

April 7, 2023

VIA ELECTRONIC FILING roc.syr@dhr.ny.gov

Ms. Julia B. Day
Regional Director
New York State Division of Human Rights
One Monroe Square
259 Monroe Avenue, Suite 308
Rochester, New York 14607

Re: *Maynard D. Baker, Jr. v. Allegany County, Case No. 10223724*

Dear Ms. Kent:

This position statement¹ is submitted on behalf of Respondent Allegany County² (“Respondent,” “Allegany County,” or the “County”) in response to the above-referenced Complaint of age discrimination and retaliation (“Complaint”) filed by Complainant Maynard D. Baker, Jr. (“Mr. Baker” or “Complainant”). Allegany County denies that Mr. Baker has been subjected to any form of unlawful discrimination or retaliation. As discussed more fully below, Mr. Baker’s Complaint—all of which alleges time-barred, nondiscriminatory conduct—is wholly without merit and should be dismissed in its entirety for lack of probable cause.

I. INTRODUCTION

Mr. Baker, one of the elected Coroners for Allegany County, has complained for years about the distribution of assignments among the four County Coroners. Now, for the

¹ This position statement is intended to be Respondent’s response to the allegations raised in the above-referenced Complaint. This position statement is not intended to be an exhaustive treatment of any and all evidence that may be available to Respondent at the time this position statement was prepared, and it should not be interpreted to signify that Respondent has completed all investigations it may wish to pursue in this matter. Further, this position statement is not intended to raise all legal theories and/or defenses that ultimately may be raised by Respondent in this matter. This position statement is based on Respondent’s understanding of the allegations set forth in the Complaint to the best of its knowledge and recollection as of the date of this document..

² Complainant identified both the “Allegany County Government” and the “Allegany County Legislative Board” as respondents. Neither is an genuine, legal entity. The actual legal entity here is Allegany County, which encompasses the County government and legislature. This is being filed on the County’s behalf.

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very first time, he couches his complaint in terms of alleged age discrimination and retaliation. This newfound theory is not only contrived, but lacking in evidentiary support and fraught with legal defects. It cannot survive scrutiny.

As an initial matter, Mr. Baker's Complaint is untimely. The New York Human Rights Law ("NYHRL") requires employees seeking to pursue discrimination and retaliation claims to file their complaints with the Division "within one year of the alleged unlawful discrimination practice." N.Y. Exec. L. § 297(5). Any alleged conduct that occurred more than one year before Mr. Baker filed the present Complaint is therefore time-barred and cannot be considered. In the first sentence of Section 9 of the Complaint, Mr. Baker explicitly admits: "This situation is an ongoing problem which I have been requesting for three years to be remediated." (Complaint, § 9) (emphasis added). As reflected by this admission, any cause of action that Mr. Baker seeks to assert here accrued at least three years ago. His allegations, therefore, fall outside of the applicable one-year statute of limitations.

Even beyond the timeliness issue, Mr. Baker's Complaint fails because the underlying allegations have nothing to do with unlawful discrimination. This is reflected by Mr. Baker's own approach to the issue. Indeed, throughout the last three years during which Mr. Baker has raised issues regarding the distribution of assignments, he has consistently conveyed his complaints in terms of "unfairness in the distribution of coroner calls" and "ethical violations"—not discrimination or retaliation. Throughout the many exchanges and meetings in the last three years, Mr. Baker has never complained to any Allegany County official that he was being subjected to age discrimination or retaliation.

As explained in further detail below, there is a glaring absence of evidence that Mr. Baker was discriminated against based on his age or that Allegany County retaliated against him. The distribution of work among the Coroners is explained by a number of factors, most prominently among them the geographic location of each Coroner and the preferences of private citizens and institutions who seek out assistance from those Coroners who have developed reputations for responsiveness. Moreover, given that a former Coroner who is older used to receive more referrals than the other Coroners, it is abundantly clear that age has no impact on this dynamic.

In the end, Mr. Baker's Complaint amounts to nothing more than Mr. Baker airing years' worth of personal grievances that he has with the current and former coroners. His Complaint is one of personal gripes, not discrimination or retaliation. It is wholly without merit and should be dismissed in its entirety.

II. STATEMENT OF FACTS

a. Allegany County

Allegany County is committed to equal opportunity in employment and does not discriminate on the basis of age, sex, or any other protected characteristics. Allegany County's Equal Employment Opportunity Policy Statement provides in relevant part:

It is the policy of Allegany County not to discriminate against any applicant for employment, or any employee because of **age**, color, sex, disability, national origin, race, religion, or veteran status. . . . Allegany County will take affirmative action to ensure that the EEO Policy is implemented, with particular regard to: . . . working conditions.

A copy of Allegany County's Equal Employment Opportunity Policy Statement is attached as Exhibit A. In addition, Allegany County also maintains a separate Title VI Nondiscrimination Policy Statement, which further demonstrates its commitment to maintain a work-environment free of such unlawful conduct by strictly prohibiting discrimination in the workplace. Specifically, Allegany County's Title VI Nondiscrimination Policy Statement provides in relevant part:

It is the policy of Allegany County that no person shall on the grounds of race, color, national origin, age, disability, sex, income or English proficiency as provides by Title VI of the Civil Rights Act of 1964, the Civil Rights Restoration Act of 1987, Age Discrimination Act of 1975, . . . be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance. Additionally, every effort will be made to ensure nondiscrimination in all of Allegany County programs and activities, whether those programs and activities are federally funded or not.

A copy of Allegany County's Title VI Nondiscrimination Policy Statement is attached as Exhibit B.

b. Allegany County Coroners

Allegany County has four publicly elected Coroners who serve the County. The current Allegany County Coroners, in addition to Mr. Baker, are Mark Rinker, L. Herbert

Williams, and Dylan Foust. Each Coroner is of equal status and receives compensation on a per diem basis.

Mr. Baker was born on July 14, 1960. He was elected as an Allegany County Coroner in November 2007 and began serving his first term in January 2008. Mr. Baker owns a funeral home business and resides in Andover. Mr. Rinker was born in 1979 and owns a funeral home business in Cuba. Mr. Williams was born in 1937 and owns a funeral home business in Fillmore. Mr. Foust was born in 1997 and currently owns a funeral home business in Wellsville.

Before Mr. Foust was elected, he worked as an associate for Ted Crowell, who was also an Allegany County Coroner. Mr. Crowell was elected for his first term as Allegany County Coroner in November 1981 and retired at the end of 2019. Mr. Crowell was in his eighties when he retired. At the time of Mr. Crowell's retirement, Mr. Foust purchased Mr. Crowell's well-respected funeral home business in Wellsville and successfully ran for Mr. Crowell's County Coroner position.

Around that same time, Mr. Baker, who was primarily located in Andover and operated a funeral home there, also purchased a funeral home in Wellsville.

c. Coroner Call Distribution

Many if not most of the referrals for County Coroners are made by private citizens and institutions (e.g., hospitals), as well as other entities such as the Wellsville Police Department that are not affiliated with the County. In these circumstances, the County has no control over which Coroner is contacted. Instead, the person or entity seeking assistance typically contacts the Coroner with whom they are most familiar and, as is often the case, works and resides in a nearby area. Similarly, the State Police often reach out to a County Coroner directly. The County has no control over whom the State Police choose to contact. Historically, as one might expect, the State Police have tended to favor those Coroners whom they believe to be most responsive.

Other referrals to Coroners are processed through the Allegany County 911 call center. When a referral for a County Coroner comes into the 911 call center, one of the four Coroners is then called. Generally, the 911 call center refers matters to the Coroner who is geographically closest to the case.

As mentioned, assignments to County Coroners are largely influenced the geographic location that is at issue. Specifically, Mr. Rinker has responded mostly to calls in the western region of the County; Mr. Williams has responded mostly to calls in the northern region of the County; Mr. Baker has responded to calls nearby Andover and the eastern region of the County; and Mr. Crowell responded to most calls in the southern region of

the county. Like Mr. Crowell before him, Mr. Foust receives a considerable amount of the calls from the southern region of the county.

The chart below shows the number of assignments each Coroners has received annually since 2019:

	2019 Statistics	2020 Statistics	2021 Statistics	2022 Statistics
Rinker	11.3% (12/106)	15.4% (19/123)	13.9% (20/144)	10.6% (15/142)
Baker	29.2% (31/106)	18.7% (23/123)	22.9% (33/144)	17.6% (25/142)
Crowell	54.7% (58/106)	-----	-----	-----
Foust	-----	56.9% (70/123)	55.5% (80/144)	62.7% (89/142)
Williams	4.7% (5/106)	8.9% (11/123)	7.6% (11/144)	9.1% (13/142)

As evidenced by these statistics, Mr. Crowell -- the oldest Coroner at the time -- handled the majority of the County Coroner calls in 2019 – 54%. In fact, this was true for a number of years even prior to 2019. This was largely due to Mr. Crowell’s well-known reputation for being responsive. Messrs. Williams and Rinker received a lower percentage of Allegany County Coroner calls before and after Mr. Crowell retired. This is because these two Coroners were primarily interested in restricting their work to their respective regions of the County. A copy of the Annual Coroner’s Reports are attached as Exhibit C.

