IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	**Civil Action No. 7:16-cv-00054-O**
	§	
UNITED STATES OF AMERICA, et al.,	§	
	§	
	§	
	§	
Defendants.	§	
	§	

DR. RACHEL TUDOR'S REPLY TO DEFENDANTS' OPPOSITION TO INTERVENTION AND JOINDER

A. Dr. Tudor's Declaratory Judgment Claim Shares with the Main Action A Question of Law

To the extent that this Court deems Plaintiffs' First Amended Complaint (ECF Doc. 6) to seek a declaration interpreting the scope of Title VII's sex discrimination proscription as applied to transgender persons in all litigations currently pending before federal district courts (including Dr. Tudor's litigation in the Western District of Oklahoma), Dr. Tudor's Declaratory Judgment Claim plainly shares a question of law with the main action.

Dr. Tudor's putative Complaint in Intervention (ECF Doc. 67-1 at 10), seeks a declaration from this Court recognizing that a July 10, 2015 order issued by the Western District of Oklahoma finally decided the scope of Title VII as to Dr. Tudor. *United States et al. v. Se. Okla. State Univ. et al.*, civ-150324-C, 2015 WL 4606079 at *2 (July 10, 2015) [hereinafter July 2015 Order] (holding that Dr. Tudor's allegations of sex discrimination fall within the scope of Title VII's sex discrimination proscription and Tudor "falls within a protected class"). Dr.

Tudor's claim directly overlaps with the preliminary and final declaratory relief sought by Plaintiffs in the instant litigation since Plaintiffs seek relief which requires that this Court construe the scope of Title VII's sex discrimination proscription as applied to transgender persons.

The overlap between Dr. Tudor's claim and Plaintiffs' claims is plain. Plaintiffs make clear that the instant litigation seeks to redress Defendants' efforts to interpret Title VII and Title IX to reach sex discrimination alleged by transgender persons in, *inter alia*, all litigations pending before all federal districts courts where Defendants are a party, including the Oklahoma Litigation. *See, e.g.*, Transcript of Hearing at 18–19, *Texas et al. v. United States et al.*, 7:16-cv-00054-O (N.D.Tex. Sept. 30, 2016) (asserting that Plaintiffs were standing by arguments elevated in ECF Doc. 64); ECF Doc. 64 at 3 (arguing that the Preliminary Injunction enjoins DOJ's ability "to continue" the Oklahoma Litigation).

While Plaintiffs' claims arise under the Administrative Procedures Act and the U.S. Constitution, all claims turn on the same threshold issue—does statutorily prescribed "sex" discrimination reach sex discrimination against transgender persons. If the term "sex" reasonably encompasses sex discrimination against transgender persons, then all of Plaintiffs claims fail since the "Guidelines" at issue would not, in that case, present a new rule but rather an interpretation of existing statutory obligations. This overlap between the threshold issue in Plaintiffs' claims for relief and Dr. Tudor's claim is sufficient to create a common issue of law. *See, e.g.*, *New Orleans Pub. Serv., Inc. v. United Gas Pipe Line Co.*, 690 F.2d 1203, 1209 (5th Cir. 1982), *on reh'g en banc*, 732 F.2d 452 (5th Cir. 1984) (parties seeking to intervene presenting similar questions as to the interpretation of a contract raise same question of law). *See also Stallworth v. Monsanto Co.*, 558 F.2d 257, 269 (5th Cir. 1977) (observing that Fed. R. Civ.

P. 24(b)(2)'s common interest of law element should be liberally construed; declining to give deference to district court on commonality of issue of law determination).

