CASE NO. 15-cv-324-C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff/Intervenor

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA

Defendants.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT

DIXIE L. COFFEY, OBA#11876
KINDANNE C. JONES, OBA#11374
JEB E. JOSEPH, OBA#19137
TIMOTHY M. BUNSON, OBA#19137
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921 Facsimile: (405) 521-4518
dixie.coffey@oag.ok.gov
kindanne.jones@oag.ok.gov
jeb.joseph@oag.ok.gov
tim.bun@oag.ok.gov
Attorney for

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IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

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DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION FOR SUMMARY JUDGMENTAND BRIEF IN SUPPORT

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to Fed. R. Civ. P. 56(a) and LCvR 56.1 move this Court for summary judgment in their favor[1], showing the Court as follows:

INTRODUCTION

In 2004 Dr. Robert Tudor was hired at SEOSU in the English, Humanities, and Languages Department ("EHL") as a tenure-track professor. In 2007 Dr. Tudor began using the name "Rachel," and transitioned from presenting himself as a man

[1] The sole remaining party adverse to Defendants is Intervenor, Dr. Rachel Tudor. If the Court later determines that Plaintiff, United States of America, should

to presenting herself as a woman. In 2008 Dr. Tudor ("Intervenor" or "Tudor") made an abortive attempt to apply for tenure. At a most preliminary level the EHL committee voted 0-5 against recommending her for tenure. Then after a conversation with her department chair, Intervenor withdrew her application before it could be sent to the Dean and higher administration for consideration. In 2009 Intervenor again submitted her application for tenure, this time receiving enough committee votes (4-1) for her application portfolio to be sent up for administrative consideration. Intervenor's portfolio was then reviewed independently first by the Dean, and then by the Vice-President for Academic Affairs, both of whom had concerns about Intervenor's application and recommended against the granting of tenure. In an attempt to assist Intervenor, the administration decided to offer her an opportunity to withdraw her portfolio prior to denial, and then to have an extra time period in which to improve her portfolio. At the time, she was warned that if the portfolio were allowed to continue being considered, tenure would be denied. Intervenor ignored the academic and professional advice she received from administrators (the decision makers) at SEOSU, and pushed forward with a deficient tenure application, with full knowledge she would not succeed. The result of Tudor's selfish and cavalier approach to the tenure process was that Intervenor's application for tenure was denied. Rather than accept personal responsibility for her own inadequacies in a very detail-oriented process, Tudor began first by submitting internal procedure grievances at the university, and then by filing external charges of discrimination against the State with the United States of

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continue in this litigation then Defendants reserve the right to file a separate

America's ("Plaintiff" or "USA") "Department of Education" ("DOE"), even claiming racial discrimination. After nearly five (5) years Plaintiff finally filed its lawsuit. Intervenor then joined the lawsuit. While USA and Defendants have resolved their dispute via a mutually acceptable settlement agreement, Intervenor's claims remain. Given that no material facts are genuinely disputed at this point, Defendants SEOSU and RUSO move this Court for summary judgment on all counts.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Intervenor was born a male, Robert Tudor, in 1963. *Deposition of Intervenor* at p. 118, ln. 4-8, attached as Exhibit 1.

2. Intervenor began work at SEOSU the fall of 2004. *Id.* at p. 86, ln. 19-24.

3. Intervenor presented herself as a male from 2004-2007, then presented herself as a female from 2007 to 2016. *Id.* at p. 131, ln. 5-9.

4. From 2007 until after the denial of her tenure portfolio in 2010, Intervenor submitted no written complaints (to any person or entity) alleging unlawful harassment, hostile work environment, discrimination, or retaliation against SEOSU, RUSO, or any of their employees. *Intervenor's Response to RUSO's Interrogatory No. 2,* attached as Exhibit 2.

5. The tenure and promotion portfolio review process at SEOSU is a multi-tiered process going up from academic department, to dean, then to

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dispositive motion *vis a vis* that entity.

vice-president for academic affairs, then to the university president. *Deposition of Jesse Snowden* at p. 45, ln. 24 – p. 46, ln. 6, attached as Exhibit 3.

6. During the 2008-2009 academic year, ("AY08-09"), Intervenor submitted her portfolio to the English, Humanities, and Languages Department ("EHL") for promotion and tenure consideration. Ex. 1 at p. 31, ln. 9-11.

7. During AY08-09, the EHL promotion and tenure committee voted unanimously against Intervenor receiving further tenure consideration. *Deposition of Lucretia Scoufos* at p. 64, ln. 14-20; p. 152, ln. 21-23, attached as Exhibit 4.

8. After the vote against her portfolio, and followed by her conversation with the EHL Department Chair during AY08-09, Intervenor withdrew her tenure application from further consideration. Ex. 1 at p. 175, ln. 6-21.

9. During the 2009-2010 academic year, ("AY09-10"), Intervenor again submitted her portfolio to the ("EHL") Department for promotion and tenure consideration. *Id.* at p. 31, ln. 9-11.

10. During the AY09-10, the EHL promotion and tenure committee voted 4-1 in favor of allowing Intervenor's portfolio to receive tenure consideration from the SEOSU administration. *Deposition of Randy Prus* at p. 145, ln. 5-7, 25 - p. 146, ln. 5, attached as Exhibit 5.

11. After Intervenor's AY09-10 portfolio left the EHL committee it was reviewed by then-Dean Lucretia Scoufos ("Dean Scoufos"), who did not recommend Intervenor for promotion and tenure because Intervenor did not have the credentials. Ex. 4 at p. 103, ln. 23-25.

12. After Intervenor's AY09-10 portfolio moved from Dean Scoufos up the administrative chain it was reviewed by then-Interim Vice-President for Academic Affairs Douglas McMillan ("VP McMillan"), who did not recommend Intervenor for promotion and tenure. *Deposition of Doug McMillan* at p. 114, ln. 21-23, attached as Exhibit 6.

13. Among reasons cited by VP McMillan for not recommending Intervenor's portfolio for promotion and tenure was that in his "professional judgment, [Intervenor's scholarship] didn't reach that noteworthy and exceptional standard that the service did not meet the [] requirement from policy." *Id.* at p. 115, ln. 16-18.

14. After VP McMillan completed his review of Intervenor's AY09-10 portfolio, he sent it to then-President Dr. Larry Minks on or about February 10, 2010. *Id.* at p. 109, ln. 4-11.

15. Prior to a final denial of Intervenor's tenure application in AY09-10, Intervenor was given the opportunity by SEOSU to withdraw and improve her portfolio, to be reconsidered in a later academic year. Ex. 4 at p. 152, ln. 10 – p. 153, ln. 6.

16. VP McMillan, Dean Scoufos, and Dr. John Mischo (then-Chair of the EHL Department) agreed that this was a generous offer, amounting to a "gift" to Intervenor. *Id.* at p. 152, ln. 10-12; p. 153, ln. 6, 13-15.

17. On April 6, 2010, Intervenor rejected SEOSU's offer to withdraw and improve her portfolio before final rejection. *Id.* at p. 153, ln. 6-20.

18. Prior to April 30, 2010, Intervenor was informed by then-President of SEOSU, Dr. Larry Minks, that her AY09-10 request for tenure and promotion had been denied. *April 30, 2010 McMillan Memo to Intervenor,* attached as Exhibit 7.

19. Once an application for tenure moves through the administration, if the portfolio is not withdrawn prior to denial by the president, then the professor cannot reapply. Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2 and Ex. 6 at p. 189, ln. 21-24.

20. Intervenor filed her first discrimination charge with the U.S. Department of Education in September 2010 alleging her tenure denial was due to discrimination because she was female and Native American. There was no mention of her transgender status. *September 2010 DOE Charge,* attached as Exhibit 8.

21. In AY09-10 and AY10-11, both men and women received tenure. *Excerpts from SEOSU's Response to EEOC Request for Info.* at Bates No. 459*,* attached as Exhibit 9.

22. At the time of Intervenor's application, once the tenure and promotion process ended the portfolios were returned to the faculty members and no copies were retained by SEOSU. *Id.* at Bates Nos. 1949-1950.

23. After leaving SEOSU, Intervenor claims that she applied for employment at over one hundred (100) institutions of higher education across the United States. *Intervenor's Response to RUSO's Interrogatory No. 11,* attached as Exhibit 10.

24. Despite reportedly applying at over one hundred (100) institutions of higher education across the United States after leaving SEOSU, Intervenor only received one (1) offer of employment. Ex. 1 at p. 90, ln. 8-19.

25. Intervenor's only offer of employment was at Collin College, a community college in Texas. She accepted that offer. *Id.* at p. 90, ln. 8-19; p. 100, ln. 10-14.

26. During her employment at Collin College, Intervenor received a "notable number of evaluations that described her instruction as unclear and her classroom management as inadequate," and having a "need for improvement." *Excerpts from Intervenor's Collin College Personnel File,* at CC270, attached as Exhibit 11.

27. During her employment at Collin College, Intervenor received notification that her "service to Collin College does not meet Collins' standard of excellence." *Id.* at CC268.

28. During her employment at Collin College, Intervenor received notification that her "professional development does not meet Collins' standard of excellence." *Id.* at CC268.

29. During her employment at Collin College, Intervenor received notification that her "simply maintaining membership on committees does not constitute substantive service." *Id.* at CC270.

30. During her employment at Collin College, Intervenor received notification of student complaints about her instruction, and that these complaints were consistent with prior student complaints. *Id.* at CC270.

31. During her employment at Collin College, Intervenor received notification that while "she does not see a need for improvement in her instruction or classroom management" that "stance [] is inconsistent with the dean's assessment." Further, it was noted that "[t]he service she has provided continues to be adequate, not outstanding." *Id.* at CC270.

32. Intervenor started work at Collin College in 2012, and was then non-renewed by that school in spring 2016. Ex. 1 at p. 90, ln. 4-6; Ex. 11 at CC1059-CC1065.

33. Unable to take responsibility for her own shortcomings as an instructor, Intervenor accused Collin College of discriminating against her based on her transgender status. Ex. 11 at CC1061-1065.

34. SEOSU had an anti-sexual harassment policy in effect, including a grievance procedure, during Intervenor's employment. *SEOSU Anti-Sexual Harassment Policy,* attached as Exhibit 12.

35. SEOSU had an equal opportunity and anti-discrimination policy in effect during Intervenor's employment. *SEOSU Equal Opportunity and Anti-Discrimination Policy,* attached as Exhibit 13.

36. Intervenor never submitted a complaint or grievance about any allegedly harassing statements. Ex. 1 at pp. 306-307.

37. In June 2007, Intervenor had a conversation with HR Director, Ms. Cathy Conway, during which Conway offered optional use of a single-occupancy, unisex, handicap accessible restroom in Intervenor's building, (as well a family

restroom in the student union), should Intervenor want or need it during her transition. *Deposition of Cathy Conway,* at p. 48, ln. 15-21, attached as Exhibit 14.

38. Intervenor thanked Ms. Conway for her professionalism at the end of her conversation about restroom options. *Id.* at p. 48, ln. 21-22.

STANDARD OF REVIEW

Summary judgment shall be granted when the moving party demonstrates that it is entitled to judgment as a matter of law because there is no evidence – considering the pleadings, depositions, answers to interrogatories, along with affidavits – to support the claims of the nonmoving party or that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). An issue is "genuine" only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "A fact is 'material' if, under the governing law, it could have an effect on the outcome of the lawsuit." *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that no genuine issue of material fact exists. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1190. The court must "'view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.'" *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (quotation omitted). Although

Intervenor is entitled to all reasonable inferences from the record, she must still marshal sufficient evidence requiring submission of the matter to the jury in order to avoid summary judgment. *Piercy v. Maketa*, 480 F.3d 1192, 1197 (10th Cir. 2007). Thus, if Intervenor bears the burden of persuasion on a claim at trial, then summary judgment may be warranted if (a) Defendants point out a lack of evidence to support an essential element of that claim, and (b) Intervenor cannot identify specific facts that would create a genuine issue. *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1143-44 (10th Cir. 2013).

ANALYSIS AND AUTHORITY

I. INTERVENOR HAS NOT ESTABLISHED A PRIMA FACIE CLAIM OF HOSTILE WORK ENVIRONMENT. (COUNT ONE)

a. The *prima facie* case

A hostile work environment is one which is permeated with discriminatory intimidation and ridicule sufficiently severe or pervasive as to be abusive to a reasonable individual. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). To establish a *prima facie* case of hostile work environment based on sex, a plaintiff must establish that (1) she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and it created an abusive working environment. *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1134 (10th Cir. 2005).

In order to be actionable, a sexually objectionable environment must be both objectively and subjectively offensive: one that a reasonable person would find

hostile or abusive, and one that the particular plaintiff in fact perceived to be so. *Id.* at 370-371. Title VII does not establish a general civility code for the workplace, and a plaintiff may not predicate a hostile work environment claim on run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in the workplace. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015). "Therefore, to avoid summary judgment at the prima facie stage, a plaintiff must present evidence that creates a genuine dispute of material fact as to whether 'the workplace is permeated with discriminatory intimidation, ridicule, and insult[] that is sufficiently severe or pervasive to alter the conditions of the victim's employment.'" *Id.* (citing *Hall v. U.S. Dep't of Labor*, 476 F.3d 847, 851 (10th Cir. 2007)).

Based solely upon the false and unsupported allegations in Intervenor's Complaint, one might mistakenly conclude the existence of a hostile work environment. But these claims can quickly be put to rest because they have absolutely no factual basis or evidentiary support, despite the seven years of discovery conducted by the EEOC, U.S.A., and/or Intervenor. Intervenor's vague, conclusory allegations include:

> Southeastern's administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping…

[Doc. 24, ¶ 131].

> Dr. Tudor was targeted for harassment by administrators because of her sex…

[Doc. 24, ¶ 132].

> The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficient severe or pervasive…

[Doc. 24, ¶ 135].

However, a review of the **specific occurrences** upon which Intervenor relies reveal a complete lack of evidentiary support for her claim that these incidents occurred or that they created a hostile work environment:[2]

> 1) A one-time incident (for which Tudor is uncertain of either date or year) of a double hearsay statement, allegedly made by Dr. McMillan to Jane McMillan, who then allegedly repeated it to Dr. Tudor, that Dr. McMillan "objected to the transgender lifestyle."

(Ex. 1 at p. 298, ln. 25 – 299, ln. 24); [Doc. 24, ¶ 136].

> 2) A one-time incident in June 2007 when SEOSU's Human Resources Director, Cathy Conway, supposedly told Tudor she was prohibited from using the multi-stall women's restrooms on campus;

(Ex. 1 at p. 305, ln. 20-24); [Doc. 24, ¶ 137];

> 3) A one-time incident in June 2007 of SEOSU's Human Resources Director, Cathy Conway, supposedly counseled Tudor about not wearing short skirts or inappropriate make-up

(Ex. 1 at p. 305, ln. 3 – p. 306, ln. 4);

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[2]None of these alleged harassing events can be considered because none of them occurred within 300 days of Intervenor's initial discrimination charge, filed with U.S. Department of Education, in September 2010. [Doc. 1, ¶ 59]. Under Title VII, an employee must file a charge with the EEOC within 300 days of the discriminatory conduct. 42 U.S.C. §2000e-5(e)(1). While certain circumstances permit hostile work environment claims to rely in part on conduct that occurred outside the 300 day limitations period, those circumstances are not present here. To consider pre-limitations period conduct, those acts must comprise "part of the same actionable hostile work environment practice" that continued into the limitations period. *Duncan v.Manager, Dep't of Safety*, 397 F.3d 1300, 1308-1309 (10th Cir. 2005) The pre- and post- limitations period incidents must involve the same type of employment actions, occur relatively frequently and have been perpetrated by the same managers. Here, there are no post-limitations period incidents, much less incidents that occurred with frequency.

4) Hearsay statements of a couple of comments in 2007 that may have included misgendering, i.e. someone referring to Dr. Tudor as "he," or using masculine pronouns after Tudor's gender transition; and

5) Defendants provided a health insurance plan with an exclusion for transgender health care (Tudor submits this allegation despite the fact she never sought coverage for any transgender-specific health care).

(Ex. 1 at p. 283-285, 312-313); [Doc. 24, ¶ 146].[3]

All of these alleged comments are untrue, and it is significantly telling that at no time over the remaining four (4) year period of employment at SEOSU did Intervenor complain or submit any type of grievance regarding any of these supposed incidents. (Ex. 1 at pp. 306-309). Health coverage was never denied by SEOSU or RUSO. Even if one assumed the alleged comments were true, these instances fail to demonstrate a work environment permeated with intimidation and ridicule. *See Morris v. City of Colo. Springs*, 666 F.3d 654, 669 (10th Cir. 2012) (failure to complain of incident for several days and continuing to work for employer for three months suggests incident not subjectively severe.) A "few isolated incidents" of "sporadic" offensive behavior, as opposed to "a steady barrage of opprobrious harassment, is not enough to make out a hostile work environment claim, unless those few events amount to such extreme behavior as physical or sexual assault. *Id.* at 665-668; *See also Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) ("five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in

[3] Intervenor never raised the issue of health care exclusions in her DOE/EEOC charges, and therefore, this claim cannot be considered because Intervenor failed to exhaust her administrative remedy regarding this claim.

her presence in a sixteen month period" were not sufficiently pervasive to support a hostile work environment claim); *cf. Witt v. Roadway Exp.*, 136 F.3d 1424, 1428-29, 1432 (10th Cir. 1998) (two incidents over two years where employee was called a "n****r," including "F*** that n****r, he don't have no rights" in response to the employee's complaint, did not constitute a hostile work environment).

The Court must analyze the conduct at issue here with the aforementioned guidelines in mind and determine whether a reasonable jury could find that the subjective and objective effects of the conduct were to pollute the environment with harassing conduct that was, *inter alia*, sexually humiliating, offensive, or insulting, to the extent it is sufficiently severe or pervasive. *Lounds*, 812 F.3d at 1228.

In making the determination of whether an environment is hostile, courts consider all the circumstances, such as frequency and severity of the discriminatory conduct; whether it was physically threatening or humiliating; and whether it unreasonably interfered with an employee's work performance. *Harris* at 370. Isolated incidents, unless extremely serious, will not amount to a discriminatory change in the terms and conditions of employment. *Faragher v. City of Boca Raton,* 118 S.Ct. 2275, 2283 (1998); *Morris v. City of Colorado Springs*, 666 F.3d 654, 664 (2012). In attempting to define the severity of the offensive conditions necessary to constitute actionable sex discrimination, the *Faragher* court looked to prior cases of discriminatory harassment based on race, and noted, "[d]iscourtesy or rudeness should not be confused with racial harassment;" "a lack of racial sensitivity does not, alone, amount to actionable harassment." *Faragher* at 787; citations omitted. The U.S. Supreme Court has made it clear that conduct must be extreme to amount

to a change in the terms and conditions of employment. *Id.* at 788. Without question, the evidence here falls so far short of discriminatory harassment that **no reasonable person** could find it to be objectively or subjectively hostile or abusive.

b. Remedial measures not pursued

If a hostile work environment is established, then liability is imputed to the employer through a theory of vicarious liability, subject to the defense that the employer took reasonable care to prevent (and promptly correct) harassing behavior and the employee unreasonably failed to take advantage of the preventative and corrective opportunities available. *Faragher* at 2292-2293 (1998); *Burlington Industies, Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998). The hostile environment methodology effectuates Congressional preference for conciliation rather than litigation by balancing the imposition of vicarious liability with the preventative and remedial measures defense. This encourages the employer in its obligation to prevent violations, and encourages the employee to report harassment before an environment becomes severe and pervasive. *Ellerth* at 2270; *Faragher* at 2292.

Preventative measures include adoption and dissemination of a harassment policy. Remedial measures require prompt investigation once proper notice of harassment is received. *Helm v. Kansas*, 656 F.3d 1277, 1290 (10th Cir. 2011). While an employee of SEOSU, Intervenor ***never*** submitted a complaint or grievance regarding the allegedly harassing statements. Hence, Intervenor never gave Defendants notice (proper or otherwise) of any such supposed harassment, and thus, Defendants were deprived of any opportunity to conduct an investigation of the alleged harassment. Not only did Intervenor deprive Defendants of the

opportunity to employ remedial measures, she also deprived Defendants of the ability to address the veracity of Intervenor's allegations. Of course, this presupposes the statements were ever actually made, and there is no evidence of that. Intervenor's claims of hostile work environment were never brought to Defendants' attention during her SEOSU employment. Had Intervenor given Defendants proper notice then the university or RUSO board would have had the opportunity to investigate the situation, remediate it if necessary, and avoid litigation altogether. Thus, even if the alleged statements occurred, which Defendants deny, Intervenor failed to avail herself of appropriate remedial measures, despite her excessive and extensive use of the university's grievance processes for multiple other reasons.

For example, Cathy Conway, SEOSU Human Resources Director admitted she had a telephone discussion with Intervenor relating to which bathroom Intervenor might initially feel the most comfortable utilizing after beginning her transition. In the single conversation between Ms. Conway and Intervenor, Ms. Conway proposed to Intervenor the option of using the single-occupancy, unisex, handicap accessible bathroom in Intervenor's office building because it was a single-occupant option with more privacy. In response, Intervenor thanked Ms. Conway for the suggestion and for her professionalism. Ms. Conway's notes of this conversation substantiate her recollection. In Intervenor's deposition, she claimed that as a result of this singular conversation in June 2007 she was forced to run all over campus for the next four years, in search of unisex bathrooms, and that she thus endured great embarrassment and humiliation as a result. However, despite

Intervenor's intricate knowledge of SEOSU's grievance process, and her innate willingness to complain, Intervenor never submitted any type of complaint about the alleged bathroom restriction, or about attire, make-up, or any other restrictions supposedly placed upon her by Ms. Conway. There is simply no evidence that these occurred, but more importantly, no evidence of SEOSU's awareness of any harassing conduct. Thus, vicarious liability cannot be imposed on Defendants.

In summary, Intervenor fails to illustrate a hostile work environment. Take the totality of the circumstances, in a light most favorable to Intervenor, her unsubstantiated allegations of isolated instances of harassment fail to show a workplace permeated with sexually based intimidation and ridicule. Furthermore, Defendants were deprived of any opportunities to address Intervenor's accusations, while at the same time Intervenor did not exercise reasonable care to avoid harm. Summary judgment in favor of Defendants should be granted.

II. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF DISCRIMINATION. (COUNT TWO)

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an employee based on their sex:

> It shall be unlawful employment practice for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1).

Initially, Intervenor bears the burden of proving a *prima facie* case of sex discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);

Perry v. Woodward, 199 F.3d 1126, 1135 (10th Cir. 1999). A *prima facie* case of discriminatory discharge (or non-renewal in this case) requires Intervenor to show, "(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge." *Perry*, 199 F.3d at 1135 (citation omitted); *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012) (recharacterizing the fourth factor as "she was treated less favorably than others not in the protected class"). At every stage, Intervenor retains the burden of persuasion under Title VII that she was intentionally discriminated against. *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2016 (2000); and Fed. R. Evid. 301.

If Intervenor "establishes her *prima facie* case, a rebuttable presumption arises that the defendants unlawfully discriminated against her." *Perry*, 199 F.3d 1135 (citation omitted). The burden then shifts to the State to "articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff." *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). This is only a burden of production. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993). If such reason is produced, then the presumption created by a *prima facie* case is rebutted and falls away. *Id.* at 507. Once the defendant articulates any valid reason, "the plaintiff can avoid summary judgment ***only*** if she is able to show that a **genuine** dispute of material fact exists as to whether the defendant's articulated reason was pretextual." *Perry*, 199 F.3d at 1135 (citing *Randle v. City of Aurora*), 69 F.3d 441, 451 (10th Cir. 1995)), or not the true reason, *Hicks*, 509 U.S. 508.

a. Intervenor fails to establish a *prima facie* case of discrimination.

Intervenor's Complaint somewhat confusingly asserts either conjunctively or disjunctively that for purposes of Title VII protection her protected status is either (a) that she is specifically a woman, or (b) that she is a woman, thereby potentially cloaking herself with the protected status designation to meet criterion number (1) under *McDonnell Douglas*. However, to the extent Intervenor relies on her status as a transgender person, her *prima facie* case crumbles from the outset. The courts have consistently told us that transgender status is not, by itself, a protected class. The Tenth Circuit Court of Appeals has explicitly stated, ". . . transsexuals are not a protected class under Title VII," *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007). That decision remains undisturbed in this Circuit.

The United States of America, in a recent *amicus curiae* filing in the Second Circuit Court of Appeals case of *Zarda v. Altitude Express*, 15-3775, submitted the following:

> The term "sex" is not defined in Title VII, but as Judge Skyes observed in *Hively* without dispute from the majority, "[i]n common, ordinary usage in 1964 – and now, for that matter – the word 'sex' means biologically *male* or *female*." 853 F.3d at 362 (dissenting op.) (citing dictionaries). As for the term "discrimination," the Supreme Court has held that Title VII requires a showing that an employer has treated "similarly situated employees" of different sexes unequally. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

Brief for Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation as Amici Curiae Supporting

Appellees and Affirmance, Zarda v. Altitude Express, (2015) (No. 15-3775) (United States Court of Appeals for the Second Circuit)[4].

Under *Etsitty*, one's transgender status does not place a person in a protected class. Under the authority and reasoning recently offered by the United States of America, 'sex' means a person's biological status and male or female. Intervenor has not plead, nor can she show, that she is biologically female. This fact precludes her from proving she belongs to the protected class of "female," which precludes her from satisfying the first element under *McDonnell Douglas*.[5]

Intervenor also fails to show that her case meets the second element under *McDonnell Douglas*. Under *Khalik*, Intervenor has not shown that she was treated less favorably than similarly situated employees outside of her protected class. A similarly situated employee is one who shares the same supervisor and is subject to the same standards governing performance along with other relevant employment circumstances. *Green v. New Mexico*, 420 F.3d 1189, 1194-1195 (2005). The law shows us that transgender is not a protected class. If Intervenor hangs the proverbial hat on the notion of membership in the protected class of "female," then the evidence shows us that (a) Intervenor is not biologically female, and (b) that other females were, in fact, given tenure in the same time frame as Intervenor's application. Thus, the second element of *McDonnell Douglas* cannot be met.

[4] Attached for the Court's convenience.

[5] Intervenor was born biologically male, (*See* UMF 1.), and male is not a protected class under Title VII.

Intervenor's *prima facie* case falls further apart at element four of the *McDonnell Douglas* test. A plaintiff has no *prima* facie case if she fails to demonstrate that the job was filled by someone outside the protected class. *U.S. v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981). In *Fuentes v. Perskie*, the Third Circuit ruled that "[i]n a case of failure to hire or promote under Title VII, the plaintiff must first carry the initial burden . . . by showing . . . (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 32 F.3d 759, 763 (3rd Cir. 1994) (internal citations omitted). In *Brown v. Delaware River Port Authority*, the district court there held that once an applicant was rejected for the position, the opening was closed. 10 F.Supp. 3d 556, 561-62 (D.N.J. 2014). Because the position was closed, the plaintiff failed to meet the fourth prong of the *McDonnell Douglas* test.

In *Houston v. Independent School Dist. No. 89 of Oklahoma*, this Court determined that the plaintiff therein failed to make a *prima facie* case because she failed to demonstrate that her position was not eliminated. 2010 WL 988414, at *9 (W.D.O.K). In fact, the *Houston* court found that there was no other person that held the position in question after that plaintiff had left the employer, and that there was no "evidence that the position remained open and available to others." *Id.* Here, Interevenor has failed to show that the tenure position which she sought was either left open after her separation from the University, or that it was filled by any other person outside the protected class.

Interevenor must show that after her non-renewal the job was not eliminated. But Intervenor cannot do that. The tenure position to which Intervenor aspired ceased to exist after her separation from the University. Intervenor cannot show the tenure-track position in that department was filled by any new hire or existing employee. Instead, the classes Intervenor formerly taught were split up among existing faculty.

b. Intervenor was denied tenure for legitimate, nondiscriminatory reasons.

Despite exhaustive (bordering on abusive) Discovery practice, Intervenor has produced zero direct evidence of discrimination. If Intervenor had demonstrated a *prima facie* case (which she has not), then under the *McDonnell Douglas* formula, the burden would shift to the State to demonstrate its legitimate nondiscriminatory reasons for Intervenor's non-renewal. In addition to Intervenor's failure under the University's multi-stage tenure review process - which progresses upward from (a) a committee in the English, Humanities and Languages Department to (b) the Dean of Arts & Sciences, to (c) the Vice-President for Academic Affairs, to (d) the University President, who then makes a recommendation to the RUSO Board –Intervenor demonstrated her lack of qualification by being unable to attain renewal at Collin College, a two-year community college, the only job she was apparently offered after allegedly applying at over one hundred (100) colleges and universities across the nation.

The burden for the State at this point is one of production, not persuasion, and involves no credibility assessment at all. *Reeves v. Sanderson Plumbing*

Products, Inc., 530 U.S. 133, 142 (2000). The State meets "this burden by offering admissible evidence sufficient for the trier of fact to conclude that Intervenor] was [denied tenure] for legitimate, nondiscriminatory reasons." *Id.* (citations omitted). Once legitimate, nondiscriminatory reasons are offered, then the presumptions and burdens against Defendants fall away, and Intervenor still must prove that she was actually discriminated against. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993).

In situations like the present case's determinations of academic tenure, courts have generally made determinations of liability along a sliding scale. According to an article in the *Harvard Law Review*, "as a court's estimation of a particular job's mental difficulty, communication and educational requirements, prestige, and social important increases, the more apt it becomes to require complex, particularized, and convincing evidence [from a plaintiff] before finding that a *prima facie* or conclusive case of discrimination has been established." Tenure and Partnership As Title VII Remedies, 94 Harv. L. Rev. 457, 472 (1980). *See also Sweeney v. Board of Trustees*, 569 F.2d 169, 176 n. 14 (1st Cir.) ("[j]udicial tolerance of subjective criteria seems to increase with the complexity of the job involved"), *vacated on other grounds*, 439 U.S. 24 (1978).

Courts have also found that denials of tenure in particular are inherently subjective, but at the same time courts have repeatedly affirmed a great deference to the decision-makers in tenure determinations. *See Lewis v. Chicago State College*, 299 F.Supp. 1357, 1359 (N.D. Ill. 1969) ("A professor's value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and

numerous other intangible qualities which cannot be measured by objective standards.") *See, e.g. Johnson v. University of Pittsburg*, 435 F.Supp. 1328, 1371 (W.D. Pa. 1977) ("In determining qualifications in [these] circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.")

In seeking to rebut a plaintiff's *prima facie* case, a "defendant need not persuade the court that it was actually motivated by the proffered reasons." *Burdine*, 450 U.S. at 254. It is clear from the evidence noted above that there were multiple reviewers of Intervenor's tenure application, and that there were multiple determinations that the University had legitimate, nondiscriminatory reasons for denying Intervenor tenure. And it is also clear that any court reviewing those determinations should grant great deference to the decision makers in academia.

c. Denial of Intervenor's tenure application was not pretextual since she was given the professional judgment of university administrators and an extended period in which to improve her portfolio, coupled with her rejection of those opportunities.

"[S]hould the defendant carry this burden of production of legitimate, nondiscriminatory reasons], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Burdine*, 450 U.S. at 253; *see also Hicks*, 509 U.S. at 510-11 (holding presumption of discrimination disappears once defendant carries its burden of production). "A plaintiff may establish pretext by showing 'such weaknesses, implausibilities inconsistencies, incoherencies, or contradictions in the employer's proffered

legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.'" *Santana v. City & Cnty. of Denver*, 488 F.3d 860, 864-65 (10th Cir. 2007) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). "However, 'mere conjecture that [an] employer's explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.'" *Id.* (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1998).

"In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*" not "the plaintiff's subjective evaluation of the situation." *Luster v. Vilsack*, 667 F.3d 1089, 1093 (10th Cir. 2011) (emphasis in original) (internal quotation marks and citation omitted). "But a reason cannot be proved to be 'a pretext for discrimination' unless it is shown both that the reason was false, and that discrimination was the real reason." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Intervenor must come forth with evidence that would convince a reasonable finder of fact that State's proffered reasons are unworthy of credence. *Mackenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1278 (10th Cir. 2005) (citations omitted).

Tenure is not to be given lightly. Tenure carries with it significant protections against termination, and is, in effect, a contract for life. *See Huang v. College of the Holy Cross*, 436 F.Supp. 639, 653 (D. Mass. 1977); *Labat v. Board of Higher Educ.*, 401 F.Supp. 753, 756 (S.D.N.Y. 1975). In the present case, Intervenor submitted her tenure portfolio for consideration twice. In her 2008-2009 application,

on her first attempt to receive tenure, the vote in her departmental committee against her portfolio was 0-5. Her second attempt a year later (2009-2010), was given a 4-1 vote, allowing her portfolio to proceed up out of the department. But that vote was not a guarantee of tenure, only permission from her departmental colleagues to seek tenure from the administration above.

During administrative review, first by the Dean of the college, second by the Academic Vice President, and then third by the University President, Intervenor's tenure portfolio was found to be deficient. After it became clear to the administration that Intervenor's portfolio did not merit tenure, a decision was made to offer Intervenor an opportunity to withdraw her current application, take extra time to improve her portfolio, and then resubmit a satisfactory application portfolio. [6] She declined that invitation. The University administration was surprised by Intervenor's decision, but it was hers to make. And she must live with the detrimental effects of her personal and professional decision. The multiple stages of review, coupled with the extraordinary opportunity given to Intervenor (which she rejected), demonstrate without genuine contravention that the University's decision against granting tenure was not pretextual. Intervenor has no evidence to the contrary, and certainly not a preponderance of the evidence. It seems likely that Intervenor regrets her decision to not withdraw her portfolio and improve it, and perhaps she made that decision out of hurt feelings rather than cool

[6] While there may be some dispute as to the length of time Intervenor was offered to improve her portfolio, there is no dispute that she was offered the- opportunity to withdraw her application for tenure prior to its denial so that she could reapply after a period of time with an improved portfolio.

deliberations. But, her refusal to accept the university's gift-like offer does not amount to unlawful discrimination by SEOSU.

Lest Intervenor claim that SEOSU and its administrators were merely conspiring against her unfairly, the evaluation of Intervenor's professional quality was also borne out by the post-separation evidence. Setting aside the great deference courts historically have granted, and should continue to grant, to academia about such issues, Intervenor was judged less than deserving by what she claims are over one hundred (100) higher education institutions, all of which declined to offer her a job. Further, the only one that did offer her a job, (Collin Community College), ultimately did not renew her employment due to its determination that her work performance and product was not sufficient. This third-party, real-world employer's determination about Intervenor's quality as a professor in a higher education setting is telling, and it is supportive and corroborative of SEOSU's determination about Intervenor.[7] Summary judgment should be granted in favor of the University and RUSO.

III. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF RETALIATION. (COUNT THREE)

"Under [*McDonnell Douglas'*] familiar framework, [Intervenor] must first establish a *prima facie* case of retaliation by showing "(1) she engaged in protected opposition to Title VII discrimination; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action." *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1227

[7] Intervenor has been unable to obtain academic employment since her March 2016 nonrenewal by Collin College.

(10th Cir. 2008) (*citing Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1229 (10th Cir. 2004). In the case at bar, Intervenor cannot genuinely show that she was subjected to retaliation by RUSO or SEOSU.

As noted above, transgender is not a protected status under Title VII. Therefore, any purported discrimination on that basis is not prohibited by Title VII and could not serve as the basis for step one of the *prima facie* retaliation analysis under *Fye*, described above. Further, to the extent Intervenor contends she was a woman who suffered gender stereotyping discrimination, there is zero credible evidence of that. The exhaustive Discovery conducted in this case yielded no direct or indirect evidence of gender stereotyping.

It is clear that Intervenor makes no claim of retaliation prior to her not being allowed to reapply for tenure after her portfolio was denied. In fact, Intervenor's Complaint [Doc. 24] makes exactly one (1) factual allegation in purported support of her retaliation claim: that she was denied the opportunity to reapply for tenure during the 2010-2011 academic year, despite that her tenure application the year before had been allowed to proceed to the University President's review without first being withdrawn. However, any such allowance of repetition of application, (after denial), would have been extraordinary, and contrary to administrative practice. The testimony of multiple witnesses confirms that once an application for tenure moves up out of the department and through the administration, if the portfolio is not withdrawn <u>*prior to denial*</u> by the President then the professor cannot reapply. For example, former interim-president and vice-president for academic affairs, Dr. Jesse Snowden, testified in pertinent part, as follows:

> Q. At Southeastern while you were interim president, could the candidate apply in the fifth year, get denied by the president, and the reapply in their sixth year?
> A. No.
> Q. Why not?
> A. One – the policy, once you went through the process, that was it. You were either granted tenure or not.
> Q. Was that also true when you were vice-president for academic affairs?
> A. Yes.
> …
> A. I don't know of any university that allows you to apply again after you've been denied tenure.

(Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2).

In another instance, former vice-president for academic affairs, Dr. Douglas McMillan, testified in pertinent part, as follows:

> Q. And is it your understanding that this policy prohibited reapplication for tenure after denial by the president?
> A. Yes.

(Ex. 6 at p. 189, ln. 21-24).

To the extent Intervenor was not allowed to reapply after she ignored University leadership's advice, but instead let her tenure portfolio and application go all the way up through the administration knowing it would be denied, Intervenor neither engaged in protected activity nor suffered an adverse employment action. She made a choice, and that choice had consequences. She was treated no less fairly than anyone else. Summary judgment in favor of RUSO and SEOSU should be granted.

CONCLUSION

Intervenor does not belong to a class protected under Title VII. Intervenor has not produced reliable evidence of unlawful treatment by SEOSU or RUSO, because such evidence does not exist. Defendants have produced legitimate, nondiscriminatory reasons for their decisions and actions, and those determinations were even corroborated by Intervenor's employment (and search therefore) after her departure from SEOSU. Intervenor has not shown that Defendants' reasons were pretextual because there is no evidence of pretext. Tenure is a significant commitment of time and taxpayers' resources, and it is not to be given lightly. Intervenor was not unlawfully discriminated against or subjected to a hostile work environment; she merely failed to meet the requirements for attainment of tenure. Summary judgment should be granted in favor of the Regional University System of Oklahoma and Southeastern Oklahoma State University.

Respectfully submitted,

/s/Dixie L. Coffey
DIXIE L. COFFEY, OBA #11876
KINDANNE JONES, OBA #11374
JEB E. JOSEPH, OBA #19137
TIMOTHY M. BUNSON, OBA #31004
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, OK 73105
Telephone: 405.521.3921
Facsimile: 405.521.4518
Email: dixie.coffey@oag.ok.gov
kindanne.jones@oag.ok.gov
jeb.joseph@oag.ok.gov
tim.bunson@oag.ok.gov
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of September, 2017, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Valerie Meyer
Shayna Bloom
US DEPT. OF JUSTICE CIVIL RIGHTS DIVISION-DC
950 Pennsylvania Avenue NW Rm 49258 PHB
Washington, DC 20530
Email: valerie.meyer@usdoj.gov
shayna.bloom@usdoj.gov
Attorneys for United States of America

Brittany Novotny
NATIONAL LITIGATION LAW GROUP, PLLC
42 Shepherd Center
2401 NW 23rd Street
Oklahoma City, OK 73107
Email: bnovotny@nationlit.com
Attorney for Intervenor Plaintiff

Ezra Young
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 1121
Email: ezraiyoung@gmail.com
Attorney for Intervenor Plaintiff

Allan K. Townsend
c/o Kay Sewell, Assistant U.S. Attorney
U.S. Attorney's Office for the
Western District of Oklahoma
210 W. Park Ave., Ste. 400
Oklahoma City, OK 73102
Email: allan.townsend@usdoj.gov
Attorney for United States of America

/s/ Dixie Coffey
Dixie Coffey

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**NO. 5:15-CV-00324-C**
	)	
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME I
TAKEN ON BEHALF OF THE DEFENDANTS
IN OKLAHOMA CITY, OKLAHOMA
ON MARCH 7, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

Exhibit 1

Q (By Ms. Coffey) Let me go back to -- my question, though, was whether or not -- well, I'm sorry. You were going to identify everyone that you were aware of, whether it's firsthand knowledge or your understanding, based on what you hear from others, of people who have voted against you for tenure.

So the -- and let me -- I'm going to narrow it to various years. You first submitted a tenure application in 2008, correct?

A Yes.

Q That tenure application didn't make it past the tenure review committee, did it?

MS. WEISS: Objection; confusing.

THE WITNESS: Could you rephrase the question?

Q (By Ms. Coffey) What's confusing about that question?

MS. WEISS: My objection was based on "make it past."

THE WITNESS: Yes, could you explain what you mean by "make it past"?

Q (By Ms. Coffey) What is your understanding of what happened in the 2008 tenure process?

A The tenure and promotion committee reviewed

Exhibit 1

agree that you were denied unemployment -- that you were denied unemployment benefits and that's why the State took them back?

A That was the determination that I filed, my point of view of why I thought I was eligible for them.

Q And the best that you can recall, this was the summer of 2008 or 2009?

A Yes.

Q When did you come to work at Southeastern?

A 2007.

Q Are you sure? And I'm not trying to trick you. I think that the documents show that you came to Southeastern in 2004. You began teaching at Southeastern in 2004.

A Oh, I misunderstood the question. I was still thinking about the unemployment. It would be helpful to see the document for my employment dates.

Q Okay. So as you sit here today, you don't remember when you started working at Southeastern?

A I do remember.

Q Okay. When was that?

A In the fall of 2000 -- I'm counting backwards now. The fall of 2004.

Q Why did you file for unemployment in the

Exhibit 1

unemployment in 2011?

A I'm not aware.

Q Okay. You indicated that you now are employed at Collin College. When did you get that job?

A 2012.

Q Did you begin teaching there -- when did -- when were you notified that you had been hired by Collin College?

A That was the summer of 2012.

Q Did you begin teaching in the fall of 2012?

A Yes.

Q Why did you go to work there?

A Could you be more specific?

Q Do you have any reasons for accepting the job offer from Collin College?

A Because I was unemployed.

Q Was that the only offer that you received?

A Yes.

Q When did you begin -- when did you begin searching for a job?

A 2011.

Q When in 2011?

A I believe it was sometime in the late spring. I'd like to request for me to see a copy of

Exhibit 1

you give me some frame of reference? I can look at -- discuss the historical reason, the State of Texas, higher education, what -- what frame of reference would you like for me to --

Q (By Ms. Coffey) I have no idea why Collin College doesn't have tenured positions, so I'm asking you if you know. If you don't know, that's fine.

A It would all be -- it would all be speculation, each one of those frames of reference.

Q What type of an institution is Collin College?

A It's a community college.

Q Are you aware of other community colleges in Texas which offer -- that offer tenured positions?

A Right now, I couldn't -- right now, I don't -- in 2016, I don't have that information.

Q Okay. Did you at one point, or you just aren't sure of what --

A Oh.

Q -- of what that status is in Texas?

A I don't know what the status of tenure in community colleges is at present.

Q Okay. Does Collin College offer four-year programs, four-year degrees?

A I don't know.

Exhibit 1

going by Rachel Jona?

A No.

Q Okay. Let me be clear, though, because I added a qualifier to that. You're born as Robert Joe in 1963, and you went by that name consistently and no other name until you started using the name of Rachel Jona in the early '90s; is that correct?

A Yes.

Q Then you've told me that you went by Rachel Jona in the early '90s for how long?

A It had been two or three years, approximately.

Q And after that you started going by T.R.?

A Yes.

Q For a couple of years?

A Yes.

Q And then that takes us to possibly the late '90s, and that's when you began -- no. So after you went by T.R. for a couple of years, then what name did you go by?

A After T.R., I was Rachel Jona.

Q Okay. We're up to the early '90s when you went -- you switched from Robert Joe to going by Rachel Jona.

A Yes.

Exhibit 1

they actually --

Q Any other names you've gone by that we haven't discussed?

A No.

Q So you presented as a female for two to three years in the early '90s, and then did not present again as a female until 2007; is that correct?

A Yes.

Q Okay. Did somebody tell you that your Texas license would expire at some certain time, or what -- what caused you to seek out obtaining an Oklahoma license -- driver's license?

A Because I was a resident of Oklahoma at the time.

Q So you just decided, since you were an Oklahoma resident, that you would go get an Oklahoma license, or did some authority tell you that you needed to obtain an Oklahoma license?

