



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, DC 20507

Marion County Coroner's Office
Appellant,

v.

John Linehan,
Respondent.

Appeal No. 1120080001

EEOC Charge No. 470-2006-00980

HUDALJ No. 07-020-NA

DECISION

Appellant filed a timely appeal from the November 23, 2007 decision of a U.S. Administrative Law Judge ("ALJ") finding that appellant discriminated against respondent in violation of the Government Employee Rights Act ("GERA"), 42 U.S.C. § 2000e-16a *et seq.* The Equal Employment Opportunity Commission ("EEOC") accepts the appeal in accordance with EEOC Regulation 29 C.F.R. § 1603.101 *et seq.*

BACKGROUND

The record reflects that on January 1, 1999, respondent (Caucasian) was hired as a full-time Deputy Coroner for the Marion County Coroner's Office ("Coroner's Office") in Indiana. Deputy Coroners, both full and part-time, perform duties related to Coroner's Office functions that include, but are not limited to, responding to and investigating the scene of a death or imminent death; observing autopsies; collecting evidence; interviewing witnesses; doing runs for forensic pathologists; working routine "office time;" writing reports; following developed case protocols; and maintaining Coroner's Office vehicles to official standards. Deputy Coroners are not exempt employees and must submit timecards reflecting their work hours.

Deputy Coroners report directly to the Chief Deputy Coroner. The Coroner position is a part-time position, and, as a result, the Chief Deputy Coroner is responsible for managing the day-to-day operations of the Coroner's Office, such as reviewing reports; handling death certificates; coordinating death investigations; supervising and disciplining employees; determining work schedules; creating and enforcing Coroner's Office policies; conducting employee evaluations; preparing and carrying out the Coroner's Office budget; and other similar activities. However, the Chief Deputy Coroner works with the Coroner in making hiring and firing decisions.

At the time he was hired, respondent had nearly thirty years of experience as a paramedic and four years of experience as a temporary Deputy Coroner. The former Coroner allowed respondent to work on a part-time basis as a paramedic on his days off, and respondent annually submitted a written disclosure regarding his outside employment to the county.

In April 2004, the Chief Deputy Coroner went on maternity leave, and the former Coroner appointed respondent as Interim Chief Deputy Coroner. While serving as Interim Chief Deputy Coroner, respondent performed all the duties of the Chief Deputy Coroner, including managing the day-to-day affairs of the office and preparing the Coroner's Office's 2005 budget. Respondent's proposed 2005 budget provided for staff raises, including the Chief Deputy Coroner position. After the former Coroner reviewed and approved the salary increases, respondent presented the budget to the City-County Council and worked with the County Auditor's Office to obtain raises for each position in the office. The Chief Deputy Coroner's annual salary was increased from \$55,000 to \$62,400.

In November 2004, a new Coroner (African-American), the responding management official ("RMO"), was elected. Once RMO was elected, but prior to his assumption of duties, a Deputy Coroner ("DC1") (African-American), approached RMO and indicated her interest in being appointed as the Chief Deputy Coroner. After speaking with several interested candidates for the position, RMO appointed respondent to the Chief Deputy Coroner position because respondent had already been serving in the position on an interim basis, and he wanted to maintain continuity in the office. RMO was sworn in as the Marion County Coroner on January 1, 2005. Respondent was re-sworn in as a Deputy Coroner by RMO, and, on January 1, 2005, respondent was sworn in as Chief Deputy Coroner.

Soon after his appointment, respondent met with RMO to discuss his agenda. RMO notified respondent that he wanted his employees to abide by an "open door" policy. RMO also informed respondent that he wanted to find a way to hire more African-American employees. RMO asked respondent to determine how new African-American deputies could be appointed and indicated to respondent that he had run background checks and police record searches of the current employees. Respondent contacted the Office of Corporation Counsel and was informed that he could not fire employees without cause. Despite this fact, a former member of RMO's campaign committee regularly sent respondent resumes of African-American candidates, and RMO asked respondent to hire two African-American friends.

In February 2005, the Office Manager (African-American) informed RMO that a salary increase had been approved for the Chief Deputy Coroner position in 2005. RMO testified at the hearing that he had not been previously informed about the raise. Respondent testified that RMO had spoken with him and approved of the raise.

In March 2005, respondent recommended the termination of one of the Deputy Coroners ("DC2") (Caucasian) who had been disciplined by the previous Chief Deputy Coroner for incidents in which he exercised poor judgment. DC2 had recently been suspended for failing to follow established procedures for handling evidence in Coroner's cases, and he had left drugs

from a scene in his car. DC2 also threw away documents from a decedent's body, that were critical pieces of evidence in a case involving the FBI, in his office trash can. Respondent indicated that DC2 also violated Coroner's Office procedures by throwing documents stained with bodily fluids from the decedent in the regular trash. Respondent testified that RMO concurred with his decision. DC2 resigned to avoid termination.

In April 2005, DC1 approached respondent and RMO to propose that they create, and promote her into, a new Assistant Chief Deputy Coroner position. RMO decided not to create the new position because there was no authorization or funding for such a position.

In June or July 2005, respondent informed RMO that he wanted to issue DC1 discipline for multiple performance issues. Respondent indicated that office policy required Deputy Coroners to respond to the scene of an imminent death within thirty minutes after receiving a call notifying them of the case. However, on one occasion DC1 had taken one hour and fifteen minutes to arrive at a scene where an individual was lying dead in the street with family and friends gathering around the body. On another occasion, DC1 did not arrive at a hospital where a child was dying and the family wished to donate the child's organs until two hours after she had received the call. By the time DC1 arrived, the child had died, and the organs could no longer be used. Respondent indicated that he had been in contact with DC1 several times during the two hour delay, during which she repeatedly indicated that she was almost at the hospital. DC1 informed respondent that she was delayed because of car trouble, but she declined his offer to send another Deputy Coroner because she was "right there." Both cases occurred on days when DC1 was on call and required to be available for duty.¹ Respondent indicated that he did not normally submit proposed disciplinary actions to RMO for approval, but he did so in this case to avoid the appearance of bias because DC1 had applied for the Chief Deputy Coroner position. RMO did not approve the disciplinary action and instructed respondent not to discipline DC1. RMO did not explain his decision to respondent.