Defendants' opposition to Dr. Tudor's intervention turns in part on the notion that this Court should shut the courthouse doors on Dr. Tudor before ever deciding whether Dr. Tudor's Complaint in Intervention raises a viable claim. ECF Doc. 81 at 5 ("Dr. Tudor's motion should be denied because her proposed claim would not survive a motion to dismiss."). Defendants' position begs the question. This Court cannot determine whether Dr. Tudor's claim is legally viable unless it assesses whether preclusive effect should be given to the July 2015 Order. Absent a clarification from this Court that the preliminary injunction does not reach the Oklahoma Litigation, this Court should hear from Dr. Tudor so that it may make a sound decision on this issue for the purposes of appeal. Declining to let Tudor intervene before adjudicating this issue makes no sense; indeed, it is an approach that is highly disfavored by the Fifth Circuit. *See, e.g.*, *Atlantis Dev. Corp. v. United States*, 379 F.2d 818, 827 (5th Cir. 1967) ("The Government would avoid all of these problems by urging us to rule as a matter of law on the face of the moving papers that the intervenors could not possibly win on the trial of the intervention and consequently intervention should be denied. . . . But it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all.").

B. Defendants misapprehend the preclusive effect of a denial of a motion to dismiss premised upon an issue of law.

Dr. Tudor respectfully disagrees with Defendants' construal of the preclusive effect of a denial of a motion to dismiss premised upon an issue of law. The Fifth Circuit has never decided whether such a decision should enjoy preclusive effect for collateral estoppel purposes. Indeed,

none of the authorities Defendants cite support this proposition.[1] However, key principles animating related precedents and respected treatises support giving such a decision preclusive effect.

Collateral estoppel bars re-litigation of issues of law or fact actually litigated and necessary to the holding of a prior order in another litigation. Whereas "[r]es judicata operates only when there has been a prior 'judgment *on the merits*'," collateral estoppel has "more limited preclusive effect," baring only re-litigation of issues actually litigated and necessary to holdings in the prior litigation. *Keene Corp. v. United States*, 591 F.Supp. 1340, 1346 (D.D.C. 1984), *aff'd sub nom.*, *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987) (giving preclusive effect to deficiencies in complaint scrutinized in prior litigations).

There is no principled reason not to afford preclusive effect to an order settling an issue of law on a motion to dismiss for failure to state a claim. As the Restatement (Second) of Judgments § 27 cmt. d teaches, "[a]n issue may be submitted and determined on a motion to dismiss for failure to state a claim. . . A determination may be based on a failure of pleading or of proof as well as on the sustaining of the burden of proof." *See also B&B Hardware, Inc. v.*

[1] *RecoverEdge L.P. v. Pentecost*, 44 F.2d 1284, 1290 (5th Cir. 1995) approvingly cites Restatement (Second) of Judgments § 27, which supports granting preclusive effect to a denial of a motion to dismiss. *See* Restatement (Second) of Judgments § 27 cmt. d. *Ashe v. Swenson*, 397 U.S. 436 (1970) is inapposite; *Ashe* discusses collateral estoppel in criminal cases and concerns itself with re-litigation of facts. *Avondale Shipyards, Inc. v. Insured Lloyd's*, 786 F.2d 1265, 1269 (5th Cir. 1986) is concerned with the preclusive effect given to a grant of partial summary judgment involving an issue of fact that was not "a critical and necessary part of a judgment." *Id.* at 1269 (quotations omitted). *In re Pickle*, 1998 WL 413023 (5th Cir. June 12, 1998) (unpublished), merely states that an order denying a motion to dismiss is generally considered a nonappealable interlocutory order. *But see Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312 (5th Cir. 1999) (holding denial of motion to dismiss on Eleventh Amendment or qualified immunity grounds are appealable collateral orders when based on issues of law). *Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1103 (5th Cir. 1981), is concerned the effect granted to partial summary judgments, not the preclusive effect afforded to an order settling an issue of law on a motion to dismiss for failure to state a claim.

Hargis Indus., Inc., 135 S.Ct. 1293, 1303 (2015) (observing that "the idea of issue preclusion is straightforward, [but] it can be challenging to implement" and turning to the Restatement (Second) of Judgments § 27 for guidance). Where a party, as Dr. Tudor did in the Oklahoma Litigation, sustains her burden of proof at the motion to dismiss stage on a threshold issue of law, the issue was finally decided. *Cf. Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312 (5th Cir. 1999) (holding denial of motion to dismiss on Eleventh Amendment or qualified immunity grounds are appealable collateral orders when based on issues of law).