A My understanding is that I need an Oklahoma license to operate a motor vehicle in Oklahoma.

Q Okay. Why did you move to Norman?

A To attend the University of Oklahoma.

Q How long were you a student at OU, University of Oklahoma?

Exhibit 1

A If the ans- -- if the question is, did I apply for tenure and promotion in 2008 --

Q Yes.

A -- the answer to that specific question is yes.

Q Okay. How did that process conclude? Did your tenure -- let me -- okay. Can you answer that, how it concluded?

A Yes.

Q What was the end of it? What marked the end of that process in 2008?

A A collegial and collaborative conversation between me and my department chair about -- about fortifying my application for the subsequent year.

Q Okay. So you do not view it as -- that you withdrew your application for tenure at any stage in 2008?

A Well, I --

Q Did you or did you not withdraw your application?

A Well, yes, of course.

Q So now -- you've withdrawn it in 2008, so 2009 is a significant year for you, right? With respect to tenure and promotion.

A I don't understand. Can you explain how --

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	**NO. 5:15-CV-00324-C**
	)	
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME II

TAKEN ON BEHALF OF THE DEFENDANTS

IN OKLAHOMA CITY, OKLAHOMA

ON MARCH 8, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

Exhibit 1

you were suggesting I'm reading outside of professional items.

So with respect to hobbies, outside of your teaching, your research, professional reading, what -- do you have any hobbies?

A No.

Q Okay. When you were applying for jobs, did you investigate as to the health benefits that were offered by various colleges and universities?

A No.

Q One of your claims in this lawsuit is that Southeastern and/or Regional -- the RUS- -- the acronym RUSO, discriminated against you because of the health benefits that were excluded from the plan; is that right?

A Yes.

Q And to be more specific, what health benefits are you claiming were excluded and, therefore, were discriminatory toward you?

A Trans-related healthcare benefits.

Q And describe which -- what benefits you're referring to.

A Any healthcare benefits which transgender people require for their well-being.

Q But not -- I mean, that's -- but that's not

Exhibit 1

accurate. I mean, if you had -- if you need dental care, are you claiming that your dental care was excluded under their health policy? You know, so I'm asking you specifically what -- you're claiming that certain health benefits were excluded from Southeastern's policy and that such exclusion was discriminatory towards you as a transgender, right?

A Yes.

Q Okay. So is hormone therapy for transgenders, is that one benefit you're referring to?

A Hormone therapy is one benefit.

Q So identify other benefits for me, please.

A They're regularly -- regular monitoring of hormone levels in the blood.

Q Does that differ from hormone therapy or is it part -- I mean, is it all part of the same exclusion?

A I believe they're part of the same exclusion since they are both transgender healthcare related.

Q All right. Any other specific benefits that you're claiming you were denied?

A Yes.

Q What?

Exhibit 1

A Vaginal reconstruction surgery.
Q Anything else?
A Breast reconstruction surgery.
Q Anything else?
A Facial reconstruction surgery.
Q Anything else?
A Those are the ones that I recall at the moment.
Q When you were job searching, did you make any attempt to determine whether any of these benefits you just identified were offered by these other -- by any college that you wished to apply to?
A No.
Q Why not? Was it not important to you?
A It was important to me. I was thinking about how to answer your question.
Q Are you aware of any college or university in the United States that provides -- in their health plan, provides for the benefits -- any of the benefits you just identified?
A I believe that some do.
Q Which colleges or universities do?
A I don't recall at the moment.
Q Okay. Have you ever done any research on this issue?

symposium committee, and so I could have clar- -- I could have discussed that with him and --

Q Would it be a fair statement that you believe Doug McMillan did not place the same significance on your involvement and your writings with respect to the Native American symposium?

A Yes.

Q Would the same be true with respect to Dean Scoufos?

A Yes.

Q You said that one of the reasons -- one of the facts you were relying upon for Doug McMillan's discrimination is that his sister Janet disclosed that Doug had bias toward you or toward transgender. I'm not sure if you used that term, but is that your -- is that what you're claiming, is that Doug McMillan's sister Janet told you that Doug had a bias toward transgenders?

A Yes.

Q Okay. Now, first -- her name's Jane, correct?

A Her name is Jane, that's correct. I --

Q When did Jane tell you that?

A When we had lunch together.

Q Tell me specifically, the best that you can

Exhibit 1

recall verbatim, what Jane McMillan told you with respect to her brother and this discrimination you're accusing him of.

A Could you rephrase the question, please?

Q Tell me, to the best of your recollection, and verbatim, if possible, but if not, the best that you can recall, of what Jane McMillan said to you with regard to Doug McMillan's bias against transgenders.

A She said that her brother had bias against transgender people, but she didn't share that bias.

Q She told you, "My brother has bias against transgenders"?

A Words to those effect.

Q What do you recall her words being?

A To the effect that he objected to the, quote, "transgender lifestyle," or words to that effect.

Q Okay. You've used that term now a few times. What do you recall -- as you're sitting at lunch with Jane McMillan, what words do you recall her telling you with respect to her brother's bias?

A As I stated before, that her brother had bias against transgender people.

Q How did the conversation come up?

Exhibit 1

your tenure denial in 2009?

A I don't recollect at present.

Q Okay. So your conversation with Cathy Conway, fall of 2007, what did she tell you about Doug McMillan?

A That he had inquired whether or not I could be summarily terminated because I'm transgender, that he had placed some odious conditions on my continued employment at Southeastern.

Q Cathy Conway told you that Doug McMillan placed odious conditions on your continued employment at Southeastern?

A No. She defined -- she gave me the conditions and I will characterize them as odious.

Q Cathy Conway told you that Doug McMillan placed certain conditions on your continued employment?

A Yes.

Q Okay. What conditions were those?

A That I may only use the single-stall handicap restroom on the second floor of the building where I work; that I was prohibited from using any other multi-stall restrooms -- women's restrooms on campus.

Q Anything else?

Exhibit 1

A Yes.
Q What?
A That I should not wear short skirts that might -- or makeup which may be considered excessive.
Q Anything else?
A That's what I can recollect at this time.
Q How many written grievances did you file regarding those -- with Southeastern regarding those conditions that you claim Doug McMillan placed on your continued employment?
A Okay. Restate the question, please.
Q Let me ask it this way. Did you ever submit a written complaint or a written grievance concerning the conditions that Doug McMillan supposedly placed on your continued employment at Southeastern?
A I'd have to refresh my memory by looking at the details of the complaint that I filed with Claire Stubblefield to accurately answer your question.
Q But as you sit here today, do you recall ever submitting any kind of a written grievance while you were employed at Southeastern complaining of these conditions that you claim Doug McMillan placed on your continued employment?
A Your inquiry is of a written grievance.

Exhibit 1

No, I do not recall at this moment filing a written grievance in respect to those conditions.

Q Did you ever -- after that initial conversation with Cathy Conway, did you ever have any further conversations with her about those conditions?

A I don't recall having additional conversations about those conditions.

Q Did those conditions bother you?

A Yes.

Q Is there any reason why you couldn't have gone to Cathy Conway and indicated that you were bothered by those conditions?

MS. WEISS: Objection.

THE WITNESS: Yes.

Q (By Ms. Coffey) What reason?

A Fear of loss of employment, fear of retaliation, fear of unknown consequences.

Q So is it your claim that you never complained to Cathy Conway about any of these conditions because you were afraid of retaliation and/or loss of your job?

A Those are the -- those are the reasons I can think of right now.

Q How would anybody at Southeastern have

Exhibit 1

A Her name escapes me at the moment.
Q What did you tell her?
A She asked me to step into the restroom, and I told her I was prohibited, I could not do that.
Q Anything else to that conversation?
A Not that I recall.
Q If Cathy Conway testifies that she suggested perhaps you would be more comfortable using the unisex bathroom that you have referred to, is that an inaccurate description of her comment to you?
MS. WEISS: Objection.
THE WITNESS: It is different than the way that I recall the conversation.
Q (By Ms. Coffey) Do you recall thanking Cathy Conway for her professionalism in discussing with you these transgender issues, including the use of a particular bathroom?
A I don't recall --
Q All right.
A -- stating those words.
Q Something to that effect?
A I may have complimented her on her professionalism.
Q Okay. Just now when I asked you that question, you didn't want to admit that. You

Exhibit 1

A There's a certain stigma that goes along with being denied tenure and promotion.

Q And is that the sole basis for why you claim that Southeastern's respons- -- is partially responsible for you to not be able to get a job at one of those universities?

A Excuse me, could you restate the question?

Q Well, let me ask this this way. Any other reason why you're claiming that Southeastern is responsible for you not being able to get another job?

A In addition to the ones that I gave you?

Q Yeah, loss of professional relationship, you said loss of tenure and promotion and loss of employment.

A And the consequences of those things.

Q Have you ever received mental health or psychological counseling concerning your trans- -- being a transgender?

A Yes.

Q Were any of those sessions covered by your health benefits offered -- or the health benefits that you had while at Southeastern?

A No.

Q Did you submit medical claims for that

Exhibit 1

counseling -- medical -- while at Southeastern, did you submit medical claims to your insurance company to cover that counseling?

A No.

Q Okay. So it's not your claim that the health benefits at Southeastern were denying you coverage for counseling; is that correct? That's not part of your claim?

A Excuse me, could you restate the question?

Q Well, are you claiming that one of the exclusions of your health benefits at Southeastern was counseling for your transgender status?

A My understanding is that any trans-related healthcare was excluded.

Q Okay. Did you ever seek coverage for any counseling while you were at Southeastern?

A No.

Q Okay. So you had no idea whether or not it would have been covered; is that right?

MS. WEISS: Objection.

THE WITNESS: It was my understanding that it was not covered.

Q (By Ms. Coffey) Then how did you come to have that understanding?

A I read the exclusion of the policy.

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S RESPONSES TO REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S FIRST SET OF DISCOVERY REQUESTS

TO: Defendant, Regional University System of Oklahoma
c/o Kindanee C. Jones, Dixie L. Coffey, and Jeb Joseph
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Section
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-4518
Email: Kindanne.Jones@oag.ok.gov
Dixie.Coffey@oag.ok.gov
Jeb.Joseph@oag.ok.gov

Attorneys for Defendant State of Oklahoma Ex rel. Regional University System of Oklahoma & Southeastern Oklahoma State University

Exhibit 2

INTERROGATORIES

Interrogatory No. 1: *Please identify all individuals, (as per definition no. 5, above), to whom you complained about sexual discrimination or harassment perpetrated by SEOSU or its agents.*

RESPONSE:

Name	Occupation	Personal Contact	Employer(s)	Employer Contact
Dan Althoff	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Kenneth Chinn	Unknown	Unknown	Unknown	Unknown
Byron Clark	SEOSU Associate Vice President for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Lisa Coleman	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Margaret Cotter-Lynch	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Corie Delashaw	SEOSU Instructor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
William Fridley	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Jeffrey Gastorf	Physician	Unknown	Unknown	1400 Bryan Dr., Suite 208 Durant, OK 74701 580-931-2003
Douglas McMillan	SEOSU Vice President for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Jane McMillan	Unknown	Unknown	Unknown	Unknown
Lawrence Minks	Unknown	Unknown	Unknown	Unknown
John Mischo	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Virginia Parrish	Unknown	The only contact information Plaintiff/Intervenor has for Parrish is this email address: drvparrish@gmail.com	Unknown	Unknown
Karen Prus	SEOSU Secretary	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701

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Randy Prus	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Lucretia Scoufos	SEOSU Executive Dean for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Claire Stubblefield	SEOSU Affirmative Action Officer	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Paula Smith-Allen	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
Mark Spencer	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4th Ave Durant, OK 74701
David Tafet	Journalist	Unknown	*Dallas Voice*	1825 Market Center Blvd. Suite 240 Dallas, TX 75207
Charles Weiner	Unknown	Unknown	Unknown	Unknown

Interrogatory No. 2: *Please identify and describe all reports or complaints, (as per definition nos. 8 and 9, above), made by you about sexual discrimination or harassment perpetrated by SEOSU and/or its agents.*

RESPONSE: Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has evidence of complaints of discrimination and/or harassment, but she need not produce or exactingly describe each and every time she complained about discrimination and/or harassment perpetrated by SEOSU and/or its agents.

Subject to, and not withstanding this objection, Plaintiff/Intervenor can attest to the following non-exhaustive list of complaints she made between 2007 and 2011:

Sometime in 2007, oral complaint to Dr. Jeffrey Gastorf. I began hormone therapy and started getting blood tests to monitor my hormone levels as part of my medically necessary treatment for gender dysphoria sometime in 2007. I recall that sometime in 2007 Dr. Gastorf advised that either he or a member of his staff had run my health insurance and/or checked with

the health benefits administrator and confirmed that there was a categorical exclusion on all care for gender transition, including but not limited to exogenous hormone treatment and blood tests to monitor my hormone treatment. I recall being very upset about this exclusion when Dr. Gastorf explained it to me.

August 2007 oral complaint to Jane McMillan. On my first day at work presenting as female, Jane McMillan came by my office to see how I was doing. During this meeting, McMillan asked me if I wanted to step out of the office and "go talk in the restroom." I then complained to McMillan that I was not permitted to enter any multi-stall women's restrooms on the SEOSU campus. I advised that SEOSU Human Resources had expressly prohibited me from using all multi-stall women's restrooms on the SEOSU campus.

Sometime in 2009, oral complaint to Charlie Babb. Sometime in 2009 I attended an event on the SEOSU campus that I believe was titled "Respectful Workplace." Charlie Babb, general counsel for RUSO, was the speaker. Among other things, Babb advised attendees that transgender employees were not a "protected class" and that transgender persons "can no more bring suit [for workplace discrimination] than people who tattoo their faces." Babb callously laughed after making this remark. Babb went on to say—continuing to compare transgender persons to persons with tattoos on their faces— "you can fire them with impunity." Continuing the analogy further, Babb said, "you would never hire someone who had tattooed their face, would you?" Babb laughed mockingly again. At that point I raised my hand (as I intended to publicly complain about Babb's flagrantly offensive remarks), but Babb ignored me and moved on. I felt humiliated by Babb's remarks as many of my friends and colleagues (including, but not limited to, Jane McMillan and Daniel Althoff) were in attendance. At some point during this event Babb distributed handouts to attendees. The handout was several pages long. After the

event was over, I introduced myself to Babb and complained to him that his statements about transgender persons were deeply offensive. I further complained to Babb that it was inappropriate to mock transgender people during an event billed as addressing issues in a "respectful workplace." I also requested that Babb not make disparaging comments about transgender persons in future presentations. Though Babb listened to my oral complaints, Babb did not apologize for his remarks or offer any conciliatory words.

Late August 2009 oral complaint to Lucretia Scoufos. In late August 2009 I met with Lucretia Scoufos to discuss the process for applying for promotion and tenure during the 2009-10 term. During this meeting Scoufos asked me if there was anyone who I did not want on my committee. In response to Scoufos' question, I advised that I thought Lisa Coleman had been treating me differently since I started presenting as female at work and that, because of this, I did not want Coleman to sit on my committee. I specifically told Scoufos that I thought that Coleman did not invite me on an honor's field trip and that I thought I was not invited because of some kind of anti-transgender bias.

October 27, 2009 email complaint to John Mischo. On or about October 27, 2009 John Mischo sent me an email advising me that Lisa Coleman, Randy Prus, Paula Smith Allen, Mark Spencer, and Virginia Parrish had been assigned to my committee and that Lisa Coleman had been designated the committee chair. I replied to Mischo's email and complained that I had already discussed this issue with Scoufos and we had agreed that Spencer would chair my committee. I also complained to Mischo that Scoufos had agreed that Coleman should not be on my committee and that Daniel Althoff would serve instead.

October 29, 2009 oral complaint to Lucretia Scoufos. On this day I met with Lucretia Scoufos, Mischo also attended the meeting. During this meeting I complained to Scoufos about

Coleman's placement on my tenure and promotion committee. During this meeting I reminded Scoufos that I had previously complained about what I believed at the time to be a bias incident involving Coleman. Despite my protest, Scoufos insisted on Coleman serving on my committee and chairing the committee.

January 19, 2010 email complaint to Kenneth Chinn. I complained to Mr. Chinn (then serving as Faculty Senate Chair at SEOSU) that my 2009-10 application for promotion and tenure was denied and that I believed that the denial violated SEOSU's written policies and procedures concerning applications for promotion and tenure.

January 19, 2010 email complaint to Jane McMillan. I complained to Jane McMillan that Dean Scoufos suggested denying my application for tenure and promotion and recommended a one-year terminal contract. In this email, I noted that "I've worked so hard to earn the acceptance of my colleagues and students—I guess administration was a bridge too far."

February 2010 oral complaints to John Mischo. I met with Mischo (at the time, Mischo was Chair of the English Department at SEOSU) on several occasions throughout February 2010. During these meetings I told Mischo that I believed that Scoufos and McMillan SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. During these conversations, I indicated that I believed that my application was denied because of sex discrimination.

February 2010 oral complaint to Mark Spencer. I orally complained to Spencer sometime in February 2010. I recall that I told Spencer that I believed that Scoufos and McMillan had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. During these

conversations, I indicated that I believed that my application was denied because of sex discrimination.

February 4, 2010 email complaint to Mark Spencer. On this day I sent an email reply to Spencer further complaining about Scoufos' decision to vote against my tenure and promotion.

February 5, 2010 oral complaint to Jane McMillan. On this day I had lunch with Jane McMillan. During our lunch, I complained to Ms. McMillan that Dean Scoufos had denied my 2009-10 application for promotion and tenure. During this conversation, Ms. McMillan told me that her brother Douglas McMillan was prejudiced against transgender persons. I recall Ms. McMillan expressly telling me that she did not share her brother's prejudices.

February 16, 2010 email complaint to John Mischo. On this day I sent an email to Mischo and attached drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Mischo for feedback on my complaint letters.

February 16, 2010 email complaint to Mark Spencer. On this day I sent an email to Spencer and attached drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Spencer to give me feedback on my complaint letters.

February 16, 2010 email complaint to Virginia Parrish. On this day I sent an email to Parrish with drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Parrish to give me feedback on my complaint letters.

February 19, 2010 email complaint to Corie Delashaw. On this day Delashaw emailed me advising that she had spoken to Kenneth Chinn about Scoufos and McMillan voting to deny my application for tenure and promotion. Delashaw asked me whether I was given a reason for the denials. I wrote back to Delashaw and advised that "McMillan didn't provide any reason—

just one single sentence: 'This is to provide notification of my recommendation to the President that you NOT be granted promotion to Associate Professor with tenure'." I further advised Delashaw that I would be requesting a meeting with Minks the next week "before he makes his decision" and that I planned to write to "McMillan and Scoufos requesting that they provide a rationale for their decisions."

February 19, 2010 email complaint to Lucretia Scoufos. On this day I emailed Scoufos a letter wherein I complained about her vote to deny my application for promotion and tenure and requested that she provide me with a clear explanation of why she voted to deny my application. Mischo was cc'd on this email. Scoufos replied that "I do not discuss these matters over email" and advised me to contact her administrative assistant to make an appointment to see her.

February 19, 2010 email complaint to Douglas McMillan. On this day I emailed Douglas McMillan a letter wherein I complained about his vote to deny my application for promotion and tenure and requested that he provide me with a clear explanation of why he voted to deny my application. Mischo was cc'd on this email. McMillan replied that "It is my policy not to handle inguiries [*sic.*] like this by email. You should first make an appointment with [Scoufos], I believe she is fully capable of responding to your inquiry. If you are not satisfied with the answer you receive from Scoufos, you should make an appointment with my assistant . . . . I also ask that you invite Dr. Scoufos and Dr. Mischo to the meeting."

February 25, 2010 meeting with Lucretia Scoufos and John Mischo. I met with Scoufos at 2pm on this day. Mischo also attended this meeting. During this meeting I complained to Scoufos that she did not provide me with an explanation for why she voted to deny my 2009-10 application for promotion and tenure. Scoufos refused to give an explanation.

Scoufos advised me that she would not discuss her vote until after Minks voted.

February 26, 2010 email complaint to Mark Spencer. On this day I sent an email to Spencer complaining that Scoufos would not tell me why she voted against my application for tenure and promotion and that Douglas McMillan advised me that "he supports Scoufos—but she won't explain her rationale—so you see the problem." I then advised Spencer that I would be filing an appeal with the Faculty Appellate Committee and attached a draft of my complaint to the email.

February 26, 2010 email complaint to Corie Delashaw. On this day I sent an email to Delashaw advising her that Scoufos and McMillan had refused "to offer any explanation for their decision, so I'm filing an appeal with the faculty appellate committee." I attached a draft of my complaint to the Faculty Appellate Committee.

February 26, 2010 written complaint to Lawrence Minks. I sent Minks (then the President of SEOSU) a written grievance requesting a hearing before the SEOSU Faculty Appellate Committee (FAC) alleging that I had been denied due process when Scoufos and Douglas McMillan refused to explain or otherwise provide substantive explanations for their decisions to oppose my 2009-10 application for promotion and tenure.

March 2, 2010 attempted oral complaint to Douglas McMillan. In late February 2010 I made an appointment to speak with McMillan to complain about Scoufos and McMillan not providing me with an explanation as to why they voted to deny my application for promotion and tenure. A meeting was booked for March 2, 2010 at 2.30pm. However, shortly before that meeting was convened I received an email from McMillan's assistant informing me that, "Dr. McMillan would like to postpone the meeting until after the Faculty Appeals Committee and President make their decision. You will be contacted with a new meeting date and time." I was

never contacted by McMillan or his assistant to advise of a new meeting date and time.

April 7, 2010 complaint letter to Lawrence Minks. On this day I sent Minks a letter complaining about Scoufos and McMillan's votes to deny my 2009-10 application for promotion and tenure as well as their refusal to provide me with explanations as to why they had voted to deny my application.

April 6, 2010 complaint letter to Lucretia Scoufos. On this day I sent Scoufos a letter wherein I complained about a meeting I had had with her earlier that day. In my letter, I complained that Scoufos had demanded during the April 6, 2010 meeting that I "withdraw my application for promotion and tenure." Lawrence Minks, Douglas McMillan, and John Mischo were cc'd.