On August 12, 2005, DC1 wrote RMO an e-mail alleging that she had been intentionally excluded from the Coroner's Office's eight-week long orientation training program for new Deputies. DC1 stated that respondent had not provided her with an itinerary for the training or information about a class she was supposed to teach during the program. DC1 alleged that respondent had purposely excluded-African American employees at the Coroner's Office from participating in the training program. However, respondent stated that he had informed all of his deputies of the dates for the training by e-mail and had posted the itinerary on a board outside of DC1's office. Respondent also sent an e-mail to the deputies the day of the first training session. DC1 did not attend any of the training sessions. Respondent taught DC1's class when she did not arrive for her course. The record reflects that one of the African-American Deputy Coroners attended the training and was introduced to the new trainees along with the other deputies.²

¹ Full time Deputy Coroners work 24-hour shifts, beginning at 7 a.m., and are on call at any time during their designated shifts.

² DC1 testified that she contacted the EEOC regarding her claim but never filed a formal charge.

On August 26, 2005, respondent conducted a mandatory staff meeting. The staff had been previously informed by notice about the meeting, and each staff member, including DC1, was required to sign a form acknowledging receipt of the notice. The morning of the meeting DC1 called respondent to inform him that she would be late for the meeting. DC1 arrived thirty minutes late and was the only employee who arrived late. The Office Manager later informed respondent that DC1 had filled out her time sheet to indicate that she had arrived on time and worked a full eight hours. Respondent, with assistance from an employee at the County Human Resources Office, subsequently prepared a written reprimand for DC1 for falsification of her time sheet. However, RMO directed respondent not to issue the reprimand without explanation.

On October 21, 2005, respondent, with assistance from an employee at the human resources office, prepared a reprimand for DC1 for tardiness. The reprimand noted that DC1 had been late to morning report on four occasions in October; more than one hour late reporting to a homicide crime scene on October 6, 2005; more than one hour late reporting to a hospital on August 10, 2005; and thirty minutes late for the August 26, 2005 meeting. There is no evidence that RMO was informed of the October 21, 2005 reprimand prior to its issuance.

Shortly after DC1 was issued the reprimand, an "anonymous" letter was sent to members of the City-County Council accusing respondent of "double dipping" and "ghost employment" because of his work as a paramedic in addition to his duties as Chief Deputy Coroner. On November 1, 2005, respondent responded to the allegations in writing, including his time and pay records from the hospital where he worked as a paramedic, which showed the occasions in 2005 when he had performed paramedic training and duties. RMO was aware during the relevant time period that respondent worked part time as a paramedic at the hospital, and that he had recently been participating in training events to maintain his paramedic certification, because respondent had kept RMO informed about his activities. DC1 later admitted to authoring the letter.

In late October or early November 2005, the Coroner's Office discovered that \$3,000 was missing from a property locker. Respondent contacted the Office of Corporation Counsel and was directed to immediately file a police report. When he was informed about the missing property, RMO directed respondent not to file the police report. Respondent ultimately filed the report at the urging of an official from the Office of Corporation Counsel. Respondent worked with a police officer during the investigation of the situation.

Soon after the police report was filed, respondent discovered that other property was missing from the office. Respondent found the missing property, along with approximately \$7,000 in cash missing from the safe, in a janitor's (race unknown) closet. Respondent reported this discovery to RMO who indicated that he would handle the situation and forbade respondent from contacting the police again. RMO indicated at the hearing that the janitor had accused respondent of "talking harsh to him," and RMO ordered the janitor to report directly to him rather than respondent. There is no evidence in the record addressing whether RMO investigated the theft allegations against the janitor or took any disciplinary action against him.

On November 11, 2005, DC1 did not attend a mandatory morning report. When respondent confronted DC1 about her absence, she walked away from his office and returned with another Deputy Coroner (Caucasian). DC1 had the other Deputy Coroner stand outside the office while DC1 began yelling at respondent, calling him names, and threatening him. DC1 informed respondent that she had received permission to miss the morning report from RMO, and she demanded that respondent call RMO. Respondent was unable to reach RMO by phone at that time. After DC1 left respondent's office, she contacted RMO to inform him about what had transpired. RMO then phoned respondent and told him that he was no longer allowed to discipline DC1 without RMO's permission.

On Monday November 14, 2005, respondent went to the Human Resources Office with the intention of filing a formal charge of discrimination. An official accepted respondent's written complaint and informed him that RMO would be contacted regarding his complaint. The official also indicated to respondent that someone would be in contact with him. Respondent provided the official with his written complaint and supporting documentation. Later that day, RMO met with respondent, with the Office Manager present as a witness. RMO informed respondent that he was going to be making a change and that respondent was going to be removed from the position of Chief Deputy Coroner. RMO did not provide respondent with an explanation or reason for his removal. Respondent alleged that he saw a copy of his discrimination complaint on RMO's desk and that RMO held up the document several times stating that respondent had to "get it taken care of." RMO also informed respondent that he wanted a smooth transition to the next Chief Deputy Coroner, and respondent was to continue performing his duties until the transition occurred. However, RMO removed oversight of employees from respondent's responsibilities. Respondent understood RMO's orders to indicate that he would remain a Deputy Coroner once he was no longer performing the duties of the Chief Deputy Coroner.