Moreover, where a party seeks to invoke collateral estoppel to preclude re-litigation of a threshold issue of law already decided in another litigation that is still pending, equities and principles of judicial economy weigh heavily in favor of giving it preclusive effect. While such an order may not be final in the sense that parties to the original litigation may seek reconsideration from the first court or appeal it later, such an order should not be open to collateral attack in other fora. To decide otherwise would invite nonprevailing parties to bring successive, parallel litigations in other fora seeking declaratory judgments on issues of law with the express purpose of enjoining earlier filed but still live litigations. Such a result would cut against the values undergirding collateral estoppel. *See, e.g.*, *SIL–FLO, Inc. v. SFHC, Inc.,* 917 F.2d 1507, 1521 (10th Cir.1990) (*citing Blonder–Tongue Laboratories, Inc. v. University of Illinois Foundation,* 402 U.S. 313, 334 (1971) ("The requirement that the party against whom the prior judgment is asserted had a full and fair opportunity to be heard centers on the fundamental fairness of preventing the party from relitigating an issue [she] has lost in a prior proceeding.")).

Additionally, where there is mutuality of parties, it is incumbent upon courts to give prior adjudications settling an issue of statutory interpretation at the motion to dismiss stage preclusive effect. "In such a case, it is unfair to the winning party and an unnecessary burden on the courts

to allow repeated litigation of the same issue in what is essentially the same controversy, even if the issue is regarded one of 'law'." *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 171 (1984) (*quoting* Restatement (Second) of Judgments § 28, cmt. b (1982)). Collateral estoppel's threshold requirement that the parties had "one opportunity to litigate an issue fully and fairly" is enough to ensure fairness. *Continental Can Co. v. Marshall*, 603 F.2d 590, 594 (7th Cir. 1979). Thus, even if not deemed "final" in most circumstances, in a unique situation like this where the same parties are disputing the same issue of law in quick, successive and overlapping litigations, a denial of a motion to dismiss deciding an issue of law should be granted preclusive effect. *Cf. Golman v. Tesoro Drilling Corp.*, 700 F.2d 249, 253 (5th Cir. 1983) (*citing In re Falstaff Brewing Co. Antitrust Litigation*, 441 F.Supp. 62, 66 (E.D.Mo.1977) (holding that an order granting partial summary judgment based upon pleadings and affidavits in a still-pending case "is, in the sense requisite for raising an estoppel, a final judgment on the merits."). While virtually every party would prefer a second bite at relitigating an issue, and "there will always [be] a lingering question whether the party might have succeeded in proving his point if he had only been given a second chance . . . [w]ithout more, this is not sufficient to outweigh the extremely important policy underlying the doctrine of collateral estoppel—that litigation of issues at some point must come to an end." *James Talcott v. Allahabad Bank, Ltd.*, 444 F.2d 451, 463 (5th Cir. 1971), *cert. denied*, 404 U.S. 940 (1971).

C. However, Dr. Tudor's motion to intervene and ancillary motions should be denied as moot if this Court determines that the injunction does not enjoin the Oklahoma Litigation.

As noted in her motion to intervention (ECF doc. 67 at 1–3), all of Dr. Tudor's pending motions should be denied as moot if this Court determines that the Preliminary Injunction (ECF Doc. 58) does not enjoin any part of the Oklahoma Litigation.

CONCLUSION

For the reasons stated above, if this Court determines that the Oklahoma Litigation is in any way enjoined by this Court's Preliminary Injunction Dr. Tudor's intervention should be granted. In the alternative, if this Court determines that the Oklahoma Litigation is not in any way enjoined by this Court's Preliminary Injunction Dr. Tudor's motions should be denied as moot.

Dated: October 17, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will serve all counsel of record.

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