April 9, 2010 email complaint to Mark Spencer. On this day I complained to Spencer that I had been called into Scoufos' office earlier that week and was "told to either withdraw my application for tenure or face termination." I advised Spencer that I had written Scoufos a letter complaining about that meeting. I also complained to Spencer that "I have verbally asked President Minks' assistant for an appointment without success" and attached a copy of the letter I sent Minks on April 7, 2010.

April 29, 2010 written complaint to Kenneth Chinn. On this day I sent Chinn a letter detailing my concerns about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure. Among other things, I expressly advised Chinn that I believed that I was denied promotion and tenure because of sex discrimination.

April 2010 oral complaint to Lisa Coleman. Sometime in April 2010 I orally complained to Coleman about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written

Exhibit 2

policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Coleman that I believed that I was denied promotion and tenure because of sex discrimination.

April 2010 oral complaint to Corie Delashaw. Sometime in April 2010 I orally complained to Delashaw about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Delashaw that I believed that I was denied promotion and tenure because of sex discrimination.

May 2010 oral complaint to Virginia Parrish. Sometime in April 2010 I orally complained to Parrish about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Parrish that I believed that I was denied promotion and tenure because of sex discrimination.

May 2010 oral complaint to Dan Althoff. Sometime in May 2010 I orally complained to Althoff about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Althoff that I believed that I was denied promotion and tenure because of sex discrimination.

May 5, 2010 written appeal to Lawrence Minks. On this day I sent a written appeal to Minks. In my letter I complained about Charles Weiner's decision on April 29, 2010 that Mink's

Exhibit 2

decision to vote against my 2009-10 application for promotion and tenure "moots the judgment of the Faculty Appellate Committee in regards to the Committee's decision that Dr. Scoufos and Dr. McMillan should provide detailed written explanations that clearly delineate the factors that led to their decisions to disagree with the Faculty's Tenure and Promotion Committee."

August 30, 2010 written complaint to Lawrence Minks. On this day I sent a written grievance to Minks requesting a hearing before the Faculty Appeals Committee. Among other things, I alleged that my 2009-10 application for promotion and tenure had been denied because of sex discrimination.

August 30, 2010 written complaint to Claire Stubblefield. On this day I sent a written grievance to Stubblefield alleging, *inter alia*, that SEOSU's decision to deny my 2009-10 application for promotion and tenure was discriminatory and expressly complained that bias was motivated by my sex.

August 31, 2010 written complaint to U.S. Department of Education. On this day I sent a letter to the Department of Education ("DOE"). The letter complained that my 2009-10 application for promotion and tenure had been denied and that I believed the denial was motivated by bias. This letter also complained of a hostile work environment. For example, the letter referenced "odious bullying" and "hostile attitude arising from discrimination" and "adversarial and hostile demeanor toward a Native American woman." I have been advised that this letter was later forwarded by the DOE to the U.S. Equal Employment Opportunity Commission ("EEOC").

September 14, 2010 email complaint to Claire Stubblefield. On this day I emailed Stubblefield and complained that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10

application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Stubblefield that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter. I attached copies of both of Scoufos' letters to this email.

September 14, 2010 email complaint to Mark Spencer. On this day I emailed Spencer and that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010.

September 14, 2010 email complaint to Mark Mischo. On this day I emailed Mischo that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010.

September 16, 2010 supplemental grievance to Charles Weiner. On this day I sent Charles Weiner (then an Assistant Vice President at SEOSU) additional written information supplementing my pending grievance regarding SEOSU's decision to deny my 2009-10

Exhibit 2

application for promotion and tenure.

September 24, 2010 oral complaint to Claire Stubblefield. On this day I orally complained to Stubblefield that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Stubblefield that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter.

September 24, 2010 email complaint to Byron Clark. On this day I sent an email to Clark complaining that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Clark that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter.

October 2010 oral complaint to William Fridley. Sometime in October 2010 I orally complained to Fridley (then serving as Chair of Personnel Policies Committee) that I believed SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. I also

indicated that I believed that my application was denied because of sex discrimination.

October 2010 oral complaint to Margaret Cotter-Lynch. Sometime in October 2010 I orally complained to Cotter-Lynch that I believed that SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. I also indicated that I believed that my application was denied because of sex discrimination.

October 7, 2010 email complaint to Daniel Althoff, John Mischo, Lisa Coleman, Mark Spencer, Paula Smith Allen, Virginia Parrish, and Randy Prus. On this day I sent an email complaint to Althoff, Coleman, Spencer, Smith Allen, Parrish, and Prus. In my email I complained that I had received a letter from Douglas McMillan advising me that I was not permitted to re-apply for promotion and tenure during the 2010-11 application cycle. I attached a copy of McMillan's letter to my email.

October 7, 2010 email complaint to Claire Stubblefield. On this day I sent an email complaint to Stubblefield alleging that McMillan's October 5, 2010 letter advising me that I was not permitted to reapply for promotion and tenure during the 2010-11 application cycle was retaliatory.

October 11, 2010 written complaint to SEOSU Faculty Appellate Committee and Lawrence Minks. On this day I sent a letter to the SEOSU Faculty Appellate Committee and Lawrence Minks, challenging SEOSU's decision to not permit me to re-apply for promotion and tenure during the 2010-11 application cycle.

October 14, 2010 complaint letter sent to Claire Stubblefield. On this day I sent a letter to Claire Stubblefield via email wherein I added additional allegations to the grievance I filed on August 30, 2010.

Exhibit 2

October 15, 2010 email to Margaret Cotter-Lynch. On this day I sent an email to Cotter-Lynch complaining about Douglas McMillan's decision to not let me re-apply for tenure and promotion during the 2010-11 application cycle and other matters.

October 15, 2010 email to John Mischo. On this day I sent an email to Mischo complaining about Douglas McMillan's decision to not let me re-apply for tenure and promotion during the 2010-11 application cycle and other matters.

October 28, 2010 amended complaint filed with Claire Stubblefield. On this day I filed an amended complaint with Claire Stubblefield, formally amending the complaint I filed with Stubblefield on August 20, 2010.

November 2010 oral complaint to Karen Prus. I visited Karen Prus sometime in November 2010 at the new Social Science building on the SEOSU campus. During our visit, Prus took me on a tour of the new building. At some point, Prus asked me if I would like to continue our conversation in the nearby women's multi-stall restroom. I then complained to Prus that I was not permitted to enter any multi-stall women's restrooms on the SEOSU campus. I then indicated that SEOSU Human Resources had expressly prohibited me from using all multi-stall women's restrooms on the SEOSU campus.

November 8, 2010 email to Claire Stubblefield. On this day I sent Stubblefield an email in connection with my pending grievances that advised her of a "Dear Colleague Letter" Issued by the U.S. Department of Education that explicitly stated that discrimination on the basis of gender identity is prohibited by federal law.

January 9, 2011 email complaint to Charla Hall. On this day I sent a letter (attached to an email) to Charla Hall (then serving as Chair of the FAC's hearing committee). This letter complained about Charles Weiner's January 4, 2015 letter wherein he informed me that, in his

capacity as the President's Designee, he disagreed with the findings of the FAC Hearing Committee.

Spring 2011 oral complaints to John Mischo, Lisa Coleman, Margaret Cotter-Lynch, Virginia Parrish, and Paula Smith Allen. I orally complained to Mischo, Coleman, Cotter-Lynch, Parris, and Smith Allen about Stubblefield's January 2011 report.

January 19, 2011 email to Lisa Coleman. On this day I sent an email to Coleman complaining about Stubblefield's January 2011 report. Among other things, I complained that Stubblefield's report did not mention an interview Stubblefield conducted with Coleman and heavily drew from statements attributed to Randy Prus.

January 31, 2011 email complaint to William Fridley. On this day I sent an email to Fridley complaining about an email I received from Byron Clark earlier that day. Specifically, I complained to Fridley that Clark (and other members of the SEOSU administration) did not appear to inform the Faculty Senate of *ex parte* changes to the Policies and Procedures Manual and, without Faculty Senate input, had adopted new policies and procedures by which my grievance would be administered.

February 7, 2011 email complaint to William Fridley. On this day I sent an email to Fridley wherein I attached a draft of my response to Byron Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance. I asked Fridley for feedback on my draft letter.

February 7, 2011 email complaint to Corie Delashaw. On this day I sent an email to Delashaw wherein I complained about Byron Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance.

February 7, 2011 email complaint to Byron Clark. On this day I sent an email to Clark. I attached a letter wherein I complained about Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance.

February 11, 2011 email complaint to William Fridley. On this day I sent an email to Fridley complaining about an email I received earlier that day from Byron Clark advising me that the SEOSU administration would use the newly adopted policies and procedures outlined in Clark's January 31, 2011 email.

February 18, 2011 email complaint to Daniel Althoff, John Mischo, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Randy Prus, Virginia Parrish, and Wilma Shires. On tis day I sent an email to Althoff, Mischo, Cotter-Lynch, Spencer, Smith Allen, Prus, Parrish, and Shires. Among other things, I complained about Walkup's decision to issue his own "recommendation" that I not be permitted to apply for promotion and tenure during the 2010-11 application cycle as well as the SEOSU administration's decision to devise new policies and procedures for administering my grievance without input from the Faculty Senate.

March 4, 2011 appeal of Walkup's January 2011 decision. On this day I sent Byron Clark an appeal of Ross Walkup's January 2011 decision (made in Walkup's capacity as the President's Designee).

March 29, 2011 email complaint to Caryn Witten, Daniel Althoff, Janet Barker, John Mischo, Kim McGehee, Lisa Coleman, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Randy Prus, Virginia Parrish, and Wilma Shires. On this day I sent an email to Althoff, Mischo, McGehee, Coleman, Cotter-Lynch, Spencer, Smith Allen, Prus, Parrish, and

Exhibit 2

Shires. In my email I advised that a new report shows "how widespread and hurtful discrimination is around the country—it is not just SE or Oklahoma," and linked to an NPR.org news story that discussed the findings of a new report on transgender discrimination in the Untied States. That report is: NAT'L CTR. TRANSGENDER EQUALITY & NAT'L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), *available at* http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

April 4, 2011 complaint email to Daniel Althoff, John Mischo, Kim McGehee, Lisa Coleman, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Virginia Parrish, Wilma Shires. On this day I sent an email to Althoff, Mischo, McGehee, Coleman, Cotter-Lynch, Spencer, Smith Allen, Parrish, and Shires. Among other things, I complained that on April 2, 2011 Minks "decided to reject the judgment of the Faculty Appellate Committee and the formal request of the Faculty Senate to honor the FAC decision."

April 28, 2011 email complaint to Anita Levy. On this day I sent an email complaint to Anita Levy (then the Senior Program Officer of the American Association of University Professors). Among other things, I complained about the SEOSU administration's denial of my 2009-10 application for promotion and tenure and the SEOSU administration's decision to not let me reapply for promotion and tenure during the 2010-11 application cycle.

May 2011 Oral complaint memorialized in article by David Tafet. I was interviewed by David Tafet during Spring 2011. Among other things, I complained to Tafet that my 2009-10 application for promotion and tenure had been denied and that I believed the denial was motivated by my sex. A copy of the final article published by the *Dallas Voice* on May 5, 2011.

July 2011 supplemental charge of discrimination filed with EEOC. On or about July

6, 2011 I filed a supplemental charge of discrimination with the EEOC.

Summer 2011 online petition seeking reinstatement. Sometime during Summer 2011 Margaret Cotter-Lynch launched an online petition hosted on thepetitionsite.com seeking reinstatement on my behalf The petition was addressed to the attention of Sheridan McCaffree and the Regents of the Regional University System of Oklahoma. Upon information and belief, Cotter-Lynch hand delivered a printed copy of the petition with all 4080 signatories to RUSO sometime after October 22, 2011.

Publicly accessible blog entries calling for assistance and sharing information about discrimination and retaliation by SEOSU and RUSO agents and employees. Between 2011 and 2012 I wrote several entries on a publicly accessible blog. Among other things, these entries exhaustingly detail many of my experiences of discrimination and retaliation by SEOSU and RUSO and I sought help from members of the public. For example, in an April 18, 2011 entry I asked readers to reach out to the Regional University System of Oklahoma and provided contact information for Sheridan McCaffree.

Interrogatory No. 3: *Please identify each RUSO or SEOSU agent or employee who has admitted to you that he or she discriminated against, or harassed, you.*

RESPONSE: No RUSO or SEOSU agents have admitted directly to me that they have discriminated against and/or harassed me.

Interrogatory No. 4: *Please identify each person who has told you that he or she personally witnessed discrimination or harassment directed at you.*

RESPONSE: Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has evidence of discrimination and/or harassment, but she need not produce or exactingly describe each and

Exhibit 2

VERIFICATION FOR RESPONSES TO
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S
FIRST SET OF INTERROGATORIES

I certify under penalty of perjury under the laws of the United States of America that the foregoing Responses to Interrogatories are true and correct.

Rachel Tudor
Dr. Rachel Tudor

10/21/15
Date

Exhibit 2

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA, Plaintiff	)	
RACHEL TUDOR, Plaintiff-Intervenor	)	
VS.	)	CASE NO. 5:15-CV-00324-C
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants	)	

ORAL DEPOSITION OF
DR. JESSE SNOWDEN
MAY 3, 2016

ORAL DEPOSITION OF DR. JESSE SNOWDEN, produced as a witness at the instance of the PLAINTIFF, and duly sworn, was taken in the above-styled and numbered cause on May 3, 2016, from 8:27 a.m. to 4:10 p.m., before Tobi Moreland, CSR in and for the State of Texas, at the Office of the United States Attorney, 600 E. Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure and any stipulations made on the record.

Exhibit 3

A. No.

Q. When you received tenure at Millsaps, you did not receive promotion at the same time; is that right?

A. That's right.

Q. Was that unusual to receive tenure but not promotion at Millsaps?

A. No, because I was already associate professor.

Q. Had you been promoted prior to receiving tenure at Millsaps then?

MR. JOSEPH: Object to the form.

A. No. I came in as an associate professor.

Q. (By Ms. Meyer) Did Millsaps have assistant professor positions?

A. Oh, yes.

Q. When you were interim president, what was your role in the tenure and promotion review process?

MR. JOSEPH: Object to the form.

Q. (By Ms. Meyer) When you were interim president, what was your role in the tenure review process?

A. I was the final reviewer on campus.

Q. Was that also your role with respect to reviewing promotion applications at Southeastern?

A. Yes.

Q. What was the role of the administration generally in the tenure review process at Southeastern?

Exhibit 3

MR. JOSEPH: Object to the form.

A. The process is a multi-tiered process and begins with the dean, who gets the recommendation from the department chair. Dean reviews it, makes a recommendation to the vice-president for academic affairs, who then reviews it and makes a recommendation to the president.

Q. (By Ms. Meyer) Is the vice-president of academic affairs considered a member of the administration?

A. Yes.

Q. Is the dean considered a member of the administration?

A. Yes.

Q. Is the department chair considered a member of the administration?

A. No, not really, although they have administrative duties. It's one of those dual.

Q. I'm going to direct your attention to what's been marked in a previous deposition as Plaintiff's Exhibit No. 6, if you could turn to Plaintiff's Exhibit No. 6 in the binder, please.

A. All right.

Q. It's a document that's Bates labeled EEOC000300 to 301. Dr. Snowden, if you could read on the first page beginning where it says, "3.7.4, Role of Faculty," and

Exhibit 3

time frame there, although normally it takes four or five years for a person to reach the minimum standards.

Q. When you say it was your policy not to be rigid, what do you mean by that?

A. Well, if someone had an exceptional record, it was the university's advantage to go ahead and promote them and tenure them as soon as possible to try to keep them on the faculty.

Q. At Southeastern while you were interim president, could the candidate apply in the fifth year, get denied by the president, and then reapply in their sixth year?

A. No.

Q. Why not?

A. Once -- the policy, once you went through the process, that was it. You were either granted tenure or not.

Q. Was that also true when you were vice-president for academic affairs?

A. Yes.

Q. And you said that this was the policy, correct?

A. Yes.

Q. Was that a policy that was in writing?

A. I think it was. I'm not sure.

Q. Had this always been --

Exhibit 3

A. I don't know of any university that allows you to apply again after you've been denied tenure.

Q. Do you know if this policy that you've described was always the case at Southeastern?

A. No, I don't.

Q. Was it the case while you were vice-president for academic affairs at Southeastern?

A. I'm sorry, what was --

Q. You described a policy where somebody cannot be denied tenure and then reapply subsequently, correct?

MR. JOSEPH: Object to the form.

A. Yes.

Q. (By Ms. Meyer) Was that also the policy while you were vice-president for academic affairs at Southeastern?

A. Yes.

Q. So professors cannot apply for tenure more than once at Southeastern?

A. Now, what happens at the department level, if it doesn't go beyond that, they absolutely could. But if it goes through the process, no.

Q. So at what point in the process is there a point of no return, so to speak, where once the candidate has reached that point, they can't reapply after that if they are denied?

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff Intervenor,	)	
	)	
vs.	)	No. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

DEPOSITION OF LUCRETIA SCOUFOS

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 9, 2016

REPORTED BY: ROSIE STANDRIDGE, CSR

Exhibit 4

been marked as Plaintiff's Exhibit 149. Are the handwritten notes in the bottom half of Plaintiff's Exhibit -- let me strike that.

Let me just identify the document for the record. Plaintiff's Exhibit 149 is a single-page document Bates numbered EEOC 974.

Are the handwritten notes on the bottom half of Plaintiff's Exhibit 149 your notes?

A. Yes.

Q. Could you please read them aloud?

A. (Reading) Dr. Mischo and Tudor met with me today to clarify the issue of her P&T committee. Dr. Tudor readily admitted that she had misunderstood my directives and advice. However, during the conversation, she told us that she had applied for promotion and tenure the year before but Dr. Mark Spencer (he was on her committee) -- that's in parentheses -- but Dr. -- that -- that the vote had been unanimously against her being promoted with tenure, attached.

I don't seem to have the attachment.

(Reading) She went on to say that Mark as a friend advised her to withdraw her application. Both Dr. Mischo and I expressed our shock and extreme disapproval that a committee member would break a

11:53 A. Yes.

11:53 Q. (By Mr. Townsend) And when you made a decision not to recommend Dr. Tudor for tenure, was one of the reasons that you made your decision the fact that her portfolio said she had more peer-reviewed publications accepted than she had?

11:54 A. Let me restate it so I -- so the question to me is, was her discrepancy of putting some in that were not, one of -- her discrepancy, was that a reason that I -- that I did not recommend her -- one of the reasons I did not recommend her? Is that the question?

11:54 Q. Yes.

11:54 A. No.

11:54 Q. Why not?

11:54 MS. COFFEY: Object to form.

11:54 A. Because I don't know if she realized that -- that they have to be accepted before you put them in the -- in the portfolio; although, it was discussed in our meeting. Maybe -- I just go by the portfolio, by the vita.

11:55 Q. (By Mr. Townsend) Could you explain, please, why you did not recommend Dr. Tudor to receive promotion and tenure in the 2009-'10 academic year?

11:55 A. Because she didn't have the credentials.

Exhibit 4

been marked Plaintiff's Exhibit 150.

MR. TOWNSEND: I have a copy here for Dixie and for you, Ezra.

Q. (By Mr. Townsend) Are these your handwritten notes?

A. Yes.

Q. Plaintiff's Exhibit 150 is a one-page document Bates numbered EEOC 913. Could you please read these notes aloud?

A. (Reading) Met in my office at 12:30 with Dr. Tudor and John Mischo at the request of Dr. Doug McMillan, interim vice president for academic affairs. I extended the offer to Dr. Tudor to withdraw her application for promotion and tenure at this juncture on this day by 5:00 p.m. In turn, Dr. McMillan would extend her an additional -- extend her additional year to bring her portfolio into compliance with the criteria necessary for promotion and tenure.

This is -- in essence, would avail her to two years rather than just one year -- rather than just the one year she had after being refused unanimously by her promotion and tenure committee in 2008.

Actually, Dr. McMillan's offer would have given her more than a year before resubmitting her

Exhibit 4

request again in 2011. This would have allowed Dr. Tudor 18 months before having to resubmit her application for promotion and tenure again on 10/15/11 to meet the criteria she was needing -- to -- to meet the criteria she was needing.

In essence, this was a gift. And she refused it. Summarily, Dr. McMillan was giving her overs if she would withdraw her application from 2009 -- as she had done when Dr. Mark Spencer advised her to do the year before in 2008 -- and reapply in October 2011, thus allowing her the time she needed to meet the university and RUSO requirement.

Neither Dr. Mischo nor I advised her what to do, but both of us agreed with my statement that it was a gift. Her deadline is 5:00 p.m. today to respond to Dr. Minks.

Q. Thank you. And then at the top of that, it's dated April 6th, 2010, and at 12:30 p.m., correct?

A. At the top of it, I have 04/06/10.

Q. Right. I think -- well, I didn't say the numbers; but that's April 6th, 2010, correct?

A. Yes.

Q. All right. So just for shorthand, I'm going to refer to the offer that you made during this

Exhibit 4

reasonable request for her to make?

A. I think that it would have been a reasonable request for her to make, but I would think that it would be a given that she would get it in writing. That's the reason it doesn't stand out in my mind that she asked for that, because I would have said that would be a given.

Q. Why would it have been a given?

A. Well, if I put myself in her place, and somebody said we'll do this and this for you, I would say, you put it in writing and I'll do it; but not until I see it in writing, even though Dr. Mischo was there to witness it.

Q. During this meeting on -- strike that.

During the April 6th meeting, was there any discussion about Dr. Tudor being able to apply again in the 2010-'11 academic year?

A. What the discussion was, that she would not apply -- this was a stipulation, that she would not apply in 2010 because -- and I'm pretty much quoting Dr. McMillan now -- it's not verbatim, but -- because he said this will give her a year to -- he said this over the phone to me: This will give her a year to bring up her portfolio. And then she can apply in 2011. That will give her more of an opportunity.

Exhibit 4

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, et al.	)	
Plaintiff,	)	
VS.	)	Civil Action No. 5:15-CV-00324-C
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, et al.	)	
Defendant.	)	

****

ORAL DEPOSITION OF
DR. RANDY PRUS
MARCH 9, 2016

****

ORAL DEPOSITION OF DR. RANDY PRUS, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 9th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

Exhibit 5

informed of the decision when I became chair.