On November 16, 2005, respondent met with two officials in the Human Resources Office to discuss his discrimination complaint. He was informed by both officials that the office would continue processing his complaint and that RMO would be informed about the complaint.

Later that week, a mandatory staff meeting was held. At the meeting, the staff was informed that respondent would no longer be Chief Deputy Coroner. The staff was further informed that they should consult one of the Deputy Coroners ("DC3") (Caucasian), regarding any questions on runs and DC1 about death certificates. RMO testified that DC3 was appointed Interim Chief Deputy Coroner because he had the longest tenure with the office.

On November 18, 2005, respondent left for a previously scheduled vacation overseas. When he was about to depart for his trip, respondent received a phone call from a reporter requesting a statement regarding the allegation that he was being investigated for "ghost" employment. Respondent then contacted the Office of Corporation Counsel to determine if he was being investigated regarding the allegations, and he was assured that they were unaware of any investigation. While respondent was on vacation, the local media published a news story on respondent and the rumored investigation into the allegations of ghost employment.

On November 28, 2005, respondent returned to work and discussed the allegations of ghost employment with RMO. Respondent informed RMO of his disappointment and shock that RMO had told the media that there was an investigation into respondent's conduct when, to his knowledge, no investigation was being undertaken. Later that day, however, an investigator for the County prosecutor called respondent asking if he could discuss the allegations and stating that he had been contacted by someone at the Office of Corporation Counsel regarding the matter. Respondent subsequently met with the investigator for several hours and went over documents with him, including his time sheets from both of his places of employment. RMO testified that sometime that week he and respondent met with a Democratic Party member to discuss RMO's decision to relieve respondent of his duties and the pending investigation.

During the last week of November 2005, respondent discovered documents in his office that DC1 had left on his desk, including a list of tasks DC1 intended to undertake as Chief Deputy Coroner. The list indicated that she planned on making DC3 a senior deputy or investigator and noted that that she needed to change all passwords/access for respondent. DC1's notes also included a plan to review the Coroner's Office pathology contract and a copy of the anonymous letter sent to the City-County Council accusing respondent of ghost employment.

On December 2, 2005, RMO signed and sent respondent a notice of termination, effective immediately. The letter stated that respondent was being terminated as Chief Deputy Coroner but contained no reasons for his termination. The letter did not address whether respondent was being terminated from employment with the Coroner's Office, but all parties involved treated the letter as a complete termination from employment.

On December 5, 2005, respondent requested a formal review of his termination. On December 9, 2005, the Marion County Chief Deputy Auditor denied his request noting that "[a]ll County employees are considered employees at-will" and that employees in appointed positions were not eligible to participate in the County's grievance process.

Shortly after respondent's termination, RMO accepted applications for the position of Chief Deputy Coroner. DC1 submitted the only application. DC3 testified that he attempted to submit an application for the position, but he was informed by the Human Resources Office that the deadline to submit an application had passed. On December 19, 2005, DC1 was appointed as the new Chief Deputy Coroner.

On June 19, 2006, the Coroner's Office cancelled its contract with Forensic Pathology Associates ("FPA"), a group that had been contracted to perform autopsies for the county. RMO testified that the contract was cancelled because the contract respondent had negotiated allowed FPA to perform private autopsies using County equipment. RMO and DC1 subsequently accepted individual applications for contract employees to perform autopsies for the Coroner's Office. Four former FPA employees (African-American) were selected. During this time, an Office Assistant (Caucasian), who had been demoted from a part-time Deputy Coroner position, overheard a conversation between RMO and DC1, in which RMO allegedly stated "I will put my people where they belong," DC asked "in charge?" and RMO replied "yup."

On February 14, 2006, respondent filed an EEO charge alleging that he was discriminated against on the bases of race (Caucasian), sex (male), age (53), and in reprisal for prior protected EEO activity when:

- (1) On November 14, 2005, he was relieved of his duties as Chief Deputy Coroner; and
- (2) On December 2, 2005, he was terminated from the Coroner's Office.

On September 28, 2006, the EEOC issued respondent a Notice of Right to Sue. On October 5, 2006, the EEOC vacated the Notice of Right to Sue, and the case was referred to an ALJ in accordance with 29 C.F.R. § 1603.201. The ALJ assigned to the case held a two-day hearing on July 11-12 2007 and issued a decision on November 23, 2007.

ALJ's DECISION

The ALJ's decision determined that respondent had been discriminated against based on his race and in retaliation for his prior protected EEO activity. Specifically, the ALJ found that respondent established that he was discriminated against based on his race under both the direct and indirect methods of proof when RMO relieved him of his duties as Chief Deputy Coroner on November 14, 2005 and terminated him on December 2, 2005. The ALJ further found that respondent established that he was discriminated against in retaliation for his prior protected EEO activity under the indirect method of proof when RMO terminated him on December 2, 2005. However, the ALJ found that respondent failed to establish that he was discriminated against based on retaliation for his prior protected activity when he was relieved of his duties. The ALJ also found that respondent failed to establish that he was discriminated against based on his age or sex with respect to both claims. Regarding remedies, the ALJ awarded respondent \$163,600 in front pay, \$200,000 in compensatory damages, and \$66,133.90 in attorney's fees.

CONTENTIONS ON APPEAL

On appeal, appellant argues that the ALJ erred in finding that RMO discriminated against respondent based on his race and in retaliation for his protected activity because the ALJ's findings are not supported by substantial evidence in the record. Appellant argues that the record demonstrates that RMO terminated respondent "because of ongoing performance problems." Appellant argues that the ALJ misapplied the law when analyzing respondent's race discrimination claims under the direct and indirect methods of proof.

Appellant further argues that the ALJ's decision on respondent's retaliation claim should be reversed because "the ALJ improperly construed the document issued a few weeks after [respondent's] oral termination from the position of Chief Deputy Coroner as a separate adverse employment action, when this was nothing more than a letter confirming the earlier event." As a result, appellant argues that there is no causal connection between respondent's filing of a discrimination complaint and the issuance of the termination letter. Finally, appellant argues that

the damages award should set aside or reduced because the size of the compensatory damages award was excessive. Additionally, appellant argues that part of the monetary award was "based on a position that [respondent] never accepted and in any event, this would have been a non-policymaking position outside the scope of GERA, thereby eliminating any jurisdiction by the ALJ to issue such an award."

In response, respondent requests that the Commission affirm the ALJ's decision.³ Respondent contends that the ALJ properly determined that RMO discriminated against respondent and "improperly considered race when making personnel decisions." Respondent argues that the substantial record evidence and relevant case law support the ALJ's findings that respondent established his race discrimination claim under the direct and indirect methods of proof. Respondent also argues that the ALJ's determination with respect to retaliation is supported by substantial evidence in the record and case law. Finally, respondent argues that the ALJ has jurisdiction to hear the case under GERA and urges the Commission to affirm the ALJ's damages award.

ANALYSIS AND FINDINGS

Pursuant to 29 C.F.R. § 1603.301, any party may appeal the decision of an ALJ rendered under 29 C.F.R. § 1603.217. The appeal must set forth arguments or evidence that tend to establish that the ALJ's decision: (1) is not supported by substantial evidence; (2) contains an erroneous interpretation of law, regulation, or material fact, or misapplication of established policy; (3) contains a prejudicial error of procedure; or (4) involves a substantial question of law or policy. 29 C.F.R. § 1603.303(c)(1)-(4). The Commission defines substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. *See Pullman-Standard Co. v. Swint*, 456 U.S. 273, 293 (1982). An AJ's conclusions of law are subject to a *de novo* standard of review, whether or not a hearing was held.

Jurisdiction

As an initial matter, we must address whether the ALJ had jurisdiction to adjudicate respondent's claims. GERA, 42 U.S.C. § 2000e-16a *et seq.*, provides for the application of rights, protections and remedies to previously exempt employees of elected state and local officials under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000 *et seq.* The law extends coverage to any individual chosen or appointed by a person elected to public office in any State or political subdivision of any State by the qualified voters thereof: (a) to be a member of the elected official's personal staff; (b) to serve the elected official on the policymaking level; or (c) to serve the elected official as an immediate advisor with respect to the exercise of the constitutional or

³ Respondent does not contest the ALJ's determination that he was not discriminated against based on his sex and age on appeal. Therefore, the Commission will not address these claims. *See* EEOC Management Directive 110, Chapter 9, § IV.A. (November 9, 1999).

legal powers of the office. 42 U.S.C. § 2000e-16c(a); 29 C.F.R. § 1603.101; see *Robert F. Clarke v. Florida Public Service Commission*, EEOC Appeal No. 1120050001 (January 5, 2007) (finding that a charge did not fall within GERA's jurisdiction because the position at issue was not on the personal and/or policymaking staff of an elected official). Complaints may be made against persons, government entities, or political subdivisions. 29 C.F.R. § 1603.102(c)(2).

Appellant and respondent both concede that respondent was an appointee of the Coroner, an elected State official, and served the Coroner's Office on the policymaking level as Chief Deputy Coroner within the meaning of the Act from January 1, 2005 through November 14, 2005. However, the parties dispute whether respondent was covered by the statute after November 14, 2005, when he was relieved of his duties. Appellant argues that respondent was actually terminated on November 14, 2005, and he was no longer covered by GERA after that date. Respondent counters by arguing that he was only relieved of his duties, or demoted, to the position of Deputy Coroner on November 14, 2005, and that he was not terminated until December 2, 2005.

Upon review, we find that the ALJ had jurisdiction to adjudicate both of respondent's claims because he continued to be employed by the appellant as the Chief Deputy Coroner until he was terminated on December 2, 2005. The record supports this interpretation of the facts because respondent was only informed that he was being relieved of his management-related duties on November 14, 2005; respondent continued to be employed by the Coroner's Office after the November 14, 2005 meeting; RMO's termination letter specifically indicated that respondent was being terminated from the position of Chief Deputy Coroner, effective immediately, on December 2, 2005; RMO's termination letter made no reference to the November 14, 2005 meeting; and respondent continued to be paid as the Chief Deputy Coroner by the Coroner's Office until December 2, 2005.⁴ Therefore, we find that respondent remained in the policy making position of Chief Deputy Coroner until his termination on December 2, 2005. Accordingly, we find that respondent was subject to coverage under the Act's anti-discrimination provisions and that the ALJ had jurisdiction over respondent's claims that he was discriminatorily relieved of his duties and terminated.

Race Discrimination

An employee can support a claim for disparate treatment based on race or in retaliation for prior protected activity using either the direct method, to show that discrimination motivated the employment decision, or the indirect, burden-shifting method set forth in *McDonnell Douglas Corporation v. Green*. 411 U.S. 792 (1973). For respondent to prevail under the indirect method of proof, he must first establish a *prima facie* case of discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination, *i.e.*, that a prohibited consideration was a factor in the adverse employment action. *Id.* at 802; *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). The burden then shifts to the appellant to articulate a legitimate,

⁴ Respondent testified at the hearing that RMO indicated he would be paid at the same level until the transition to a new Chief Deputy Coroner took place.

nondiscriminatory reason for its action. *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Once the appellant has met its burden, respondent bears the ultimate responsibility to persuade the fact finder by a preponderance of the evidence that appellant acted on the basis of a prohibited reason. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993).

Respondent may establish a *prima facie* case of race discrimination by demonstrating that: (1) he is a member of a protected group; (2) he was satisfactorily performing the duties of the position; (3) he was relieved of his duties and terminated; and (4) he was replaced by someone outside his protected class. See *Paula Stitz v. City of Eureka Springs, Arkansas, et al.*, EEOC Appeal No. 11990002 (June 28, 2001); *DeLuca v. Winer Indus.*, 53 F.3d 793, 797 (7th Cir. 1995). Respondent is not required to establish that he was treated less favorably than a similarly situated employee outside his protected group, however, if he presents other, noncomparative evidence which supports an inference that his employer was motivated by unlawful discrimination. See *O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996); *McDonnell Douglas*, 411 U.S. at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the [elements] of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations."); EEOC Enforcement Guidance on *O'Connor v. Consol. Coin Caterers Corp.*, EEOC Notice No. 915.002, at 4 n.4 (September 18, 1996).

We concur with the ALJ's determination that respondent established a *prima facie* case of race discrimination when he was relieved of his duties as Chief Deputy Coroner and terminated. We find that respondent satisfied the first prong because he is Caucasian and a member of a protected group. On appeal, appellant argues that the ALJ should have analyzed whether respondent satisfied prong one using a heightened standard. Specifically, appellant argues that, because he is Caucasian, respondent should have been required to additionally establish that sufficient background circumstances exist to demonstrate that the Coroner's Office "is the unusual employer who discriminates against the majority." We reject appellant's argument because the Commission applies the same standard of proof to all race discrimination claims, regardless of respondent's race or the type of evidence used. See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 (1976) (Title VII prohibits race discrimination against all persons, including Caucasians); EEOC Compliance Manual Section 15, "Race and Color Discrimination," No. 915.003, at 15-5 (April 19, 2006).

With respect to the second prong, we find that respondent was satisfactorily performing the minimum objective requirements of his position during the relevant time period. See *Stitz*, EEOC Appeal No. 11990002 (noting that complainant "need only prove objective qualifications") (citation omitted). The record reflects that respondent performed the day-to-day duties of the Chief Deputy Coroner position during the relevant time period, including, but not limited to, managing and disciplining employees; formulating office policies; and managing employee work schedules. Additionally, the Coroner had never given respondent a negative performance evaluation or formally disciplined respondent during his tenure as Chief Deputy Coroner. Respondent satisfied the third prong because he was relieved of his duties on November 14, 2005 and terminated on December 2, 2005.

Respondent satisfied the fourth prong because he was replaced as Chief Deputy Coroner by DC1. Appellant argues on appeal that respondent failed to establish that he was replaced by someone outside his protected class because DC3 (Caucasian) served as Interim Chief Deputy Coroner immediately after respondent was relieved of his duties. However, the record reflects that DC3 and DC1 were only asked to perform certain functions that were taken away from respondent until a new full-time Chief Deputy Coroner was appointed, and DC1 was the individual ultimately selected to replace respondent. Nevertheless, we also find that there is sufficient evidence in the record to create an inference that RMO was motivated by discriminatory animus when he relieved respondent of his duties and terminated him based on RMO's stated preference for hiring African-American employees; RMO's preferential treatment of DC1; and RMO's hearing testimony regarding his reasons for relieving respondent of his duties and terminating him, which the ALJ deemed not credible.

Once respondent established a *prima facie* case of race discrimination, the burden shifted to the appellant to articulate a legitimate, nondiscriminatory reason for its actions. *Burdine*, 450 U.S. at 253. We find that appellant met its burden. With respect to claim (1), RMO testified at the hearing that he relieved respondent of his duties because he "lost confidence and trust" in respondent for a number of reasons, including that RMO was unhappy respondent failed to comply with his open door policy; he was uncomfortable with the manner in which respondent negotiated the Coroner's Office's pathology contract; he was unhappy that he was not informed of coroner's inquests being performed by respondent; he felt that respondent unfairly "targeted" employees for discipline; and he objected to respondent giving himself an "unauthorized salary increase." Appellant also argued that RMO lost trust in respondent because he suspected respondent of ghost employment, and he allegedly mismanaged an investigation into missing funds. With respect to claim (2) RMO indicated that he sent respondent a termination letter on December 2, 2005 because respondent had not returned his car and some equipment to the Coroner's Office. Additionally, appellant argues that RMO also terminated respondent for the same reasons RMO relieved respondent of his duties.

Respondent bears the burden of proving by a preponderance of the evidence that appellant's articulated reasons were a pretext for discrimination. Pretext may be shown either directly by showing that a discriminatory reason more likely motivated the employer or indirectly "by showing that the employer's proffered explanation is unworthy of credence." *Burdine*, 450 U.S. at 256. Rejection of the employer's proffered reason permits the trier of fact to "infer the ultimate fact of intentional discrimination." *Hicks*, 509 U.S. at 511.

We find that substantial evidence in the record supports the ALJ's conclusion that appellant's reasons for relieving respondent of his duties were pretextual. RMO testified that he lost confidence and trust in respondent because he "never" followed RMO's instructions to maintain an open door policy. However, RMO was only able to point to two instances when respondent met with individuals with his office door closed – when he met with a police officer investigating money missing from the Coroner's Office and when he met with pathologists during contract negotiations – and neither instance involved Coroner's Office personnel. Moreover, an Administrative Assistant (Caucasian) testified that she did not see respondent's door closed

except for one instance when two employees were in his office to take ID pictures. RMO's contention that respondent "never" abided by his open door policy is therefore not supported by the record.