As previously mentioned, when a referral to a County Coroner is needed, the New York State Police tend to call the most responsive coroner in the nearby geographic area. Similarly, medical professionals, investigators, and law enforcement personnel who work with the County Coroners on a frequent basis developed preferences for certain Coroners, like Mr. Crowell and Mr. Foust, because of their responsiveness. As evidenced by annual statistics referenced above, Mr. Crowell historically received the majority of calls from the Wellsville Police Department and Jones Memorial Hospital because he was typically the quickest to respond to a coroner call referral.

The same is true of Mr. Foust. In a telling sign of the absence of age discrimination, Mr. Foust, who took over Mr. Crowell’s Coroner position and who purchased Mr. Crowell’s Wellsville funeral home, continued to get approximately the same percentage of Coroner assignments as Mr. Crowell did. Mr. Foust established a reputation, similar to Mr. Crowell’s, for responsiveness. This reputation has obviously redounded to his benefit.

d. Mr. Baker's Complaints Never Allege Age Discrimination or Retaliation

Mr. Baker's claim of age discrimination defies logic and common sense when one considers: (1) the many previous complaints Mr. Baker made that did not once allege age discrimination; and (2) past statistics from coroner annual reports, which demonstrate a pattern based on geography and responsiveness, not age. As referenced previously, Mr. Foust is in his mid-to-late twenties, and his predecessor, Mr. Crowell, was in his eighties when he retired. They both enjoyed the approximately the same share of calls for Coroners. Age did not and does not impact the amount of calls an Allegany Coroner receives in a year.

Tellingly, the entirety of Mr. Baker's Division of Human Rights Complaint (and his documented history of complaints) is focused not on age discrimination, but on his contention that he feels that his lesser experienced colleague has not "earned" nor is deserving of the amount of coroner referral calls he receives. Plainly stated, his issue seems to be one of jealousy and entitlement—not discrimination or retaliation.

A brief history of the complaints Mr. Baker submitted to the County underscores this point:

i. August 2020 letter

In Mr. Baker's August 2020 letter addressed to the Allegany County District Attorney's Office, he explicitly stated that the purpose of his letter was to address his concern that Mr. Foust was "abusing his authority as an elected county official for personal gain." A copy of the August 2020 letter is attached as Exhibit D. He alleged absolutely nothing about discrimination or retaliation.

The District Attorney's Office investigated the matter and determined no criminal conduct of any type had taken place. Accordingly, there was no reason for the District Attorney's Office to take any action.³

ii. March 6, 2022 "Complaint Letter" & Meeting Transcript

Mr. Baker labeled his March 6, 2022 letter to the County as his "Complaint Letter." In this letter, Mr. Baker describes a conversation that he had recently had with Wellsville Chief of Police, Tim O'Grady, in which Mr. Baker asked why he does not receive many

³ Around this same time, former Allegany County District Attorney Investigator, Scott Circirello (the current Allegany County Sheriff who conducted the investigation at the District Attorney's Office), learned that Mr. Baker had been sitting in the parking lot across from Mr. Foust's private funeral home business and watching him with binoculars.

coroner calls within the Village of Wellsville. Again, Mr. Baker made no allegations pertaining to discrimination or harassment.

For his part, the Police Chief, according to Mr. Baker himself, stated that the calls to Mr. Foust (and Mr. Crowell before him) were done out of habit. Of course, whether out of habit or whether motivated by Mr. Foust's responsiveness, the calls had nothing to do with age and were not controlled by the County in any event. A copy of the March 2022 letter is attached as Exhibit E.

iii. February 12, 2023 Letter to Allegany County Personnel Officer

In this letter, Mr. Baker identifies "two very serious issues that [he has] been trying to bring to light for a long time:" (1) inequity in coroner call distribution; and (2) Mr. Foust utilizing his position to steer funeral work to his personal funeral business. A copy of this letter is attached as Exhibit F. Mr. Baker stated that he was raising the issues because he felt personally responsible as an elected government official to "effect change." Id. Notably, however, neither discrimination nor retaliation was among the things he was seeking to change. Mr. Baker once again failed to attribute any of the alleged conduct to conduct that would implicate the Human Rights Law.

e. Mr. Baker Files a Complaint with the Division

Throughout these last three years, Allegany County has been in frequent contact with Mr. Baker to discuss the Coroner call distribution process—a process dictated by statute. As it stands, and as discussed with Mr. Baker, the County currently lacks authority to ensure that private entities or individuals utilize the 911 call center. They can call the Coroner of their choice directly.

On March 7, 2023, Mr. Baker filed this Complaint with the Division accusing Allegany County of age discrimination and unlawful retaliation.

III. DISCUSSION

a. Mr. Baker's Claims Are Time-Barred

As a threshold matter, the Complaint is barred by the applicable one-year statute of limitations. N.Y. Executive Law § 297.5 ("Any complaint filed pursuant to this section must be filed within one year after the alleged unlawful discriminatory practice."). The circumstances that led to Mr. Baker's complaint have existed for years. As such, if any cause of action accrued, it did so much more than one year ago.