Q. And that was the first time you heard about her being -- the vote in '08/'09 was after you became chair?

A. Yes.

Q. All right. And Dr. Tudor applied for promotion and tenure in year 2009 as well, correct?

A. Yes.

Q. How did you first learn that she was intending to apply for promotion and tenure in 2009/'10?

A. Dr. Micho formed the committee.

Q. And did he ask you to be on it?

A. Yes.

Q. And when he asked you, what did you say?

A. Yes.

Q. Who else was on that committee?

A. Drs. Coleman, Allen, Parrish and Spencer. Dr. Coleman chaired the committee.

COURT REPORTER: Dr. Coleman what?

THE WITNESS: Chaired the committee.

COURT REPORTER: Thank you.

Q. (By Mr. Townsend) So as a member of that promotion and tenure committee, you reviewed Dr. Tudor's portfolio; is that correct?

A. Yes.

Q. And then after the promotion and tenure

Exhibit 5

committee voted, what was the vote tally?

A. I believe it was four to one.

Q. So you -- you were the one who voted against? The others voted for promotion and tenure?

A. Correct.

Q. Was there discussion between the members of the promotion and tenure committee about how to vote?

A. There was extended discussion.

Q. How long did that discussion take place?

A. An hour.

Q. Did some members of the promotion and tenure committee try to persuade you to support Dr. Tudor's application?

A. Indirectly.

Q. So I guess -- strike that. Could you just explain what was discussed about the application amongst the promotion and tenure committee during that approximately hour-long discussion.

A. Primarily it had to do with her application letter and a collection of poetry that wasn't published. It was in notebook form.

Q. It was in a what?

A. Notebook form.

Q. So what was discussed about the application letter?

Exhibit 5

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff Intervenor,	)	
	)	
vs.	)	No. 5:15-CV-00324-C
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

DEPOSITION OF DOUGLAS MCMILLAN

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 10, 2016

REPORTED BY: ROSIE STANDRIDGE, CSR

Exhibit 6

was ready to move it to Dr. Minks' office --

Q. So --

A. -- for his review.

Q. So the date, February 10th, 2010, would have been the date that you completed your review of Dr. Tudor's portfolio?

A. Yeah, when I was ready to move the portfolio down for his review.

Q. Was that also then the date, February 10th, 2010, that you sent the portfolio to Dr. Minks?

A. Typically, yeah.

Q. Then on the president line, it is blank, correct?

A. Yes.

Q. Did Dr. Minks ever sign those lines on these forms?

A. I don't know.

Q. What would happen to the portfolio transmittal form after Dr. Minks was finished reviewing the portfolio?

A. I think it stayed in the portfolio, typically.

Q. And then what would happen to the portfolio after Dr. Minks was done reviewing it?

A. Typically come back to our office. And

Exhibit 6

11:35 A. That's what they appear to be.
11:35 Q. Do you remember whether those were in her portfolio when you reviewed it?
11:35 A. I -- I don't.
11:35 Q. All right. Do you know whether Dr. Minks reviewed Dr. Tudor's tenure portfolio that she submitted in the 2009-'10 year?
11:36 A. I don't know. I assume he did, but I don't know.
11:36 Q. Why do you assume he did?
11:36 A. I brought him down there for him to review.
11:36 Q. Did he tell you that he reviewed it?
11:36 A. He told me he was done at the end of looking at them, so I -- but I didn't see him do that.
11:36 Q. Did he tell you what he thought of Dr. Tudor's portfolio?
11:36 A. I don't recall.
11:36 Q. Did he send you anything in writing explaining what he thought?
11:36 A. I don't recall seeing anything.
11:36 Q. So you did not recommend that Dr. Tudor receive promotion and tenure, correct?
11:36 A. That's correct.
11:36 Q. Why did you make that recommendation?
11:36 A. If you -- there's a letter where I detail

Exhibit 6

11:36 the reasons for that. Those -- that explains them.
11:37 It would be easier if we could be looking at that
11:37 letter.
11:37 Q. Who did you send the letter to?
11:37 A. I'd have to look at the letter again. I
11:37 believe it was to Dr. Tudor.
11:37 Q. All right. I'm just asking because there's
11:37 a lot of letters.
11:37 A. Yeah. It details what the reasons for my
11:37 not recommending were.
11:37 Q. All right. Well, as you sit here today, do
11:37 you remember any of the reasons?
11:37 A. Yes.
11:37 Q. What do you remember?
11:37 A. That the scholarship, in my opinion and my
11:37 professional judgment, didn't reach that noteworthy
11:37 and exceptional standard and that the service did not
11:37 meet the -- the requirement from policy.
11:37 Q. Okay.
11:37 A. Again, in my professional judgment.
11:37 Q. Let's -- let me see if I can guess what
11:38 letter you were talking about --
11:38 A. Okay.
11:38 Q. -- and direct your attention to it. I think
11:38 I might know what you're talking about.

Exhibit 6

So that's why I was also asking her to consider a withdrawal, so that we didn't get into this situation where we were creating a different practice.

Q. Would you turn back to Plaintiff's Exhibit 7?

A. 7? It's in the big book?

Q. Yeah.

A. Okay.

Q. Would you turn to page EEOC 332 on that page? It's policy 4.6.3. Are you there?

A. Yes.

Q. All right. This policy begins stating: The normal procedure for granting tenure is initiated by the faculty member during the fifth, sixth or seventh year to the university in a tenure track position.

Did I read that correctly?

A. Yes.

Q. Is this the policy that you were just saying?

A. Yes.

Q. And is it your understanding that this policy prohibited reapplication for tenure after denial by the president?

A. Yes.

Q. Does the policy actually say that a

Exhibit 6

MEMORANDUM

TO: Dr. Rachel Tudor

FROM: Douglas N. McMillan, Ph.D.
Interim Vice President of Academic Affairs

RE: Denial of Application for Tenure and Promotion

DATE: April 30, 2010

It is my understanding that you have been informed by President Minks of his decision to deny your request for tenure and promotion to associate professor. This authority to communicate the reasons for denial of tenure and promotion rests with the president as suggested in the Academic Policy and Procedures Manual Section 3.7.4. However, the President may delegate this authority under the RUSO Board Policy if he so desires. Dr. Minks has delegated the authority to me, as acting chief academic officer, to communicate the reasons for the denial of your application for tenure and promotion.

After careful review of your portfolio, it was determined that you do not currently meet the policy requirements for tenure and promotion in the areas of research/scholarship and contributions to the institution and/or profession. The Academic Policy and Procedures Manual stipulates that in order to be granted tenure and promotion your body of work in these areas should be both excellent and noteworthy.

An examination of the research/scholarship portion of your portfolio listed eight activities during your employment at Southeastern. These eight activities include two publications, one presentation at a regional symposium, one presentation at a local symposium, two editorships of the proceedings papers at a local symposium, and two "open-mic Chapbooks". The first three activities (the two publications and the presentation at the regional symposium) do appear to be examples of work which meet the excellent and noteworthy standard. However, the remaining activities fail to meet these standards. For example, the two Open-mic Chapbooks appear to be self-collected unpublished works which certainly do not reach the noteworthy and excellent standard. Finally, in trying to verify your contribution as editor to the proceedings of the 2006 and the 2008 Native American Symposium, some confusing information was found. In fact, the link you provided to the 2006 symposium did not identify you as an editor and the link you provided for the 2008 symposium did not lead to any proceedings. Just as an aside, editing the proceedings at a local symposium does not meet an excellent and noteworthy accomplishment for a university faculty member. In summary, your efforts in scholarship and research appear to have yielded some appropriate work; however, the body of your work, since being employed at Southeastern, is either unverifiable or falls below the policy requirement for tenure and promotion.

The Academic Policy and Procedures Manual also requires that your service reach the noteworthy and excellent standard. A review of your university service reveals that since your employment at Southeastern began, until 2009 your service has primarily been limited to serving on internal

Exhibit 7

departmental committees, such as, a program review committee, an assessment committee and a hiring committee, that clearly do not reach the policy requirement for tenure or promotion. In fact, out of eight activities you listed on your vita, four were internal departmental committees. Two of the remaining examples of service were not begun until 2009. This does not establish a record of service that is either noteworthy or excellent.

Subsequently, the reasons delineated in this memorandum formed the basis for the denial of your application for tenure and promotion.

Exhibit 7

Office for Civil Rights—Kansas City Office
United States Department of Education
8930 Ward Parkway
Suite 2037
Kansas City, MO 64114

Dr. Rachel Tudor
Department of English, Humanities & Languages
School of Arts and Sciences
Southeastern Oklahoma State University
1405 N. 4th Avenue
Durant, OK 74701
580.745.2588
rtudor@se.edu

SEP 7 10 6:19PM

Re: Discrimination in Promotion and Tenure

Date: 31 August 2010

Please investigate the administration of Southeastern Oklahoma State University for egregious violations of my civil rights under Federal law. Following is a brief synopsis of the pertinent dates, events, and personnel involved in violating my civil rights:

I was recommended for tenure and promotion by my department's Faculty Tenure and Promotion Committee in the Fall of 2009. Subsequently, Dean Scoufos and Interim Vice President for Academic Affairs McMillan denied my application for tenure and promotion. Dean Scoufos steadfastly refused to disclose her reasons for not supporting the recommendation of EHL's Tenure and Promotion Committee (Exhibit A). Dr. McMillan not only refused to disclose his reasons, he also refused to even meet with me (Exhibit B). I appealed to the Faculty Appellate Committee to review their behavior as inconsistent with Southeastern's policy and practice (Exhibit C). The Faculty Appellate Committee supported my point of view and issued a recommendation that Dean Scoufos and Dr. McMillan explain the rationales for their decisions. However, instead of respecting the common sense approach recommended by the Faculty Appellate Committee and honoring their wisdom, they contacted legal counsel and requested a legalistic legerdemain to avoid extending to me the same spirit of cooperation and collegiality that was recently freely extended to a white male candidate for tenure and promotion in my department (Exhibit D, para 3). At this point, I need to call your attention to Dr. Charles Weiner's (Assistant Vice President for Academic Affairs) role in events. The Faculty Appellate Committee met and rendered a judgment in my favor on March 22nd, however Dr. Weiner did not inform me of the Committee's decision until April 29th (Exhibit

Exhibit 8

D, see date). Policy states unequivocally that I have the right to be informed of the Committee's decision within ten days of the rendering of a verdict. It is not only inexcusable that Dr.Weiner waited five weeks to inform me of the Committee's decision, but his deliberate delay in violation of policy is evidence of collaboration between parties in the administration to delay and hinder my rights to due process and equal treatment. As a matter of fact, before I was informed of the Committee's decision the most egregious breach of my right to due process and equal opportunity for advancement in employment occurred. On April 6th I was summoned to Dean Scoufos' office. Dean Scoufos demanded that I immediately withdraw my application for tenure and promotion. When I asked for some time to think about it, she said that if I did not immediately withdraw my application, I would not be allowed to reapply in academic year 2010-2011. I mentioned that policy states tenure-track faculty have six years to apply for tenure, and I was only in my fifth year. She responded that the policy simply says tenure-track faculty "may" apply, it does not say that tenure-track faculty "must" be allowed to apply. When I did not immediately fold, she said, "you may think you are safe because the date for non-renewal of your contract without cause has passed, but you may still be non-renewed with cause if you don't withdraw your application." I asked her if she was speaking on her own authority or on behalf of Dr. McMillan. Dean Scoufos said that she was speaking on behalf of Dr. McMillan and President Minks. She said that they had met and decided to demand that I withdraw my application and to inform me of the consequences of refusing to comply with their demand. Although I was taken aback by the threats, I placed my faith in my colleagues' judgment, both the Faculty Tenure and Promotion Committee and the Faculty Appellate Committee, and refused to withdraw my application. To me, withdrawing my application would indicate that I was rejecting the good judgment of my colleagues in my department and did not have faith in the sound judgment of my colleagues in the Faculty Senate as well as surrendering to odious bullying. These events seem incredible, but Dr. John Mischo (Chair of English, Humanities, & Languages) was a witness to the meeting with Dean Scoufos and her attempts to coerce me into withdrawing my application. On April 21st President Minks denied my application for tenure and promotion. On April 29th Dr. Weiner informed me of the Faculty Appellate Committee's recommendation and of the administration's decision not to respect its judgment (Exhibit D). On April 30th Dr. McMillan composed a letter (in response to the Faculty Appellate Committee's recommendation) stating President Minks' reasons for denying my application (Exhibit E). And, here is where another egregious violation of my rights to due process and equal rights occurs, Dr. McMillan fails to mail the letter to me until June 9th (Exhibit F), almost six weeks later. Taken individually, any one of these events evidence a hostile attitude arising from discrimination; taken collectively, they demonstrate a pattern of calculated adversarial behavior intended to thwart my equal opportunity to advancement in employment—an opportunity protected by policy and law. As a matter of fact, the actions documented are in contradistinction to Regional University System of Oklahoma (RUSO) Affirmative Action policy

5.2 (c) "to reach out to all persons, including women and racial minority members, in recruitment, placement, development and advancement." Instead of reaching out to me, I was stonewalled, threatened, and denied timely access to vital information at every step of the process. Finally, note should be made of the purported reasons for President Minks denying my application (Exhibit E). President Minks' letter does not indicate any "compelling reason or exceptional case" for overruling the Faculty Tenure and Promotion Committee's judgment as required by policy. Policy states explicitly that faculty are the best judges of what constitutes substantive and meritorious contributions in their area of expertise—policy specifically eschews the type of second guessing and micromanaging described in the letter (*Policy and Procedures* 3.7.4 Role of the Faculty). As indicated by the minutia cited in his letter, President Minks clearly usurped the rights and responsibilities of the Faculty Tenure and Promotion Committee as well as undermined the principles of shared governance defined in the *Policy and Procedures Manual*. Omitted from mention in his letter are many significant contributions I have made to the university, such as designing and co-teaching a course on Native American history, literature, and law under the auspices of OSLEP (Oklahoma Scholar Leadership Enrichment Program). Most telling is his attitude toward any activities and contributions with respect to Native Americans. President Minks minimizes not only my contributions to the Native American Symposium but demeans the Symposium itself. For example, President Minks summarily dismisses my presentation at the Native American Symposium, without so much as reading the text of my presentation in order to assess its merits or consulting the English faculty, as being neither "noteworthy nor excellent" simply because it was presented at the Symposium instead of another, presumably more respectable, venue. In addition, President Minks likewise dismisses the *Proceedings* of the Native American Symposium. Astonishingly, President Minks apparently has never so much as viewed a copy of the *Proceedings* since he repeatedly affirms in his letter that he was unable to verify that I was an editor of two editions of the journal. If he had glanced at the cover of the *Proceedings*, he would have seen my name prominently displayed in bold print on the cover, along with Dr. Spencer, as an editor (Exhibit G). Copies of the *Proceedings* are readily available in Southeastern's Native American reading room. In re-reading President Minks' letter, I continue to be startled by the callousness with which he dismisses all things Native American. The lack of cultural appreciation is made more troubling by the fact that the letter was composed by another administrator, Dr. McMillan, who is clearly as dismissive of the value of Native American contributions to Southeastern as President Minks.

In conclusion, please note how different the experience of applying for tenure was for a white man in my department, Dr. Mark Spencer. The university president (who was Dr. Jesse Snowden) and Dr. Doug McMillan repeatedly met with Dr. Spencer, went over his tenure portfolio, instructed him how to revise it, invited him to provide supplemental material which included articles that he had submitted or planned to

Exhibit 8

submit for publication, and allowed him to fully explain and discuss his contributions to the university as well as providing him ample opportunity to proffer any "verification" required. Dr. Spencer received not only cooperation but a welcoming hand, guidance, and support to shepherd him through, what in the best of times is, a path wrought with anxiety. I do not resent Dr. Spencer's treatment, but affirm his experience as exemplary of the type of cooperation and collegiality between administration and faculty that characterizes a healthy university. With Dr. Spencer's experience as an exemplar, the question must be asked: why did the administration cooperate with and facilitate the tenure and promotion of a white man while adopting an adversarial and hostile demeanor toward a Native American woman? I deserve an answer to that question; but, more importantly, law and justice demands it.

Signed,

Dr. Rachel Tudor

Dept of English, Humanities & Languages
1405 N 4th Ave, PMB 4036
Durant, OK 74701
580.745.2588
rtudor@se.edu

Exhibit 8

U. S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

REQUEST FOR INFORMATION

Charging Party: Rachel Tudor

EEOC Charge No.: 564-2011-00849

Vs.

Respondent:

Southeastern Oklahoma State University

1405 N. 4th Ave., PMB 4236

Durant, Oklahoma 74701

Exhibit 9

4.9.1 Calculationof Teaching Load

Lecture
Undergraduate—1 Carnegie clock hour per week = 1 semester hour unit
Graduate—1 Carnegie clock hour per week = 1.333 semester hour units
Laboratory
2 Carnegie clock hours per week = 1 semester hour unit
Applied Lessons
1.5 clock hours per week = 1 semester hour unit
Teacher Education Practicum
(Education 2000, 3000, 4000)
20 students = 1 semester hour unit
Special Assignments
Negotiated with appropriate administrators.
Arranged Classes
These will not contribute to semester load unless adequate enrollment is obtained to be counted as a regular class (normally, 15 for undergraduate, 12 for graduate).

The load status of classes listed as directed readings, research, independent studies or departmentally specific courses will be evaluated by the department chair and the dean. Such courses will be judged by the same enrollment considerations applied to other courses.

4.9.2 Office Hours (update

A full-time faculty member is required to schedule ten office hours per week and it is recommended at least one (1) office hour be scheduled each day Monday through Friday. In addition, a faculty member is expected to be available additional hours by appointment. Faculty members teaching online or blended classes may negotiate with the department chair to substitute up to five online office hours for five physical office hours.

4.9.3 Absences from Duty

Revised 07-01-2006

When a faculty member is to be absent from an assigned responsibility, he/she must file a Faculty Absence Notification Form (see Forms). In the case of sick leave, this form is filed with Department Chair only. In the case of personal leave or leave due to Professional/ University business, the form is filed with both the Department Chair and the Dean.

4.9.4 Outside Employment

As a general rule, full–time faculty are not to be engaged in regular remuneration –producing activities (operating a private business or working as an employee for others) from 8 a.m. through 5 p.m. Monday through Friday. Exceptions must be approved by appropriate administrative personnel.

4.10 Selection and Retention of Department Chairs

Exhibit 9

denial were documented in the attached memorandum from Dr. McMillan to Dr. Tudor dated April 30, 2010. See Attachment X.

Each year according to Academic Policy and Procedure Manual 4.6.3 Procedure for Granting Promotion and Tenure, the tenure and promotion application process begins as follows:

> "By October 15, the faculty member files a written request for promotion and/or tenure with the department chair. The request must be accompanied by a portfolio exhibiting documentation of effective teaching, research/scholarship, contributions to the institution and profession, and performance of non–teaching or administrative duties, if appropriate."

The portfolio is developed by the faculty member and is considered their property. Once the review process is complete, the portfolio is returned to the faculty member and the university does not retain copies of it. Deans often encourage faculty to begin adding to their portfolios as soon as they receive them back in preparation for their next request for promotion. There is no application or resume for the application. Each decision is based on the candidate's qualifications.

2. **State the name(s) of the successful candidate(s). List everyone that was granted tenure and/or promotion during the relevant period. Include:**
   a. **Name**
   b. **Gender**
   c. **Race**
   d. **Religion**
   e. **Date of hire**
   f. **Date tenure and/or promotion granted.**
   g. **If denied tenure and/or promotion, give every reason for denial.**
   h. **Person responsible for denial.**

Response: A person's religious affiliation or beliefs are not a qualification, condition or prerequisite for any of the positions at Southeastern Oklahoma State University. Therefore it is Southeastern's policy that there is no inquiry as to an applicant's religious affiliation or belief. Interview committees are not to inquire into a person's religious affiliation or belief as it is irrelevant to a determination whether the person is qualified for employment at Southeastern.

Exhibit 9

Once employed, an employee's religious affiliation or belief is not relevant to their continued employment or performance and therefore the information is not gathered nor kept. Accordingly, Southeastern respectfully objects to gathering this information.

After sharing Southeastern's concerns with the EEOC, it was advised that this information be collected on the colleagues of Dr. Tudor because religion is one of the charges brought against SOSU. Therefore, Southeastern response is as follows:

SPRING 2010

Name	Gender	Race	Religion	Date of Hire	Date granted
Adair, Aaron	M	W	No Resp.	8/12/07	8/12/10
Althoff, Daniel	M	W	Unitarian	11/08/98	12/8/02 (P)
Cotter-Lynch, Margaret	F	W	Episcopalian	8/12/05	8/12/10
Frinkle, Karl	M	W	Declined	8/12/05	8/12/10
Jones, Wayne	M	W	No Resp.	8/1/97	8/12/10 (P)
Marshall, Charles	M	W	No Resp.	8/12/04	8/12/10
Ousey, Jack	M	W	No Religion	8/12/02	8/12/10
Topuz, Jack	M	M	Muslim	8/12/02	8/12/10(P)
Webb, Susan	F	W	Declined	11/21/98	8/12/10
White, Marc	M	M	Catholic	8/1/98	8/12/10(P)

SPRING 2011

Barker, Janet	F	W	Declined	8/12/06	8/12/10
Brewster, Dennis	M	W	Methodist	8/12/08	8/12/10
Chehbouni, Mohammed	M	Other	Declined	8/12/06	8/12/10
Combs, Deborah	F	W	Methodist	8/12/08	8/12/10(P)
Corbett, Erica	F	W	Declined	8/16/99	8/12/10(P)
Golden, Teresa	F	W	Declined	8/12/06	8/12/11
Nichols, Nick	M	W	Baptist	8/12/01	8/12/11(P)
Patton, Tim	M	W	Declined	8/17/98	8/12/11(P)
Qian, Lie	M	A	No Resp.	8/12/06	8/12/11
Weger, Stacy	M	W	Declined	No Resp.	8/12/01(P)

See Attachment Y for additional information.

If denied tenure and/or promotion, give every reason for denial. See Attachment AA.

