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.	**Case No. 15-cv-324-C**

DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S REPLY TO INTERVENOR'S RESPONSE AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND 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, and mindful of LCvR 7.1(i), provide the following reply brief in further support of their Motion for Summary Judgment [Doc. 177] in their favor, showing the Court as follows:

I. THE JUNE 1, 2007 CONVERSATION BETWEEN INTERVENOR AND CATHY CONWAY

Intervenor's Response brief [Doc. 205] relies heavily on a contorted fabrication of an account of a conversation which all parties agree took place in one

form or another in 2007, (but before the beginning of the fall semester), between then-Professor Tudor, and then-Human Resources Director Cathy Conway. In particular, Intervenor's self-serving "Declaration of Rachel Jona Tudor" [Doc. 205-2], (which is not sworn before a notary or any other officer of the Court), is replete with accusations (unsubstantiated by any other witness) that Ms. Conway indicated exactly one time to Intervenor in 2007 that then-Vice-President McMillan wanted to summarily fire Intervenor, that Conway ordered Intervenor to restrict her restroom use, her make-up choices, her choices of attire, and that Conway threatened Intervenor with termination if the restroom, dress code, and make-up restrictions were not followed.

Ms. Conway has testified, under oath sworn by an officer of the Court, that the suggestion (rather than directive) was made by her to Intervenor that the privacy of the single-occupancy handicapped-accessible restroom might be desirable during the transition period of time, that use of that restroom was not mandatory, that it was Intervenor's choice, and that such a private restroom was available both in the office building and the student union building. Nothing was said about Intervenor's attire or makeup during this conversation, or any other conversation with Intervenor. Ms. Conway also testified under oath that she informed Intervenor about the university's non-discrimination and anti-harassment policies and "reminded [Intervenor] that those were for her and everyone at the university." (*Conway Depo,* at p. 48, ln. 4 - p. 49, ln. 4, attached as Exhibit 1).

According to Intervenor's own sworn deposition testimony, her response to the information provided by Ms. Conway during this 2007 conversation was that she "would abide by" the conditions discussed at that conversation. (*Tudor Depo,* p. 227, ln. 25 – p. 228, ln. 1, attached as Exhibit 2). Further, Intervenor testified under oath that at the time of the 2007 discussion she "complimented [Ms. Conway] on her professionalism." (*Id.* at p. 310, ln. 22-23). While we have Intervenor's sworn testimony that she would abide by the conditions discussed with Ms. Conway in 2007, (but Ms. Conway denies any conditions were placed on her), and Intervenor's testimony that she may have commended Ms. