptow had not just announced that he was heading an organizing effort. Again, however, the fact that Nunamaker might have been more sensitive to Liptow's concerns because of his announcement of the union drive does not suggest anti-union animus.

According to Charging Party, the fact that Liptow was formally observed in the classroom for the first time ten days after announcing the organizing drive is circumstantial evidence that supports its claim of unlawful motive. Again, I do not agree. The timing of that observation was fully explained in the record. Moreover, the evaluation Liptow received based on this observation was generally positive.

Charging Party asserts that Respondent gained unauthorized access to Liptow's Facebook page in order to monitor his union activities and then discovered the December 1 conversation about the student. However, Charging Party has no evidence to support this suspicion, or any

evidence to contradict Respondent's claim that it learned about the conversation through an anonymous letter. According to Goffnett's testimony, Respondent administrator Anthony Fred accessed Liptow's page after December 1 and found the December 10 posting. Freds was not one of Liptow's Facebook friends, and he may or may not have used unauthorized means to access the page. However, at that point Respondent had a justification for monitoring Liptow's Facebook page that was unrelated to his union activity, i.e. to determine how many students Facebook friends Liptow had and whether he had made other comments about students on his page.

Charging Party argues that no rational employer would have discharged a valuable employee with Liptow's experience and record for the flimsy pretextual reasons given here. The record indicates that before his discharge, Liptow was a well-regarded adjunct instructor. However, on his Facebook page, Liptow made comments critical of one of his students, including referring to the student as a "dumbass." He also encouraged others, including persons he knew were also students, to mock the student's conduct. The comments were hurtful enough that the student would surely have been offended had he seen them. Although the Facebook conversation involved only a half dozen people, it was accessible to all of Liptow's 1,000 Facebook friends, as Liptow well knew, and could have been copied and distributed by any of them. Moreover, Liptow's reacted defensively when confronted by Respondent about the posting. In December 2010, Respondent had no policy on the use of social media by its employees, and there was no evidence that it had ever dealt with any similar conduct by a faculty member or other employee. In the absence of evidence that anti-union motive played any part in its decision, Respondent has no burden to show that it would have discharged Liptow even in the absence of his union activities. Charging Party argues that discharge was a disproportionate response to Liptow's offense. However, I am unable to conclude that Liptow's misconduct was so trivial, or Respondent's decision to terminate him for this conduct so unreasonable or irrational, that it Liptow's union activities must caused his termination.

Finally, Charging Party argues that supervisor Tammy Alvaro's directive to Respondent's work study students to "stay out of the matter" of Liptow's termination was evidence of Respondent's anti-union animus. This incident, however, does not indicate that Respondent or its supervisors were hostile toward Liptow's organizing activities.[3]

I find that Charging Party has not met its burden of showing that there was a causal connection between Liptow's union activities and his termination on December 15, 2010. I conclude, therefore, that the charge must be dismissed, and I recommend that the Commission issue the following order.

[3] I note that the charge did not allege, and Charging Party does not argue, that Alvaro's statement constituted unlawful interference with the student employees' exercise of their Section 9 rights or that Liptow was terminated because he urged other employees, including students, to rally in his support.

RECOMMENDED ORDER

The charge is dismissed in its entirety.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Julia C. Stern
Administrative Law Judge
Michigan Administrative Hearing System

Dated: _____