Exhibit 9

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S RESPONSES TO REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S FIRST SET OF DISCOVERY REQUESTS

TO: Defendant, Regional University System of Oklahoma
c/o Kindanee C. Jones, Dixie L. Coffey, and Jeb Joseph
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Section
313 N. E. 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921
Facsimile: (405) 521-4518
Email: Kindanne.Jones@oag.ok.gov
Dixie.Coffey@oag.ok.gov
Jeb.Joseph@oag.ok.gov

Attorneys for Defendant State of Oklahoma Ex rel. Regional University System of Oklahoma & Southeastern Oklahoma State University

Exhibit 10

expressly counseled that I could not use any multi-stall women's restroom on the SEOSU campus. After setting forth the conditions of continued employment, Conway advised that SEOSU would process my request to change my name and gender on my SEOSU records before the Fall 2007 semester started. Then the call ended.

I felt alarmed and threatened as a result of Conway's call. I expected that transitioning to female at work might be difficult, but I did not believe that I could be summarily terminated because of my sex. Conway's comments about McMillan's inquiry as well as his open prejudice against transgender persons were deeply disturbing and made me feel very anxious and fearful for my future at SEOSU.

Interrogatory No. 11: *Please identify and describe the details of all tenure-track professorships for which you have applied since leaving Southeastern Oklahoma State University.*

RESPONSE: Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has satisfied her obligation to mitigate damages, but she need not produce or exactingly describe each and every application she submitted. *See, e.g.*, *EEOC v. Unit Drilling Co.*, 2014 WL 3572219, *3 (N.D. Okla. 2014) (holding that party's request for "all job applications" during relevant time period was not proportionate to needs of the case).

Subject to and without waiving these objections, Plaintiff/Intervenor applied for teaching positions at over one-hundred institutions of higher education between Fall 2011 and accepting a position at Collin College in Summer 2012, including, but not limited to:

1. Arizona State University (Tempe, Arizona)
2. Averett University (Danville, Virginia)
3. Baindridge College (Bainbridge, Georgia)
4. Ball State University (Muncie, Indiana)

5. Baltimore Community College (Baltimore, Maryland)
6. Baylor University (Waco, Texas)
7. Bethel University (McKenzie, Tennessee)
8. Brevard College (Brevard, North Carolina)
9. Bucknell University (Lewisburg, Pennsylvania)
10. Butler County Community College (El Dorado, Kansas)
11. Central New Mexico Community College (Albuquerque, New Mexico)
12. Chabot-Las Positas Community College (Los Positas, California)
13. Colin College (McKinney, Texas)
14. Dallas County Community College (Dallas, Texas)
15. Dickinson College (Carlisle, Pennsylvania)
16. East Central University (Ada, Oklahoma)
17. Edison State College AKA Florida SouthWestern State College (Fort Myers, Florida)
18. Enterprise State Community College (Enterprise, Alabama)
19. Florida Gulf Coast University (Fort Myers, Florida)
20. Florida Institute of Technology (Melbourne, Florida)
21. Florida International University (Miami, Florida)
22. Full Sail University (Winter Park, Florida)
23. George Mason University (Fairfax, Virginia)
24. Georgia Perimeter College (Decatur, Georgia)
25. Georgia Institute of Technology (Atlanta, Georgia)
26. Germanna Community College (Locust Grove, Virginia)
27. Glenville State College (Glenville, West Virginia)
28. Grayson Community College (Denison, Texas)
29. Grinnell College (Grinnell, Iowa)
30. Houston Community College (Houston, Texas)
31. Illinois College, Jacksonville, IL (Jacksonville, Illinois)
32. Illinois State College (Normal, Illinois)
33. Indiana University Southeast (New Albany, Indiana)
34. Jackson Community College (Jackson, Michigan)
35. James Madison University (Harrisonburg, Virginia)
36. Kenyon College (Gambier, Ohio)
37. Lake Sumter Community College (Leesburg, Florida)
38. LeTourneau University (Longview, Texas)
39. Lindsey Wilson College (Columbia, Kentucky)
40. Lone Star Community College (Houston, Texas)
41. Monterey Peninsula College (Monterey, California)
42. Montgomery College (Rockville, Maryland)
43. Moraine Valley Community College (Palos Hills, Illinois)
44. Nevada State College (Henderson, Nevada)
45. New England College (Henniker, New Hampshire)
46. New Mexico Highland University (Las Vegas, New Mexico)
47. North Seattle Community College (Seattle, Washington)
48. Northern Virginia Community College (Springville, Virginia)
49. Oberlin College (Oberlin, Ohio)
50. Ohio Christian University (Circleville, Ohio)

Exhibit 10

51. Oklahoma Baptist University (Shawnee, Oklahoma)
52. Oklahoma State University (Stillwater, Oklahoma)
53. Oxbridge Academy of the Palm Beaches (West Palm Beach, Florida)
54. Palm Beach State College (Lake Worth, Florida)
55. Pellissippi State Community College (Knoxville, Tennessee)
56. Pensacola State College (Pensacola, Florida)
57. Philander Smith College (Little Rock, Arizona)
58. Pima Community College (Tucson, Arizona)
59. Polk State College (Winter Haven, Florida)
60. Portland State University (Portland, Oregon)
61. Prince George's Community College (Largo, Maryland)
62. Rasmussen College (Minneapolis, Minnesota)
63. Rogers State University (Claremore, Oklahoma)
64. San Jacinto College (Pasadena, Texas)
65. Seminole State College (Orlando, Florida)
66. Seminole State College (Seminole, Florida)
67. Shippensburg University (Shippensburg, Pennsylvania)
68. Slippery Rock University of Pennsylvania (Slippery Rock, Pennsylvania)
69. South University (Highpoint, North Carolina)
70. Southeast Missouri State University (Girardeau, Missouri)
71. Southern Methodist University (Dallas, Texas)
72. Southwestern Oklahoma State University (Weatherford, Oklahoma)
73. St. Louis Community College (St. Louis, Missouri)
74. St. Petersburg College (St. Petersburg, Florida)
75. Tarrant County College (Forth Worth, Texas)
76. Texas A & M-Kingsville (Kingsville, Texas)
77. Tiffin University (Tiffin, Ohio)
78. Towson University (Baltimore, Maryland)
79. Tri-County Technical College (Pendleton, South Carolina)
80. Trinity Valley Community College (Athens, Texas)
81. University of Arkansas (Feyetteville, Arkansas)
82. University of California-Los Angeles (Los Angeles, California)
83. University of Houston-Downtown (Houston, Texas)
84. University of Houston-Victoria (Victoria, Texas)
85. University of Iowa (Iowa City, Iowa)
86. University of Louisiana (LaFayette, Louisiana)
87. University of Maryland (College Park, Maryland)
88. University of Nevada (Las Vegas, Nevada)
89. University of North Carolina (Wilmington, North Carolina)
90. University of North Florida (Jacksonville, Florida)
91. University of Northwestern Ohio (Lima, Ohio)
92. University of Oregon (Eugene, Oregon)
93. University of Pennsylvania (Philadelphia, Pennsylvania)
94. University of Rhode Island (Kingston, Rhode Island)
95. University of South Carolina (Aiken, South Carolina)
96. University of South Florida (Sarasota, Florida)

Exhibit 10

97. University of Tampa (Tampa, Florida)
98. University of Tennessee (Knoxville, Tennessee)
99. University of Utah (Salt Lake City, Utah)
100. Utah Valley University (Orem, Utah)
101. Volunteer State Community College (Gallatin, Tennessee)
102. Wartburg College (Waverly, Iowa)
103. Webster University (Greenville, South Carolina)
104. Xavier University (Cincinnati, Ohio)

Interrogatory No. 12: *Please identify the individual human resources employee whom you contend in Paragraph 50 of Plaintiff/Intervenor's Complaint "was uncomfortable with a transgender woman . . . using a multi-stall women's restroom."*

RESPONSE: Paragraph ¶ 50 of my Complaint in Intervention refers to Cathy Conway. Prior to the June 1, 2007 phone call with Conway I had had few interactions with Conway. During the call, Conway advised me about the restroom restriction and repeatedly made references to the restroom restriction and other "conditions" being placed on my continued employment. I believed at the time that Conway's instructions as to my restroom use were improper and that they were likely motivated by Douglas McMillan's bias against transgender persons and/or Conway's own bias against transgender persons.

Name: Cathy Conway
Occupation: Unknown
Personal Contact: Unknown
Employers: Unknown
Employers' Contact: Unknown

Interrogatory No. 13: *Please identify and describe, (as per definition nos. 8, 9, and 10, above), the circumstances and date of the first time you complained to RUSO or SEOSU employees or agents about being forced to use "the single-stall, **all** genders restroom" described in Paragraph 52 of Plaintiff/Intervenor's Complaint.*

RESPONSE: On my first day at work presenting as female (sometime in August 2007), Jane McMillan came by my office to see how she was doing. During this meeting, McMillan asked me if I wanted to step out of the office and "go talk in the restroom" (referring to the women's multi-stall restroom down the hall from my office). I proceeded to complain to

Exhibit 10

VERIFICATION FOR RESPONSES TO
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S
FIRST SET OF INTERROGATORIES

I certify under penalty of perjury under the laws of the United States of America that the foregoing Responses to Interrogatories are true and correct.

Rachel Tudor
Dr. Rachel Tudor

10/21/15
Date

Exhibit 10

Dr. Rachel Tudor's Personnel File at Collin College

CC 1

Exhibit 11

Job Responsibilities/Priorities

List the employee's primary job responsibilities that require attention and describe the specific improvement that is needed to meet minimum expectations. Note that there may be other performance deficiencies that are not listed but may be addressed with future PIP's once performance in the areas listed below is corrected.

1. **Job Performance Deficiency:** Your service to Collin College does not meet Collin's standard of excellence.

Specific Results Required for Acceptable Improvement: Continue providing the service you have provided. In addition to the service you are now providing, as planned, coordinate the multiple meetings of the Interdisciplinary Colloquium. I encourage you to consider providing additional service beyond coordinating the Interdisciplinary Colloquium.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

2. **Job Performance Deficiency:** Your professional development does not meet Collin's standard of excellence.

Specific Results Required for Acceptable Improvement: In addition to attending and presenting at district professional development events, please attend (and present at) at least one regional/national professional development event.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

3. **Job Performance Deficiency:** Retool your instruction and improve your classroom management to address the concerns reflected in your student evaluation ratings and comments.

Specific Results Required for Acceptable Improvement: Continue selecting appropriate instructional materials for your composition classes, focusing these classes clearly on composition. Continue working on managing your classes so that students are well engaged; so that your instruction is clear, challenging, substantive and interactive; and so that your management of classes is more resolute and collaborative. Continue working with me and other faculty as mentors to adequately address the instructional and class management issues identified in your 2013-2014 annual appraisal and in our discussions.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

Plan Establishment

- **Support to be provided by Supervisor (e.g. training, equipment, observation, procedures):**
- Review your Fall 2014 student evaluations as soon as possible and meet shortly afterward to discuss them with Dean Weasenforth. Come prepared with an analysis of student concerns and proposals for addressing those concerns.
- Meet with Dean Weasenforth periodically through Fall 2015 to discuss your progress in fulfilling these goals.
- Attend professional development opportunities available in district as well as regional/national professional development events.
- Seek the eLC's assistance with technology-based instructional innovations.
- Confer with Scott Cheney, Co-Chair of English, with regard to any concerns you may have regarding conducting successful dual credit classes.
- Continue to confer with other full-time faculty—including the one who has served as a mentor to

Exhibit 11

Plan Establishment Signatures:

Employee: _____ **Date:** _____

Supervisor: _____ **Date:** _____

VP/P: _____ **Date:** _____

HR Liaison Received and Recorded _____ **Date:** _____

Follow-up Review

Dates of follow-up discussions: see dates below

Results of follow-up discussion #1: Professor Tudor met with me on 2/5/15 to discuss her Fall 2014 student evaluations. I noted that while some evaluations spoke highly of her and the instruction that she provided, there were a notable number of evaluations that described her instruction as unclear and her classroom management as inadequate. I noted the need for improvement; referred her to Lisa Roy-Davis, her mentor, and Scott Cheney, English Co-Chair overseeing dual credit classes; and offered my advice and support.

Results of follow-up discussion #2: Professor Tudor met with me on 9/14/15 to discuss her 2014-2015 annual appraisal. At that time, I noted her improvement in professional development and my conclusion that it met standards of excellence. We also discussed my conclusions that she still needed improvement in instruction and service since neither met standards of excellence. I offered my advice and personal support as means of improvement in instruction and service.

Results of follow-up discussion #3: Professor Tudor and I met again on 1/11/16 to discuss her 2014-2015 annual appraisal. At this meeting, with additional information and clarification, I noted that her service was adequate, albeit not outstanding. I pointed out that simply maintaining membership on committees does not constitute substantive service, and I encouraged Professor Tudor to be more proactive in seeking service opportunities and providing service. I also noted improvement in instruction based on student evaluation results from Fall 2015, but I also noted that 6 of 25 ENGL1301.S54 students responded to the evaluation and that no evaluations for ENGL1301.S07 were received by the IRO. I noted that several ENGL1301.S07 students had complained about Professor Tudor's instruction, complaints that were consistent with previous student complaints. The incomplete pool of student evaluations complicated this assessment process.

Follow-up Review: *(generally to be completed within 60-90 days of initial review date)*

Employee has achieved the required improvement described above. Professor Tudor's professional development meets standards of excellence. She has engaged in a number of professional development activities, including presenting at the Texas Tech Comparative Literature Conference, presenting at the Trends in Teaching College Composition Conference, attending the Faculty Development Conference (Scott Barry Kaufman) in Fall 2014, attending Faculty Development Conference presentations in Spring 2015, attending eLC training for Blackboard, and meeting with her mentor and chair.

Employee has not achieved the required improvement in the following area(s): Professor Tudor has stated that she does not see a need for improvement in her instruction or classroom management, a stance that is inconsistent with the dean's assessment. The service she has provided continues to be adequate, not outstanding.

Exhibit 11

Tonya Jacobson

From:	donotreply@collin.edu
Sent:	Thursday, March 17, 2016 1:27 PM
To:	Tonya Jacobson
Subject:	New Employee Complaint - Rachel Tudor
Attachments:	complaint regarding contract nonrenewal 2016.docx

NOTICE OF NEW EMPLOYEE COMPLAINT

Case Number : 55

COMPLAINANT INFORMATION:
CWID : 100139507
First Name : Rachel
Last Name : Tudor
Job Title : Professor
Campus : Spring Creek Campus

Address : 4595 West Spring Creek
City : Plano
State : TX
Zipcode : 75024

Phone Number : 9728815133

College Email Address : rtudor@collin.edu

TYPE OF COMPLAINT FILED:
Wages Hours Conditions of Work :
Violations of College Policy :
Unlawful Discrimination or Harassment :
Unlawful Retaliation :
Whistle Blower :
At-Will Termination :
Contract Termination : Y
Any Other Complaint :

DETAILS OF COMPLAINT:
Respondent : Collin College, Dean Weasenforth, Dr. Mary McRae Date of Action : March 4, 2015 Details of Complaint : See attachment Witnesses : Dean Weasenforth, Dr. Mary McRae Witness Information : Unknown Discussed Complaint With : Dean Weasenforth, Mary McRae, Norma Allen

Relief Requested : Renewal of contract for the 2016-2017 academic year.

Uploaded_Files (if any) : /DGBA_Uploaded_Supporting_Documents/complaint regarding contract nonrenewal 2016.docx

SIGNATURE AND DATE SUBMITTED:
Electronic_Signature : Rachel Tudor

CC 1059

Exhibit 11

Signature_Date : 03/17/2016

Timestamp : 03/17/2016 01:26:56 PM

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Exhibit 11

Re: Complaint Regarding Nonrenewal of Contract

The nonrenewal of my contract is a discriminatory and retaliatory act that violates my rights. The assessment on which the decision to not renew my contract was based is flawed and misrepresentative of the facts. The decision to not renew my contract should be reconsidered and a new contract issued to me for the 2016-2017 academic year.

My annual performance review stated that I "Meet Standards for Excellence" in Professional Development and Service, therefore the only area in dispute is Teaching. The only area in Teaching that Dean Weasenforth purports needs improvement is "Facilitates Learning". As a matter of fact, the categories of "Provides Students with the Fundamental Body of Knowledge of Her Discipline," "Teaches Students to Apply That Knowledge," "Responds to the Differing Educational Requirements of Students," "Employs Current Materials in Classroom Presentations and Learning Experiences," "Uses Innovative Teaching and Learning Methods," "Employs Effective Evaluation Techniques," and "Meets Classes as Scheduled" are all assessed as "Meets Standards for Excellence." It is to be noted that "Facilitates Learning" is the only ambiguous and subjective category in the Teaching Assessment section. Each of the other categories refers to specific elements that a faculty member may point to as objective evidence of having been met. Therefore, there is compelling reason to eliminate it entirely from assessment. If it is included, it should be given the least weight of all the categories. An "Improvement Needed" in that one category is certainly no justification or warrant for the catastrophic act of terminating a faculty member's employment thereby depriving a person of their livelihood, health insurance, and dignity.

Of the twenty-two areas of assessment, there is only one other area of assessment that I received anything less than "Meets Standards for Excellence." That is in the Assisting Students section. The Assisting Students section has four assessment categories: "Understands Current Career and Curriculum Options," "Helps Students with Education-Based Problems and/or Directs Students to Appropriate College Resources," "Assists Students in Accessing Appropriate College and Community Resources for Non-Educational Purposes," and "Is Available to and Approachable by Students." In the first three categories I received "Meets Standards of Excellence." Only in the category of "Is Available to and Approachable by Students" was "Improvement Needed" marked. The objective part of that assessment is whether or not I kept all of my scheduled office hours. I did. That is demonstrable. In the evaluations, many students wrote that I am "nice" and "friendly." In addition, I am a volunteer in the College's student mentoring program. The assessment of "approachable" is subjective from student to student. As in the previous example, the only area of assessment in this category tagged "Improvement Needed" is the subjective portion of one assessment criteria. Likewise, an "Improvement Needed" in that one category is not justification or warrant for the catastrophic act of terminating a faculty member's employment.

I noted in detail in a complaint to Mary McRae the biased and distorted remarks that Dean Weasenforth made in his original assessment of my performance and he was instructed to "re-format the Appraisal to point out both positive comments and constructive criticism based on a larger sampling of student

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comments." Although he did include a more balanced presentation of student comments, he persisted in distorting and misrepresenting information that I noted in my "comments" because he was unwilling to work with me to make truly equitable changes. As egregious as his continuing bias was in prejudicing the review of my assessment, his patently false claim in his "Follow-Up Review" that "Professor Tudor has stated that she does not see a need for improvement in her instruction or classroom management, a stance that is inconsistent with the dean's assessment" was probably instrumental in denial of renewal of my contract. When I read Dean Weasenforth's false claim, I pleaded with him to remove it. He refused. He wrote to me in an email that I could write what I wanted in the "comments" section. I had one class in which EVERY student marked "strongly agree" in all sixteen categories and wrote comments such as: "Great teacher—always knew what to expect" and "Very Nice!!!" I said of that particular class, in a good-humored way, that there was not much room for improvement there. Dean Weasenforth twisted that good-humored comment into an assertion that I never made. As a matter of fact, one of the comments a student wrote in another class was "humble." If I made the statement he claims I did or believed it—why would I have been so adamant since I read it in the "Follow-Up Review" that it be excised? Dean Weasenforth's false statement and his refusal to remove it is compelling evidence of bias—bias that may only be explained as discriminatory and/or retaliatory in nature.

Collin College has an institutional and cultural problem addressing discrimination against transgender employees. The discrimination begins with the absence of any explicit policy prohibiting discrimination based on gender identity and excluding any trans-related health care provisions in its insurance. Collin College health insurance even excludes coverage for mental health counseling! Employees who suffer mental health crises because of the absence of an anti-discrimination policy cannot even access health care to help them cope with the problems being a victim of discrimination creates.

Collin College human resource staff and administration are not trained to recognize or deal with trans-related discrimination—even if there were policy to prevent it. For instance, another faculty member, Leslie Richardson, made some trans-hateful remarks in my presence and Dean Weasenforth's response was to defend her because she claimed she didn't know I was trans. He did not take my report seriously until verified by three other witnesses. The aftermath was that he removed me from a faculty search committee and replaced me with Leslie Richardson. He and HR representatives met with Leslie Richardson and worked out a "solution" without including me in the discussions. Leslie Richardson was not required to attend or participate in any type of educational program to inform her about being respectful to trans colleagues or trans students. As a matter of fact, the difficulties I have had with Dean Weasenforth and the administration began, I believe not coincidentally, when I complained about Leslie Richardson's hate speech.

I informed my faulty mentor, Lisa Roy-Davis, of some students' acts of animus because they discovered that I am trans. I informed her of hateful things they posted on RateMyProfessors, threatening emails, misgendering me in the classroom, and being generally disrespectful. When Dean Weasenforth was confounded why some students in some classes made statements about my teaching proficiency and classroom management that directly contradicted what other students wrote, I explained that the majority of the disparaging comments were based on the animus that these students had towards trans people. He not only routinely dismissed my explanation but quoted these students at length as if they

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were credible in my annual assessment. The standard that Dean Weasenforth and Dr. Mary McRae use to identify trans discrimination is explicit anti-trans remarks in the evaluations—"Dr. Tudor's subjective belief that the dual credit students were purportedly biased against her is not evident in the evaluations." That simply is not how discrimination works. It is important to note that misgendering, disrespectful comments and behavior in the classroom, and harassment in social media (which I reported to my mentor) were not "subjective" but objective and empirical instances of discrimination. Thus, the need for education and training of administration so they may be able to identify the signs of discrimination when evidence is presented—beginning with taking the testimony of trans people seriously.