RMO testified that he lost trust in respondent because respondent failed to inform him of contract provisions that allowed the pathology group to perform outside autopsies, in addition to their work for the County, using County equipment and facilities free of charge. RMO also testified that he disapproved of respondent conducting inquests without first obtaining RMO's approval. However, the record reflects that the Office of Corporation Counsel had reviewed and approved of the contract after respondent had negotiated its terms, and respondent denied conducting any Coroner's inquest. Additionally, RMO's testimony indicated that he questioned the terms of the pathology contract and learned of respondent allegedly conducting inquests without RMO's consent *after* respondent had been relieved of his duties as Chief Deputy Coroner. We find RMO's argument that he considered respondent's conduct in negotiating the pathology contract provisions and allegedly performing inquests when deciding to relieve respondent of his duties is simply unworthy of belief.

RMO next testified that he questioned respondent's ability to perform his duties as Chief Deputy Coroner because respondent "nit picked" certain employees, "writing up people and firing people . . . just doing crazy stuff." In support of these statements, RMO testified that he objected to respondent firing DC2 over "something about a paper in a wastebasket," targeting the janitor by belittling him;⁵ and attempting to discipline DC1 on multiple occasions with the intent to terminate her. However, RMO had personally approved DC2's termination, and RMO did not question whether the termination was appropriate until respondent was relieved of his duties and respondent had already filed an EEO complaint. Despite the fact that RMO objected to respondent disciplining the janitor, RMO acknowledged that suspending an employee for having stolen property in his locker does not constitute "nit picking," and RMO admitted at the hearing that none of his employees had ever complained to RMO that respondent had disciplined them unfairly. RMO's concern that respondent was attempting to "set up" employees, such as DC1, by using progressive discipline to terminate them is also unworthy of belief in light of the fact that DC1 was only issued discipline on one occasion, and RMO testified that respondent could not terminate any employees without RMO's approval.

RMO further testified that he questioned respondent's confidence and trust when he learned that respondent had given himself a raise in the Coroner's Office's 2005 budget. RMO testified that he objected to the salary increase because it was unauthorized, but he did not explain why or how the raise was unauthorized. The record reflects that respondent had requested the raise through the budgetary process the year before, respondent requested raises for the entire office, the raise was approved by the former Coroner, and RMO reviewed the approved budget when he took office. Furthermore, we note that respondent prepared the budget when he was interim Chief

⁵ The ALJ's decision referred to the janitor as an African-American male, but appellant argues on appeal that the janitor was actually a Caucasian male. We are unable to discern the janitor's race from the record.

Deputy Coroner, and he could not have known at that time that he would be appointed the new Chief Deputy Coroner the following year.

With respect to the ghost employment issue, RMO was aware that respondent had a part-time job as a paramedic, respondent provided documentation to RMO of the hours he worked when he was accused of ghost employment, and respondent disclosed his outside employment to the Coroner's Office annually. Appellant's assertion that RMO was concerned that respondent was involved in ghost employment when RMO knew that respondent was not "double dipping" simply defies belief.

Regarding the alleged mismanaged investigation into missing funds, the record reflects that respondent contacted the Office of Corporation Counsel when he discovered that \$3,000 was missing from the Coroner's Office, filed a police report, and met with detectives that came to the Coroner's Office to investigate. RMO did not testify at the hearing that he suspected respondent of the theft or that he lost confidence or trust in respondent because of the situation.

We also find that respondent established pretext with respect to claim (2). RMO indicated that he issued respondent a termination letter because he failed to return his car and some office equipment to the Coroner's Office. However, respondent had no reason to return his car or all work-related equipment to the Coroner's Office at that time because he remained an employee and continued to be paid as the Chief Deputy Coroner after he was relieved of his management duties. RMO's testimony regarding his rationale for terminating respondent only two weeks after relieving him of his duties was vague and unworthy of belief. For the reasons discussed above, we also find appellant's argument that respondent was terminated because RMO lost trust and confidence in him to be pretextual.

On appeal, appellant argues that RMO was entitled to a presumption that he did not discriminate against respondent because RMO hired and fired respondent within a one year period. However, the fact that RMO was a "hirer/firer" in the same year does not mandate a finding of nondiscrimination unless there is no other evidence to suggest that the proffered reasons are a pretext for discrimination. *See Johnson v. Zema Systems Corp.*, 170 F.3d 734, 745 (7th Cir. 1999) ("[T]he same-actor inference is not itself evidence of nondiscrimination. It simply provides a convenient shorthand for cases in which a plaintiff is unable to present sufficient evidence of discrimination.").

The Commission notes that the ALJ found that RMO's testimony "contain[ed] a number of vague or contradictory statements, assertions and inferences," and credibility determinations of an ALJ are entitled to deference due to the ALJ's first-hand knowledge, through personal observation of the demeanor and conduct of the witnesses at the hearing. *See Esquer v. United States Postal Service*, EEOC Request No. 05960096 (September 6, 1996). Based on the foregoing, we concur with the ALJ's determination that respondent established that he was subjected to race discrimination on all claims when he was relieved of his duties and terminated.

Retaliation

While GERA does not specifically set forth a cause of action for retaliation, the Commission has previously determined that GERA encompassed protection against retaliation for State and local government employees exercising their rights under the Act. See *Kyle Knight v. Brazoria County, Texas*, EEOC Appeal No. 11980003 (August 22, 2001); *Board of County Com'srs, Fremont County, Colorado v. EEOC*, 405 F.3d 840 (10th Cir. 2005); *Brazoria County, Texas v. EEOC*, 391 F.3d 685 (5th Cir. 2004).