This is confirmed by Mr. Baker's own complaints, which date back at least three years. Indeed, he brought the complaints alleged in his Complaint to the attention of Allegany

County as early as 2020. Over the course of the past three years, Mr. Baker has remained adamant about two things: (1) that there is an operational issue resulting in unfair coroner call distribution; and (2) that Mr. Foust is abusing his role for personal gain. Yet, now, for the first time, Mr. Baker raises couches these same complaints in terms of discrimination and retaliation. Even if these complaints had merit --- which they do not – they are untimely and therefore barred by the one-year limitations period.

b. There Is No Legal or Factual Support for Mr. Baker’s Discrimination Claim

In order to establish a *prima facie* claim of age discrimination, a complainant must establish that: (1) he is a member of a protected class; (2) he was qualified for his position; (3) he suffered an adverse employment action; and (4) the adverse employment action occurred under circumstances giving rise to an inference of discriminatory intent. See Woodman v. WWOR-TV, Inc., 411 F.3d 69, 76 (2d Cir. 2005); Castro v. Mitchell, 2011 WL 10901797, *3 (S.D.N.Y. Aug. 25, 2011). And even if one can establish a *prima facie* case, a complainant still bears the ultimate burden of proving that he was treated differently because of his age. As the courts have repeatedly observed, the “ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” Fisher v. Vassar College, 114 F.3d 332, 1335 (2d Cir. 1997).

Here, Mr. Baker cannot possibly show that he was discriminated against on the basis of his age because he is unable to demonstrate that an adverse employment action occurred under circumstances giving rise to an inference of discrimination. All of the surrounding circumstances clearly establish that age was not a factor in the assignment of cases to Coroners. Furthermore, Mr. Baker’s own complaints through the years, none of which refer to age discrimination, belie his newly conceived theory of discrimination.

Ultimately, Mr. Baker ignores all of the evidence and surrounding circumstances and hopes to predicate a discrimination claim upon nothing more than the fact that Mr. Foust is younger than he is. But, of course, that alone falls legions short of establishing a viable discrimination claim. See Waldorf v. Liberty Maint., Inc., No. 05-CV-2557, 2007 WL 942103, at *9 (S.D.N.Y. Mar. 29, 2007) (“allegations of replacement by younger workers do not, without more, prove discrimination”). It also disregards the fact that, prior to Mr. Foust, Mr. Crowell, an older Coroner, received most of the assignments. Mr. Baker is ultimately unable to escape the fact that his claim is fundamentally flawed and lacking a scintilla of evidentiary support.

c. Mr. Baker’s Claim for Retaliation is Without Merit and Must Be Dismissed

Mr. Baker’s allegations of retaliation are equally deficient. To establish a *prima facie* claim of retaliation, a complainant must demonstrate that: (1) he engaged in protected

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activity; (2) the employer was aware of the activity; (3) he suffered a materially adverse action; and (4) there was a causal connection between the protected activity and the adverse action. Bader v. Special Metals Corp., 985 F. Supp.2d 291, 318 (N.D.N.Y. 2013).

Here, Mr. Baker's retaliation claim fails as an initial matter because he did not engage in protected activity. Under well-established law, for an employee's complaint to be considered "protected activity" under NYSHRL, the employee's complaint must actually relate to an alleged violation of the law—i.e., discrimination or retaliation that is actually prohibited by the NYSHRL—as opposed to being a generalized workplace complaint. See e.g., N.Y. Exec. L. § 296(7); Suriel v. Dominican Repub. Educ. & Mentoring Project, Inc., 85 A.D.3d 1464, 1467 (3d Dep't 2011). Yet, as discussed previously, none of Mr. Baker's complaints over the last three years has related to an alleged violation of the Human Rights Law. His complaints have related to jealousy, contrived ethics allegations, and individualized financial gain, not employment discrimination or retaliation.

Even if Mr. Baker had engaged in protected activity, his retaliation claim would still not pass muster. As described earlier, Allegany County's treatment of Mr. Baker was guided at all times by legitimate, non-discriminatory concerns having nothing to do with age or any complaint that he asserted. For this reason, Mr. Baker cannot possibly demonstrate that he would have been treated differently "but for" some protected activity. As with his other claim, Mr. Baker's retaliation claim is fatally deficient and must be dismissed in its entirety.

III. CONCLUSION

For the reasons set forth above, Mr. Baker's Complaint is entirely without merit and should be dismissed in its entirety for lack of probable cause. If you have any questions or would like any additional information, please do not hesitate to contact me.

Very truly yours,

BOND, SCHOENECK & KING, PLLC



James J. Rooney, Esq.

JJR/
Enclosures