I presented Dean Weasenforth and Dr. Mary McRae a report, "Injustice at Every Turn," that found discrimination against trans people as being "pervasive" and the "combination of anti-transgender bias and persistent, structural racism [I am also Native American] as especially devastating." For instance, over "90% of trans people experience harassment, mistreatment or discrimination on the job." It is turning a willfully blind eye to reality to believe that this type of pervasive discrimination is not reflected in the student evaluations. The Office of Human Rights released a report in 2015 that found 48% of employers appeared to prefer less qualified applicants perceived as cisgender over more qualified transgender applicants. They also found that 33% of employers offered interviews to one or more less-qualified applicants perceived as cisgender while not offering an interview to more-qualified transgender applicants—this study included community colleges as potential employers. Of particular relevance to my case is a study carried out by Nujavi Bardales in 2013 in "urban areas in Texas" and included positions in "Higher Education" that found a "statistically significant 31.7% level of discrimination against tester applicants." None of the respondents in these studies make explicit anti-trans remarks yet the authors were able to identify the pervasive and harmful effects of discrimination on trans people's employment. Why is Collin College adamant that there is no anti-trans bias in the evaluation of trans faculty? It is simply counterfactual to claim that the students at Collin College are not subject to the bias and discriminatory attitudes that are part of our culture. It is cruel and unjust to terminate a professor because she is unable to single-handedly overcome the bias and discrimination that permeates our culture. I say "singlehanded" because there are no trans-focused educational activities sponsored by the college. I made repeated pleas to my dean and colleagues for trans-related films to be included in the college's film series, for trans-related books to be included in the Book-in Common program, for trans women to be included in the multi-year Dignity Initiative, for trans-authored texts to be include in the curriculum, and to have a campus activity to mark the Trans Day of Remembrance (a day to remember the people who are murdered every year simply because they are trans), and for the college to train faculty, administrators, and HR personnel on trans-related needs.

The only purported reason for not renewing my contract are some negative evaluations and spurious comments made by a minority of students. In response, it is important to know that there is a large reservoir of data published in peer-reviewed journals documenting the fact that student evaluations are biased based on gender, race, age, and the teaching of social justice issues such as "white privilege." For instance, Heather Laube, Kelley Massoni, Joey Sprague, and Abby Ferber caution in *The Impact of Gender on the Evaluation of Teaching* that "quantitative measures can mask underlying gender bias"

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(87). Alison Bartlett writes in *"She Seems Nice": Teaching Evaluations and Gender Trouble* that "teaching evaluations are highly debatable instruments with which to measure teaching" and are "mainly acknowledged as unreliable." Lilian MacNell, Adam Driscoll, and Andrea Hunt found in *What's in a Name: Exposing Gender Bias in Student Ratings of Teaching* that "instructor gender has been shown to play an important role in influencing student ratings"; "students rated the male identity significantly higher than the female identity"; and that these findings "warrant considerable attention." In *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, the researchers found that "students hold teachers accountable to certain gendered expectations" and that they found "signs of much greater hostility towards women . . .who do not meet students' gendered expectations." Marilyn Chamberlin and JoAnn Hickey wrote in *Student Evaluations of Faculty Performance: The Role of Gender Expectations in Differential Evaluations* that "sex stereotypes influence both the expectations and evaluations of faculty members." In short, there is overwhelming evidence that gender bias does have a significant impact on student evaluations. Student evaluations may be quantifiable but they are not objective. Dean Weasenforth and company are unwarranted in relying on them to justify not renewing my contract. In light if the irrefutable evidence that there is bias against cisgender women—how much more so trans women?! Julianne Arbuckle and Benne Williams wrote in *Age and Gender Effects on Teacher Evaluations* that young male professors were consistently rated higher in student evaluations than "old" male or "old" female professors in contradistinction to their actual abilities. Likewise, Robert Stonebraker and Gary Stone found in *Too Old to Teach?* that "age has a negative impact on student ratings of faculty." I am old enough to be included under the protection of anti-ageism laws. Finally, several studies found that including social justice issues in the curriculum has a significant negative impact on student evaluations. Rakhi Ruparelia wrote in *Guilty Displeasures: White Resistance in the Social Justice Classroom* that "Professors who initiate these discussions become the natural targets of criticism and blame as students struggle with their own discomfort. The hostility of resistant white students can be interpreted as racial microaggrassions that compromise the psychological well-being and deplete the emotional and physical resources of racialized professors." And, the authors stress the importance of "understanding negative student reactions in the context of structural racism." Su Boatright-Horowitz and Sojattra Soeung put it most forthrightly in the title of their work, *Teaching White Privilege to White Students Can Mean Saying Good-bye to Positive Student Evaluations*. They found that "teaching anti-racism [which I explicitly do as well as anti-LGBT discrimination] can have a negative impact" on students evaluations because students "cast their frustrations and emotions towards educators." My composition classes write papers on the topics of immigration, sexism, civil rights, and wealth inequality.

In sum, my student evaluations are mostly positive and many students make incredibly personal and passionate affirmations of my teaching. I am always looking for ways to improve my teaching, but the fact is that there is demonstrable bias in the student evaluation because of gender, race, age, and subject matter. I am aware of legitimate criticisms and strive to address those, but the areas that may be improved are not so grave as to warrant the nonrenewal of my contract. I have carefully read Dean Weasenforth's assessment of the student evaluations and I find no awareness of the readily available scientific data and research on student evaluations with which those student evaluations should be weighed. In fact, Dean Weasenforth has been deaf to my efforts to communicate the nuance and art of

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interpreting evaluations in the context of structural gender bias, pervasive discrimination against trans people, racism, and the hostility to including lessons on white, cis, and heteronormative privilege in the curriculum.

For all of the foregoing reasons, my contract should be renewed for the 2016-2017 academic year. There simply is no legitimate or warranted reason to not renew my contract. I am even willing to relocate to one of the other Collin College campuses.

Signed,

Dr. Rachel Tudor

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5.6 SEXUAL HARASSMENT POLICY.

Statement of Policy. RUSO affirms its commitment to ensuring an environment for all employees and students which is fair, humane, and respectful -- an environment which supports and rewards employee and student performance on the basis of relevant considerations such as ability and effort. Behaviors which inappropriately assert sexuality as relevant to employee or student performance are damaging to this environment. Sexual harassment by any member of the university community, including students, faculty and staff, is a violation of both law and the Board policy, and will not be tolerated. Sexual harassment is a particularly sensitive issue which may affect any member of the university community and as such will be dealt with promptly and confidentially by the university administration. The Board reserves the right to deal administratively with sexual harassment issues whenever it deems it appropriate to do so.

Definition of Sexual Harassment. Sexual harassment shall be defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature in the following context:

a) when submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic standing, or

b) when submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting such individual, or

c) when such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment.

Examples of Prohibited Conduct.

Conduct prohibited by this policy may include, but is not limited to:

unwelcome sexual flirtation; advances or propositions for sexual activity;

continued or repeated verbal abuse of a sexual nature, such as suggestive comments and sexually explicit jokes;

sexually degrading language to describe an individual;

remarks of a sexual nature to describe a person's body or clothing;

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5.6 SEXUAL HARASSMENT POLICY. (Continued)

display of sexually demeaning objects and pictures;

offensive physical contact, such as unwelcome touching, pinching, brushing the body;

coerced sexual intercourse;

sexual assault;

actions indicating that benefits will be gained or lost based on response to sexual advances.

Retaliation. Any attempt to penalize or retaliate against a person for filing a complaint or participating in the investigation of a complaint of sexual harassment will be treated as a separate and distinct violation of the Board policy.

Sanctions. Appropriate disciplinary action may include a range of actions up to and including dismissal.

Complaint Process. This policy is in addition to the current Board and university policies concerning discrimination, and applies to all students, faculty, staff, guests or visitors. Complaints alleging violation of the sexual harassment policy will be reviewed and investigated by the appropriate university office.

Complaints may be resolved informally or may proceed through the applicable formal complaint proceedings. Complaints may be filed in the following manner:

a) Complaints against students or student organizations shall be filed with the designated official for review and investigation. The designated official, may assist in the informal resolution of the complaint or in processing a complaint through the applicable campus procedures.

Exhibit 12

5.6 SEXUAL HARASSMENT POLICY. (Continued)

b) Complaints against faculty or staff shall be filed with the designated official. The designated official may assist in the informal resolution of the complaint or in processing a formal complaint through the applicable campus procedures for faculty and staff.

c) Complaints against visitors, guests, vendors, contractors, or any other person should be directed to the university human relations department; or

d) any other appropriate process as established by the university policy.

5.7 RACIAL AND ETHNIC POLICY.

Introduction. The Board is committed to a multicultural, multiethnic and multiracial environment at each of the six regional universities. Diversity is one of the hallmarks of a great university. Promoting dignity and respect among all members of the university community is a responsibility each of us must share. Acts of racial and ethnic harassment are repugnant to the Board's commitments and will not be tolerated. While the Board embraces the principles of free speech guaranteed by the First Amendment to the United States Constitution, it abhors the abuse of this freedom by those who would provoke hatred and violence based on race and ethnicity. Racial and ethnic harassment is a growing concern across American college campuses. It has taken various forms, from criminal acts (assault and battery, vandalism, destruction of property) to anonymous, malicious intimidation and is most often directed toward persons whose race or ethnicity is readily identifiable. While principles of academic freedom and freedom of speech require tolerance of ideas and opinions, racial and ethnic harassment cannot and will not be permitted at the regional universities. The Board reserves the right to deal administratively with racial and ethnic harassment issues whenever it deems it appropriate to do so.

Statement of Policy.

It is the policy of the Board that racial and ethnic harassment is prohibited and is subject to disciplinary action as set forth in this policy. Racial and ethnic harassment is defined as:

Behavior or conduct addressed directly to individual(s) related to the victim's race, religion, ethnicity, or national origin that threatens violence, or property damage, or that incites or is likely to incite imminent lawless action.

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1. Submission to or rejection of such conduct is made explicitly or implicitly a term or condition of instruction, employment, status or participation in any course, program or other University activity.
2. Submission to or rejection of such conduct is used as a basis for evaluation in making academic or personnel decisions affecting an individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance, or of creating an intimidating, hostile or offensive environment for work or learning.

Sexual harassment encompasses any sexual attention that is unwanted, and includes sexual harassment based on sexual orientation. (McCaffree 10/2003)

Whenever there is an instance of alleged sexual harassment, or reprisal for reporting same, prompt and corrective action shall be taken.

7.4.2 Policy

It is the policy of Southeastern Oklahoma State University that sexual harassment of faculty and staff is prohibited in the work place and in the recruitment, appointment, working conditions, and advancement of employees (See Appendix C). Sexual harassment of students is prohibited in and out of the classroom and in the evaluation of students' academic performance.

It is also the policy of the University that accusations of sexual harassment which are made without good cause shall not be condoned. It should be remembered that accusations of sexual harassment are indeed grievous and can have serious and far-reaching effects upon the careers and lives of individuals. This policy is equally applicable to faculty, staff and students.

This policy is in keeping with the spirit and intent of various federal guidelines which address the issue of fair employment practices, ethical standards and enforcement procedures.

7.4.3 Grievance Procedure

Grievance procedures consistent with the principles of due process have been developed and implemented for faculty, students, and staff. The latter includes all University administrative and professional employees and support staff. The Regional University System of Oklahoma Board of Regents policy on sexual harassment is found in Appendix C.

7.4.4 Complaint Procedure

Sexual harassment is against the law and requires immediate attention and appropriate disciplinary action.

A complaint must be filed within one year of the incident to be handled under this procedure.

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Employees, students, or other individuals who feel aggrieved because of conduct that may constitute sexual harassment should inform the person engaging in such conduct that such conduct is offensive and must stop. If such conduct does not stop, relief should be sought through the procedure described below.

If a student or worker feels uncomfortable about confronting the person engaging in the conduct, they should seek assistance as follows: Anyone who feels victimized by this behavior should contact proper supervisory personnel and/or the affirmative action officer. A supervisor receiving such a complaint should immediately advise the affirmative action officer to confer on appropriate action and determine if the problem can be resolved informally.

If the complaint cannot be resolved informally, the complainant must submit a written complaint for investigation. After investigation, the affirmative action officer may convene a committee in a formal setting to review written charges, hear evidence and testimony, and make a determination on the evidence as to whether harassment did occur. If the finding is that sexual harassment did occur, the supervising vice president in concert with the affirmative action officer will take disciplinary action.

At every step of the procedure, confidentiality will be maintained to protect the individuals involved. Employees or students failing to restrict confidential information or who give false information will be subject to disciplinary action.

7.5 Racial and Ethnic Policy

Statement of Policy

Complaint Process

The Regional University System of Oklahoma Board of Regents is committed to a multicultural, multiethnic and multiracial environment at each of the six regional universities. Diversity is one of the hallmarks of a great University. Promoting dignity and respect among all members of the University community is a responsibility each of us must share. Acts of racial and ethnic harassment are repugnant to the Board's commitments and will not be tolerated. While the Board embraces the principles of free speech guaranteed by the First Amendment to the United States Constitution, it abhors the abuse of this freedom by those who would provoke hatred and violence based on race and ethnicity. Racial and ethnic harassment is a growing concern across American college campuses. It has taken various forms, from criminal acts (assault and battery, vandalism, destruction of property) to anonymous, malicious intimidation and is most often directed toward persons whose race or ethnicity is readily identifiable. While principles of academic freedom and freedom of speech require tolerance of ideas and opinions, racial and ethnic harassment cannot and will not be permitted at the regional universities. The Board reserves the right to deal administratively with racial and ethnic harassment issues whenever it deems it appropriate to do so.

7.5.1 Statement of Policy

It is the policy of the Board of Regents and Southeastern Oklahoma State University that racial and ethnic harassment shall be prohibited and is subject to disciplinary action as set forth in this policy. Racial and ethnic harassment is defined as:

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5. GENERAL POLICIES

5.1 EQUAL OPPORTUNITY. RUSO, in accordance with Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974, the Americans With Disabilities Act and to the extent required by these and other federal laws and regulations, does not discriminate on the basis of race, color, ethnicity, national origin, sex, age, religion, disability, political affiliation or status as a veteran in any of its policies, practices, or procedures. This includes but is not limited to admissions, employment, financial aid, and educational services.

5.2 AFFIRMATIVE ACTION. The Affirmative Action Plan at each university serves to supplement the Regents' policy on equal opportunity as it pertains to employment, and is an integral part of the employment policies of the Board. The principal objectives are:

a) to assure all persons equal opportunity for employment and advancement in employment regardless of race, religion, disability, color, ethnicity, national origin, sex, age, political affiliation, or status as a veteran;

b) to meet institutional responsibilities under the Civil Rights Act of 1964; commitments as a federal contractor under Executive Order 11246 and Executive Order 11375; and Oklahoma State Regents for Higher Education policies.

c) to reach out to all persons, including women and racial minority members, in the recruitment, placement, development and advancement of university personnel.

Each person having administrative or supervisory responsibilities is expected to provide leadership in applying the Affirmative Action Plan.

5.3 REGENTS' INSURANCE PROGRAM. RUSO provides the following types of insurance to eligible employees. Coverage requirements and limitations are delineated in the contracts between the Board or the regional universities and the insurer.

5.3.1 Group Health Insurance Program. Pursuant to 70 O.S. § 3510(k), RUSO provides continuous group health insurance coverage for all full-time employees

Exhibit 13

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, et al.	)	
Plaintiff,	)	
VS.	)	Civil Action No. 5:15-CV-00324-C
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, et al.	)	
Defendant.	)	

****

ORAL DEPOSITION OF
CATHY CONWAY
MARCH 10, 2016

****

ORAL DEPOSITION OF CATHY CONWAY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 10th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

Exhibit 14

June 1st.

A. Yes.

Q. What do you remember?

A. I told Dr. Tudor about the two policies, reminded her that those were for her and everyone at the university. I'm sure I told her like I tell -- told everyone that she should contact me if she had any concerns or questions, that the sexual harassment include -- policy included how to report. I advised her that she should let her department chair know about the name change and her dean, and that if she had questions about people's opinions as to gender presentation, which one to use, that she should discuss that with her counselor, such as Feleshia Porter.

I told her that this was new to all of us and that there was a restroom available, the handicapped restroom, on the second -- I believe it was the second floor of the building where she worked, that it was not mandatory, that it was her option, and there was another restroom that was a family restroom in the student union. She thanked me for my professionalism and I believe that was the end of the conversation.

Q. The two policies that you went over with her were the nondiscrimination and harassment policies that you talked to Mr. Babb about?

Exhibit 14

No. 15-3775

In the United States Court of Appeals
for the Second Circuit

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA,
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, D/B/A SKYDIVE LONG ISLAND AND RAYMOND MAYNARD,
Defendants-Appellees.

On Appeal from the
U.S. District Court
for the Eastern District of New York

Brief *Amicus Curiae* of
Conservative Legal Defense and Education Fund,
Public Advocate of the United States, and
United States Justice Foundation
in Support of Appellees and Affirmance

Joseph W. Miller
U.S. JUSTICE FOUNDATION
Ramona, CA 92065
Attorney for *Amicus*
U.S. Justice Foundation

William J. Olson*
Herbert W. Titus
Robert J. Olson
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
Attorney for *Amici Curiae*
*Attorney of Record

July 26, 2017

DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. *Amici* are non-stock, nonprofit corporations, which have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson
William J. Olson

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TABLE OF AUTHORITIES

INTEREST OF *AMICI CURIAE*[1]

Amici Conservative Legal Defense and Education Fund and United States Justice Foundation are exempt from federal income taxation under Internal Revenue Code ("IRC") section 501(c)(3). *Amicus* Public Advocate of the United States is a nonprofit organization exempt from federal income taxation under IRC section 501(c)(4). Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici* filed *amicus curiae* briefs in numerous other cases involving homosexual and so-called "transgender" rights, as well as application of the Civil Rights Act, most recently including:

- G.G. v. Gloucester County School Board (4th Cir. No. 15-2056), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support Petition for Rehearing *En Banc* (May 10, 2016) (involving application to Civil Rights Act Title IX to transgender access to bathrooms and locker rooms of the opposite sex);

- Gloucester County School Board v. G.G. (Supreme Court No. 16-273), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Petitioner (Jan. 10, 2017);

- G.G. v. Gloucester County School Board (4th Cir. No. 15-2056), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Defendant-Appellee and Affirmance (May 15, 2017) (on remand); and

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[1] No party's counsel authored this brief in whole or in part. No person, including a party or a party's counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

- E.E.O.C. v. Harris Funeral Home (6th Cir. 16-2424), Brief *Amicus Curiae* of Public Advocate of the United States, *et al*., in Support of Appellee and Affirmance (May 24, 2017) (involving application of Title VII to a transgender employee).

STATEMENT

On April 18, 2017, a panel of this Court decided that it was bound by Second Circuit precedent[2] that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation. Zarda v. Altitude Express, 855 F.3d 76 (2017). On May 25, 2017, this Court granted rehearing *en banc*, and invited *amicus curiae* briefs, to decide the following question:

> Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination "because of ... sex"?

ARGUMENT

I. ZARDA WAS FIRED FOR HIS INAPPROPRIATE BEHAVIOR, NOT HIS SEXUAL ORIENTATION.

Even before this Court considers the legal question it posed in its Order of May 25, 2017, it must ensure this case is an appropriate vehicle to decide whether discrimination based on "sexual orientation" is actionable. It is not. The Appellant urges this Court to assume that the discrimination alleged in this case was about "sexual orientation." It was not. Rather, as Zarda's own brief makes

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[2] *See* Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000).

clear, the reason he was fired was not for his sexual orientation, but for his overt sexual behavior.

Zarda made no secret about his sexuality with his boss and coworkers. In fact, for many years prior to Zarda's firing, "Maynard [knew] plaintiff was gay" and "never told Zarda to cover his sexuality." Aplt. Br. at 15. In fact, among coworkers at the office, "Zarda's orientation was subject of humor." *Id.* Based on the oversharing that is rampant in Zarda's brief, it is clear that everyone at his office (including Maynard) knew of and accepted his sexuality, even if he was the subject of "testosterone-crammed" jokes. *Id*.

Rather, it was only when Zarda chose to act in an unprofessional manner and openly discuss his sexuality with customers (rather than his coworkers), that Maynard was forced to take action. In fact, as the Zarda brief further notes, he had a bad habit of unprofessionally sharing details about his sexuality with anyone who would listen (including some customers who did not make objections), and still Maynard did not fire him. *Id*. at 12. However, it seems clear that when a customer finally complained about Zarda's unprofessional behavior, Maynard was forced to take action.

Zarda's brief essentially claims that his homosexuality permitted him to engage in unprofessional behavior with customers, and that to require a certain

minimum level of professionalism from employees is actionable. As the Zarda brief alleges, the main reason he chose to reveal his homosexuality to this particular customer was because he was strapped to her. *Id*. at 9. Although the panel opinion notes that "Zarda alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished," Zarda at 80 n.3, it would seem a matter of common sense that this disclosure was not made to a woman to whom the instructor was strapped. It also seems clear that an employer has the right to dismiss straight male skydivers who took the opportunity to tell every woman customer to whom they were strapped to how straight they were, and the employer should have the same authority over homosexual employees.

In fact, Zarda's brief actually admits that he was not fired because of his sexual orientation, but rather because of his indiscriminate chit chat — "Zarda lost his job because he told Orellana that he was a gay man." Aplt. Br. at 8.

The record is clear, then, that Zarda was not fired for being homosexual, but for his apparent need to openly profess his gayness to everyone with whom he came into contact — so they would celebrate it along with him. For such manifestly unprofessional behavior, Title VII provides no protection.

II. SEXUAL ORIENTATION IS NOT SEX.

What appears to be appellant's principal *amicus curiae*, Lambda Legal Defense and Education Fund ("Lambda"), filed an *amicus* brief which claims that discrimination based on sexual orientation "**is**" and "must be recognized **as**" discrimination based on sex. Lambda Brief at 3, 4, 6, 8 (emphasis added). However, when the time came to cite authority to back up that bald assertion, Lambda quickly backed off, opting instead to obscure by laying out a laundry list of terms such as:

- "involves sex-based considerations"
- "'inseparable from'" sex
- "'inescapably linked to sex'"
- "in relation to sex"
- "takes account of an individual's sex" and
- "'inherently rooted in gender[3] stereotypes.'" *Id*. at 4, 5 & n.3, 8.