Respondent can establish a *prima facie* case of retaliation by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Shapiro v. Social Security Administration*, EEOC Request No. 05960403 (December 6, 1996) (citing *McDonnell Douglas*, 411 U.S. at 802). Specifically, in a reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas*, a respondent may establish a *prima facie* case of reprisal by showing that: (1) he engaged in a protected activity; (2) his employer was aware of the protected activity; (3) subsequently, he was subjected to adverse treatment by his employer; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Department of the Air Force*, EEOC Appeal No. 01A00340 (September 25, 2000).

The Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. EEOC Compliance Manual Section 8: Retaliation, No. 915.003, at 8-15 (May 20, 1998); see *Burlington N. and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found "materially adverse," which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEO process).

With respect to claim (1), assuming *arguendo* that respondent established a *prima facie* case of retaliation, we concur with the ALJ's determination that respondent failed to establish that the appellant's legitimate, nondiscriminatory reasons for relieving him of his duties were a pretext for unlawful retaliation. The ALJ credited RMO's testimony that he decided to make a special trip to the office on the morning of November 14, 2005, the date respondent initiated EEO activity, to inform respondent that he was being relieved of his duties. Therefore, the record supports RMO's assertion that he decided to relieve respondent of his duties before RMO learned of respondent's EEO activity. Accordingly, respondent's claim that he was retaliated against in claim (1) must fail.

With respect to claim (2), we concur with the ALJ's determination that respondent established a *prima facie* case of retaliation because he had engaged in EEO activity; RMO was aware of respondent's EEO activity because respondent had discussed his complaint with RMO at the November 14, 2005 meeting and officials discussed respondent's complaint with RMO; he was subjected to an adverse action when he was terminated; and a nexus existed between his protected activity and the adverse action because he was terminated approximately two weeks after RMO learned of respondent's EEO activity.

Once respondent established a *prima facie* case of retaliation, the burden shifted to appellant to articulate legitimate, nondiscriminatory reasons for his termination. As discussed in our analysis of respondent's race discrimination claims, we find that appellant provided legitimate, nondiscriminatory reasons for terminating respondent. However, as discussed above, we further find that respondent established pretext because the appellant's reasons for terminating respondent are unworthy of belief. Therefore, we find that respondent established that he was subjected to unlawful retaliation when he was terminated on December 2, 2005.⁶

Remedies

GERA provides that equitable remedies and compensatory damages are available where a violation of the statute is found. 42 U.S.C. § 2000e-16b(1).

Front Pay

The ALJ awarded respondent \$163,600 in front pay. Specifically, the ALJ awarded respondent front pay from the date of his termination through what would have been the end of his term as Chief Deputy Coroner, or December 31, 2007, at a salary of \$62,400.00 annually. The ALJ also awarded respondent one year of front pay as a Deputy Coroner, at a salary of \$34,000.00 annually, "because he would have continued in employment as a Deputy Coroner beyond December 31, 2007."

Front pay is a form of equitable relief that compensates an individual when reinstatement is not possible in certain very limited circumstances. In general, reinstatement is preferred to an award of front pay. *Romero v. Department of the Air Force*, EEOC Appeal No. 01921636 (July 13, 1992). Awards of front pay imply that the complainant is able to work but cannot do so because of circumstances external to the complainant. *Goetze v. Department of the Navy*, EEOC Appeal No. 01991530 (August 22, 2001); *Brinkley v. United States Postal Service*, EEOC Request No. 05980429 (August 12, 1999). The Commission has identified three circumstances where front pay may be awarded in lieu of reinstatement, i.e., (1) where no position is available; (2) where a subsequent working relationship between the parties would be antagonistic; or (3) where the employer has a record of long-term resistance to anti-discrimination efforts. *York v. Department of the Navy*, EEOC Appeal No. 01930435 (February 25, 1994); *see also Cook v. United States Postal Service*, EEOC Appeal No. 01950027 (July 17, 1998); *Tyler v. United States Postal Service*, EEOC Request No. 05870340 (February 1, 1998).

We concur with the ALJ's determination that front pay is an appropriate remedy in this case. Reinstatement is not an option because there is no comparable position available and any subsequent working relationship between RMO, respondent, and/or DCI would be antagonistic.

⁶ The Commission will not address whether respondent established discrimination using the direct method of proof because of our finding that respondent was discriminated against based on his race and in retaliation for his prior activity under the indirect, burden-shifting method.

With respect to the size of the award, we find that the ALJ properly awarded respondent \$129,600 for the salary respondent would have received from the date of his termination through what would have been the end of his term as Chief Deputy Coroner. However, we find that the ALJ's \$34,000 award for one year of work beyond respondent's term as Chief Deputy Coroner was unwarranted.⁷

Non-Pecuniary Compensatory Damages

A party who establishes his or her claim of unlawful discrimination may receive, in addition to equitable remedies, compensatory damages for past and future pecuniary losses (*i.e.*, out of pocket expenses) and non-pecuniary losses (*e.g.*, pain and suffering, mental anguish). 42 U.S.C. §1981a(b)(3). For an employer with more than 500 employees, the limit of liability for future pecuniary and non-pecuniary damages is \$300,000. *Id.*

The particulars of what relief may be awarded, and what proof is necessary to obtain that relief, are set forth in detail in EEOC Enforcement Guidance: Compensatory and Punitive Damages Available under Section 102 of the Civil Rights Act of 1991, No. N 915-002 (July 14, 1992). Respondent must submit evidence to show that the agency's discriminatory conduct directly or proximately caused the losses for which damages are sought. *Rivera v. Department of the Navy*, EEOC Appeal No. 01934157 (July 22, 1994).

In *Carle v. Department of the Navy*, the Commission explained that "objective evidence" of non-pecuniary damages could include a statement by respondent explaining how he or she was affected by the discrimination. EEOC Appeal No. 01922369 (January 5, 1993). Statements from others, including family members and health care providers, could address the outward manifestations of the impact of the discrimination. *Id.* Respondent could also submit documentation of medical or psychiatric treatment related to the effects of the discrimination. *Id.*

The Commission notes that because there is no precise formula by which to calculate non-pecuniary damages, the ALJ is afforded broad discretion in determining such damages awards. To be sustained on appeal, an award of non-pecuniary damages should not be "monstrously excessive" standing alone, should not be the product of passion or prejudice, and should be consistent with the amount awarded in similar cases. See *Ward-Jenkins v. Department of the Interior*, EEOC Appeal No. 01961483 (March 4, 1999) (citing *Cygnar v. City of Chicago*, 865 F.2d 847, 848 (7th Cir. 1989)).

The ALJ awarded respondent \$200,000 in non-pecuniary compensatory damages "for the emotional distress he suffered from being demoted and fired, and from having his name besmirched in the press, all of which resulted in months of treatment and counseling."

⁷ Appellant argues for the first time on appeal that respondent's front pay award should be reduced because respondent failed to mitigate damages. We find that appellant failed to meet its burden of establishing that respondent did not exercise reasonable diligence to mitigate damages and that he was likely to have found comparable work.

Respondent testified at the hearing that he suffered emotional distress as a result of RMO's actions and that he was diagnosed as having situational depression. Respondent further testified that he sought treatment for his condition from his physician and a "counsel" his physician referred him to for several months. On appeal, appellant argues that the ALJ's award is excessive because the record evidence neither justifies an award for emotional distress nor supports an award of that size.

We sustain the ALJ's \$200,000.00 compensatory damages award. We find that appellant failed to establish that the award is "monstrously excessive" standing alone, the product of passion or prejudice, and inconsistent with the amount awarded in similar cases. Although appellant argues that compensatory damages should not be awarded due to respondent's failure to produce medical records corroborating the treatment he received, the Commission has held that evidence from a health care professional is not a prerequisite for recovery of compensatory damages for emotional distress. *Bernard v. Department of Veterans Affairs*, EEOC Appeal No. 01966861 (July 17, 1998); *Lawrence v. United States Postal Service*, EEOC Appeal No. 01952288 April 18, 1996); *Carpenter v. Department of Agriculture*, EEOC Appeal No. 01945652 (July 17, 1995).

Attorney's Fees and Costs

Appellant is entitled to an award of attorney's fees and costs for the successful processing of an EEO complaint under GERA. See 42 U.S.C. § 2000e-16(c)(e). The fee award is ordinarily determined by multiplying a reasonable number of hours expended on the case by a reasonable hourly rate, also known as the "lodestar." See 29 C.F.R. § 1614.501(e)(2)(ii)(B); *Bernard*, EEOC Appeal No. 01966861 (citing *Blum v. Stenson*, 465 U.S. 886 (1984)).

Attorney's fees may not be recovered for work on unsuccessful claims. *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983). Courts have held that fee applicants should exclude time expended on "truly fractionable" claims or issues on which they did not prevail. See *Nat'l Ass'n of Concerned Veterans v. Sec'y of Defense*, 675 F.2d 1319, 1327 n.13 (D.C. Cir. 1982). Claims are fractionable or unrelated when they involve "distinctly different claims for relief that are based on different facts and legal theories." *Hensley*, 461 U.S. at 434-35.

Upon review, we award respondent \$58,290.00 in attorney's fees, for attorneys working 256.70 hours at rates between \$150.00 to \$300.00 per hour, and \$3,921.95 in costs, for a total of fees and costs of \$62,211.95.⁸ Appellant has presented no arguments on appeal regarding the reasonableness of fees or the time spent. We find that the request was reasonable and that the full amount requested should be awarded to respondent's attorney.

⁸ Respondent's affidavit and the ALJ's decision erroneously indicated that \$58,290.00 in attorney's fees and \$3,921.95 in costs totaled \$66,133.90.

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the ALJs finding that respondent was discriminated against based on his race when he was relieved of his duties. We further AFFIRM the ALJ's finding that respondent was discriminated against based on his race and in retaliation for his prior protected EEO when he was terminated from the position of Chief Deputy Coroner.

ORDER

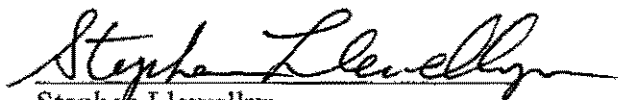
Appellant is ORDERED to take the following remedial actions:

- (1) Within ninety (90) calendar days of the date of this decision, appellant shall remit to respondent \$200,000.00 in non-pecuniary compensatory damages;
- (2) Within ninety (90) calendar days of the date of this decision, appellant shall remit to respondent \$129,600.00 in front pay;
- (3) Within ninety (90) calendar days of the date of this decision, appellant shall remit to respondent \$62,211.95 in attorney's fees.

STATEMENT OF PARTIES' RIGHT TO FILE A PETITION FOR REVIEW

Any party to a complaint who is aggrieved by a final decision under 29 C.F.R. § 1603.304 may obtain a review of such final decision under chapter 158 of title 28 of the United States Code by filing a petition for review with a United States Court of Appeals within 60 days of the date of this final decision. See 29 C.F.R. § 1603.306. Such petition for review should be filed in the judicial circuit in which the petitioner resides, or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

FOR THE COMMISSION:



Stephen Llewellyn
Executive Officer
Executive Secretariat

8/24/2009
Date

CERTIFICATE OF MAILING

For timeliness purposes, the Commission will presume that this decision was received within five (5) calendar days after it was mailed. I certify that this decision was mailed to the following recipients on the date below:

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8/25/09
Date

R. Bahry
Equal Opportunity Assistant