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[3] It is quite interesting that Lambda here uses "sex" and "gender" interchangeably. *Id*. at 8, 11, 23. However, "sex" is biological and fixed by nature, "sexual orientation" is psychological, variable by how a person feels about others, while "gender" is existential in relation to how a person feels about himself at any moment of time. There are two sexes — male and female. However, there are several "sexual orientations" — heterosexual, homosexual, bisexual, asexual, and perhaps more. As for "gender," the list of types is endless, subject only to human imagination, and for some includes things like "pedophilia" and "zoophilia." The idea of "gender" is evolving to the point where it can encompass anything the mind can conceive. In February of 2014, Facebook added 58 gender options to its users' profiles. By June of that year, UK Facebook users could select from 71 options. By February of 2015, Facebook no longer defines gender at all, allowing each person to choose one's own gender instead of being "pigeon-holed" by only 71 options. In a blank space provided, a Facebook user

Upon more careful examination, Lambda is not arguing that sexual orientation discrimination "must be recognized as" sex discrimination, but only that "'there is no reason why' discrimination because of an individual's sex 'cannot include' sexual orientation discrimination." *Id.* at 15. As Lambda is finally forced to admit, "sexual orientation" is **not actually** the same thing as "sex." *Id*. at 5 n.3 ("This is not to say that 'sex' and 'sexual orientation' are interchangeable concepts or terms...."). However, Lambda discards this flaw in its argument as "irrelevant," hoping to deflect this Court into believing that "it is wholly unnecessary for Plaintiffs-Appellants to demonstrate that 'sexual orientation' and 'sex' are synonyms or that they are interchangeable...." *Id.* at 12. Lambda should not be allowed to bootleg "sexual orientation" into the list of categories protected by Title VII from discrimination, especially when it admits the two are not at all the same.

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can become any "gender" that one wishes, subject only to the limits of expression on the ASCII keyboard. Perhaps one of the most interesting genders offered is the Native American "two-spirit" gender, which includes both male and female elements. Nevertheless, although it is easy to be diverted into gender studies, the task at hand is to discover the meaning of "sex" as used in a federal statute, not as used in an academic discussion.

III. LAMBDA'S CASE THAT SEX COMPREHENDS SEXUAL ORIENTATION IS LEGAL SOPHISTRY.

Citing the Seventh Circuit's recent decision in Hively v. Ivy Tech Cmty College of Ind., 853 F.3d 339, 341 (7th Cir. 2017), the Lambda brief claims that "'discrimination on the basis of sexual orientation is a form of sex discrimination.'" Lambda Br. at 3. In support, the Lambda brief offers three reasons, all of which seem superficially plausible, but actually are completely fallacious.

A. Lambda's "Sex-Plus" Theory Is Based on a Fallacious Comparison.

The Lambda brief rests, first of all, on its "'sex-plus'" proposition that sexual orientation:

> necessarily involves sex-based considerations because the discrimination endured by a man based on his attraction to men is not suffered by any woman with an **identical attraction** to men. [*Id.* at 3-4 (emphasis added).]

This statement presupposes that the sexual relationship of a man and another man is identical to the sexual relationship of a woman and a man. They are not now, and never have been, identical. Therefore, the proper comparison would be to pair the man, or the woman, each to a person of the opposite sex so that each is similarly situated. By making that comparison, there would be no sex

discrimination because the man and the woman would be treated exactly the same. The simple fact is that a man who is in a sexual relationship with another man is not "similarly situated" with a woman who is in a sexual relationship with a man. Rather, they are dis-similarly situated.

That is why it is commonly stated that a man married to another man is in a same-sex marriage, but a man who is married to a woman is in a marriage. In Obergefell v. Hodges, 135 S.Ct. 2584 (2015), for example, the Supreme Court was careful not to declare that a same-sex marriage was identical to an opposite-sex union, but only that whatever benefits the government confers upon a heterosexual union must also be conferred on a homosexual union.

So it is the Lambda Brief, and the court opinions upon which it relies, that are illogical, not the other way around. Again, this is so because of Lambda's fallacious comparison. Consider this illustration from the Lambda brief: "'If a business fires Ricky because of his **sexual activities** with Fred, while this action would not have been taken against Lucy if she did **exactly the same things** with Fred, then Ricky is being discriminated against because of his sex.'" *Id.* at 6. No, Ricky is not being discriminated against because of his sex (prohibited by Title VII), but because of his sexual orientation (not prohibited by Title VII). By the very nature of the biological differences between males and females, because two

men cannot do "exactly the same things" with each other as would one man and one woman.[4] Biologically, then, Ricky is not — indeed cannot — be similarly situated vis-a-vis his sexual relationship with Lucy as he would be with Fred. So the firing of Ricky is not discrimination because of his "sex," but because of his "sexual orientation" — a distinction that even the Lambda Brief acknowledges when it admits these are not "interchangeable concepts or terms." *Id.* at 5 n.3. Therefore, "sex" does not — indeed, cannot — include "sexual orientation," the two being very different terms or concepts.

Indeed, under the Lambda Brief's creative "sex-plus" theory, the action taken against a person on the basis of his "sexual orientation" is necessarily discrimination based on the "plus" add-on — not the "sex" part of the theory. And Title VII only bans discrimination based on sex. Lambda's "sex-plus" theory, by

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[4] Since time immemorial, the existence of a marriage is not based only on consent of the parties, or a civil or religious ceremony, but on the "consummation" of that marriage by sexual intercourse. As Chancellor James Kent explained:

> **If** the contract be made *per verba de praesenti*, or if made *per verba de futuro*, **and be followed by consummation**, it amounts to a **valid marriage**, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*. [J. Kent, Commentaries on American Law (1826-30), Claitor's Publishing Div. Lecture 26, section 6 (emphasis added.)]

Although it appears a concerted effort has been made to politicize and broaden the dictionary definition of "sexual intercourse" to include acts of sodomy, from time immemorial, sexual intercourse has required penile-vaginal sexual penetration. Clearly, basic anatomy makes the comparisons made by Lambda inapt.

its very definition, proves that "sexual orientation" discrimination is not "sex" discrimination. Rather, it asserts "'sex-plus' is the term for discrimination occurring **not categorically** against all members of one sex, but only those members sharing a certain **trait**" that is unrelated to their sex. *Id*. at 4 n.2 (emphasis added). Indeed, Zarda's homosexuality is not "inseparable from and inescapably linked to sex," *id*. at 4, but rather had nothing to do with his sexual orientation — as Lambda is so quick to point out, both men and women may be attracted to men. *Id*. at 4. Rather, it was Zarda's homosexuality — a trait not shared by most men — which is the **alleged** basis for the **alleged** discrimination.

B. Lambda's Analogy That Sex Is Like Race Is Fallacious.

Lambda claims that sex is like race because Title VII "'on its face treats [race and sex] **exactly the same**.'" Lambda Br. at 7 (emphasis added). It does not. While discrimination because of race is not subject to any exceptions, sex decidedly is. *See* 42 U.S.C. § 2000e-2(e). Even the Lambda Brief concedes this point in a footnote, but insists that these "limited, narrow exceptions" "are **not relevant here**." Lambda Br. at 7 n.5 (emphasis added). But the Lambda Brief never explains why the existence of these exceptions is not relevant — it just asserts it.

Instead of establishing its point that sex and race are "exactly the same," the Lambda Brief enlists the "associational discrimination" theory articulated by this Court with respect to racial discrimination, in which it ruled that if Title VII is violated by an employer by action taken against the employee for being in a sexual relationship with a person of **another race**, then it is considered to be a violation of the employee's own race. Anonymous v. Omnicom Group, Inc., 852 F.3d 195, 204 (2nd Cir. 2017) (emphasis added). Similarly, Lambda argues, if an employer takes action against an employee on the basis of a sexual relationship that the employee has with a person of the **same** sex, then the employee is discriminated against on the basis of "sex" and so the same rule should apply — the employee is being discriminated against because of his own sex. The problem with this argument is that it rests upon a dissimilar premise, not an analogous one. In the race case, the associational theory applies only to an employee who is associated with a person of another or different race, whereas in the sex case, the associational theory is applied only when the person is in a relationship with a person of the same sex. If the employee and the associate are of the same race, then there could be no violation of Title VII. Thus, the two cases are not analogous. Further, as discussed above, a relationship between a man and a man cannot possibly be considered the same as one between a man and a woman,

because they are not capable of "doing the same things" with one another. An interracial relationship, however, is capable of doing the same thing. A white man and a black woman, however, are similarly situated to two white people or two black people. To equate interracial relationships to homosexual activity is fallacious.

C. Lambda's Claim that Sexual Orientation Is Like Sexual Stereotyping in Price Waterhouse v. Hopkins Is Fallacious.

Neither Zarda's brief nor Lambda's brief presents thoughtful analysis as to why Price Waterhouse v. Hopkins, 490 U.S. 8 (1989), supports the view that Title VII prevents sex discrimination. In fact, Zarda's brief gives almost no attention to Price Waterhouse v. Hopkins except to hold it up as an illustration of the admirable creativity of the federal courts in applying Title VII beyond the text and authorial intent of that law: "Congress adopted Title VII without suggestion that sex stereotypes were illegal, *see Price Waterhouse*..." Aplt Br. at 44. Zarda makes only one reference to Price Waterhouse in a way that relates at all to the question posed by the Court on *en banc* reconsideration:

> But because the decision [in Simonton] based its holding on only a pleading, it left open the question for another day as to whether a plaintiff may allege subjugation to sex stereotypes, as recognized by *Price Waterhouse* ... as a basis to proceed under Title VII. *Simonton*, 232 F.3d at 37-38. [Aplt. Br. at 20.]

Zarda leaves it there. There is no argument in support of why Price Waterhouse would decide this issue — a complete failure of advocacy.

The Lambda brief tries to fill this void with these few sentences:

> discrimination based on [gender] stereotypes indisputably violates Title VII. *See Price Waterhouse*, 490 U.S. at 251 ("As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match [] the stereotype associated with their group....."). An individual's same-sex attraction "represents the ultimate case of failure to conform to [a sex] stereotype.... It is thus untenable to suggest that Title VII does not cover discrimination based on this attraction. [Lambda Br. at 8-9 (citations omitted).]

The Lambda brief takes great liberties with the Price Waterhouse decision, asserting that it somehow was meant to decide that discrimination based on sexual orientation was banned by Title VII. To the contrary, Justice Brennan's theory of sex discrimination based on sex stereotypes was quite narrow:

> In saying that **gender** played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a **woman**. In the specific context of **sex stereotyping**, an employer who acts on the basis of a belief that a **woman** cannot be aggressive, or that she must not be, has acted on the basis of **gender**.... "'Congress intended to strike at the entire spectrum of **disparate treatment of men and women** resulting from **sex stereotypes**.'" [Price Waterhouse at 250-51 (emphasis added).]

One can see that Justice Brennan employs the word "gender" as a synonym to the statutory term "sex," and in explaining "gender" to mean "sex" (*i.e.*, male or female), the narrow scope of Price Waterhouse is made clear. Based on the text of the statute and a fair reading of Justice Brennan's opinion, the rule of that case must be that unlawful discrimination under Title VII must be based only on either (i) sex or (ii) "sex stereotyping," where that later term is understood to reveal an underlying bias against a woman (or man) because of her (or his) nature and characteristics.

In sum, the Price Waterhouse decision simply clarified that Title VII barred not only discrimination against women as such, but also discrimination against women for how they may act as women — a thinly veiled version of opposition because a person is a woman. However, in no way does this doctrine establish a free-floating cause of action based on a right to be free of any sort of sex-stereotyping that does not reveal categorical discrimination against a real biological man or woman.

To understand the psychological (not therefore legal) term "sex-stereotyping," it is necessary to examine the derivation of that term in Price

Waterhouse. There, the term was attributed to Dr. Susan Fiske, a psychologist[5] who testified at trial for plaintiff Hopkins regarding statements made about the plaintiff by others at Price Waterhouse. Importantly, her testimony was designed to establish unlawful discrimination and was not limited to "the overtly sex-based comments of partners but also on gender-neutral remarks...." Price Waterhouse at 235. Justice Brennan summarized her testimony as follows:

> According to Fiske, Hopkins' **uniqueness** (as the only woman in the pool of candidates) and the **subjectivity** of the evaluations made it **likely** that sharply critical remarks ... were the product of **sex stereotyping**. [*Id*. at 235-36 (emphasis added).]

Justice Brennan on behalf of a minority of four justices lamely attempted to demonstrate the reliability of Dr. Fiske's imputation of discriminatory motives to

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[5] Courts must be very wary of grounding legal decisions on the social sciences, especially when it relates to sex. Recently, two social scientists demonstrated the openness of psychologists and other social scientists to the most irrational and foolish notions that fit their personal sexual and political views. *See* P. Boghossian & J. Lindsay, "The Conceptual Penis as a Social Construct: A Sokal-Style Hoax on Gender Studies," http://www.skeptic.com/reading_room/conceptual-penis-social-contruct-sokal-style-hoax-on-gender-studies/. The two authors created a "paper" entitled "The Conceptual Penis as a Social Construct," consisting of 3,000 words of utter nonsense posing as academic scholarship. Then a peer-reviewed academic journal in the social sciences accepted and published it. The two scholars who perpetuated this hoax asserted "that the *conceptual penis* is better understood not as an anatomical organ but as a gender-performative, highly fluid social construct." The authors stated, "[w]e assumed that if we were merely clear in our moral implications that maleness is intrinsically bad and that the penis is somehow at the root of it, we could get the paper published in a respectable journal." *Id*.

Price Waterhouse personnel — despite the fact that she never "met any of the people involved in the decisionmaking process," by pointing out that "it was commonly accepted practice for social psychologists to reach this kind of conclusion" without any personal contact with the persons allegedly being demeaned. Price Waterhouse at 236. Justice Brennan thereby implicitly adopted for the Court an unreliable standard of proof just because Dr. Fiske said it was "commonly" used in the world of social psychology.

In dissent, Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia exposed that Dr. Fiske's testimony was grounded in sand:

> The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske's testimony, and at this late stage we are constrained to accept it, but I think the plurality's enthusiasm for Fiske's conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral — *e.g.*, "overbearing and abrasive" — without any knowledge of the comments' basis in reality and without having met the speaker or subject. "To an expert of Dr. Fiske's qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes." [*Id*. at 293 n.5 (citations omitted).]

IV. THE LAMBDA BRIEF IS BASED UPON A FALLACIOUS EVOLUTIONARY JURISPRUDENCE.

Audaciously, Lambda contends that it is "irrelevant" and "wholly unnecessary for [Zarda] to demonstrate that 'sexual orientation' and 'sex' are synonyms or that they are interchangeable concepts or terms." *Id.* at 12. Thus, the Lambda Brief rejects any and all efforts by courts to discern the "'original public meaning'" of the phrase and word. *Id.* at 13 n.10. Indeed, the Brief argues that Title VII was "not enacted in the same legal era" as subsequent attempts to enact legislation that proscribes "sexual orientation" in addition to or separate from existing statutes aimed at discrimination on account of "sex." *Id.* at 13-14. Therefore, Lambda insists that it is "anachronistic to rely on recent legislation specifically enumerating 'sexual orientation' to justify a narrow interpretation ... 'because of ... sex.'" *Id.* at 14.

Instead, Lambda urges this Court to ignore the "flaw[ed] ... arguments that emphasize what words are *not* in the statute, rather than 'the scope of the language that already is in the statute.'" *Id.* at 9. With this argument settled, Lambda uncovers the common denominator of all its arguments (sex-plus, comparisons to race, sex stereotypes) — an "evolving legal landscape." When legal evolution is glorified, every principle known to man can be jettisoned such as here, where "the

changed 'backdrop of the Supreme Court's decisions'" opens the door to a "'broader [view of] discrimination on the basis of sexual orientation.'" *Id.* at 10. Lambda simply proclaims that "sex" now encompasses "sexual orientation" because "the right of same-sex couples to marry is now recognized as fundamental" and "intimate relations between same-sex couples" can no longer be criminalized. *Id.* It is, Lambda asserts, a "post-*Lawrence*, post-*Obergefell* world" and past "perspectives must be reconsidered." *Id.*

In harmony with Lambda, as Chief Judge Katzmann of this Circuit had already forecasted, this Circuit's rulings and comparable rulings of sister circuits — "that discrimination ... did not encompass discrimination on the basis of sexual orientation" — were not erroneous when made, just out-of-date today. Omnicom Grp. at 206 (Katzmann, C.J., concurring). Now that the Supreme Court has "afford[ed] greater legal protection to gay, lesbian, and bisexual individuals," the Chief Judge asserts, the lower federal courts need not wait for the Supreme Court to act, as the "societal understanding of same-sex relationships has **evolved** considerably." *Id*. at 206 (emphasis added).

In his search for a rationale to justify ignoring the repeated failed efforts to persuade Congress to add sexual orientation to Title VII, the Chief Judge has wittingly or unwittingly adopted the view of Oliver Wendell Holmes, Jr., as

documented by Yale political science professor Fred V. Cahill, Jr. in his book, Judicial Legislation (Ronald Press Co.: 1952):

> [L]aw is a growing thing and ... its growth is determined, not by logic, but by the 'felt necessities of the time.' In this growth, the judge is bound to play an active part. The law moves, according to Holmes, in a climate of opinion made up of **moral and political beliefs**, judgments of **policy** and even **prejudices** — all of which affect the **judge**. [Cahill at 39 (emphasis added).]

In sum, as Cahill concluded, Holmes asserted that "[j]udges really make law ... because they are motivated by the same considerations as is the legislator." *Id.* There is one overriding glitch in that philosophy. As newly installed Supreme Court Justice Neil Gorsuch explained in his very first Supreme Court opinion:

> If a statute needs repair, there's a constitutionally prescribed way to do it. It's called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the **difficulty of making new laws** isn't some bug in the constitutional design: it's the point of the design, the better to **preserve liberty**. [Perry v. MSPB, 198 L.Ed.2d 527, 545 (2017) (Gorsuch, J., dissenting) (emphasis added).]

Consonant with this separation of powers principle, this Court must decline Lambda's invitation to disregard the original meaning of "because ... of sex," as it appears in Title VII of the 1964 Civil Rights Act, simply because the Supreme Court gave approval to same-sex sodomy in 2003 and same-sex marriage in 2015. *See* Lambda Br. at 10-11. While the latter two rulings no doubt have "enjoyed

wide and **enthusiastic** judicial support,"[6] that should not be the standard by which this Court should measure its own precedents, as Lambda urges. *Id.* at 2-3. Rather, as Sir William Blackstone has reminded us, a court precedent should not be abandoned unless "the former determination is most evidently contrary to reason, much more if it be contrary to the divine law." 1 W. Blackstone, Commentaries of the Laws of England at 69-70 (Univ. Chi. Facsimile ed.: 1765). In today's postmodern, evolutionary world, however, the temptation for judges to rule lawlessly is enormous, as judges and lawyers "wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires." *See* R. Pound, Introduction To The Philosophy of Law at 3 (Yale: 1922). Should the judges of this Court succumb to the temptation to appoint themselves as super legislators who can amend statutes based on their superior wisdom and power, they would do grave damage to the inherent authority of the law.

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[6] *See* Lambda Br. at 17 n.12 (emphasis added).

Lacking any support for its position in the text of Title VII or authorial intent of that law,[7] the Lambda brief invites the Court to ignore those two touchstones and come join its campaign for "legal evolution." It perceives an evolution that would bring us toward a modern, secular state, loosed from the chains of morality. Doubtless, the evolutionary trend toward sanctioning immoral behavior is occurring in the federal courts, but that does not mean that it is correct, constitutional, or without consequence. Indeed, with an evolutionary view of "law," society moves away from anything resembling the "rule of law," to "rule by man" exercised by unelected lawyers, acting as "philosopher kings," holding office as federal judges. Unable to obtain legislation fast enough to satisfy their appetites for change, those who embrace sexual immorality appeal to judges to usurp the power to legislate for the nation:

> Western society, in turning away from Christian faith, has turned to other things. This process is commonly called *secularization*, but that conveys only the negative aspect. The word connotes the turning away from the worship of God while ignoring the fact that something is being turned *to* in its place. [Herbert Schlossberg, Idols for Destruction (Crossway Books: 1990) at 6.]

Dr. Schlossberg explains that to which society is turning are idols — "properly understood as any substitution of what is created for the creator." *Id*. "When the society ... turns away from God to idols, it is an idolatrous society and therefore is

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[7] *See* Hively at 353 (Posner, J., concurring).

heading for destruction." *Id*. "With their silver and gold, they made idols for their own destruction." Hosea 8:4. Various judges, drawn from "'the highly secularized intellectual elite"' have appointed themselves to lead the society toward the idol of sexual liberty. The temptation, Schlossberg concluded, is as old as the Garden of Eden, where the serpent told Eve:

> "You will be like God, *knowing good and evil*....." The biblical view is that God informs humanity about what is good and what is evil, and the form this information takes is law... The alternate view is in the temptation, succumbed to by Eve and her humanist descendants, to make autonomous judgments about good and evil and so to be like God. [Schlossberg, *supra*, at 48-49.]

There is nothing new under the sun. Indeed, Professor Robert Lowry Clinton puts the matter in perspective:

> In the Old Testament, the Book of Judges tells the story ... of idol-worshiping peoples with ineffectual gods confounded by the presence of a people whose God was invisible yet effectual. It is also a story of ... idolatry, as shown in the repeated lapses of God's people and their consequent deliverance into the hands of their enemies. [R.L. Clinton, God & Man in the Law at 227-28 (U. Press Kan.: 1997).]

Professor Clinton explains that there is a way back:

> In the end, it was the judge who emerged to show the people the error of their immersion in visible matter and to deliver them back to the invisible God from the hands of their oppressors. The method was, and is, always the same: the judges accomplish their task not by calling the people to follow them into a hypothetical, abstract future but by calling them to reclaim the traditions of a real and concrete past. [*Id*.]

CONCLUSION

For the foregoing reasons, the Court should find, yet again, that Title VII of the Civil Rights Act of 1964 does not cover discrimination on the basis of sexual orientation.

Respectfully submitted,

/s/ William J. Olson

Joseph W. Miller
U.S. JUSTICE FOUNDATION
Ramona, CA 92065
Attorney for *Amicus*
U.S. Justice Foundation

William J. Olson*
Herbert W. Titus
Robert J. Olson
Jeremiah L. Morgan
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180-5615
(703) 356-5070
wjo@mindspring.com
Attorney for *Amici Curiae*

July 26, 2017

*Counsel of Record

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amici Curiae* Conservative Legal Defense and Education Fund, *et al.* in Support of Appellees and Affirmance complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,440 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Conservative Legal Defense and
Education Fund, *et al.*

Dated: July 26, 2017

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amici Curiae* of Conservative Legal Defense and Education Fund, *et al.* in Support of Appellees and Affirmance was made, this 26th day of July 2017, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ William J. Olson
William J. Olson
Attorney for *Amici Curiae*
Conservative Legal Defense and
Education Fund, *et al.*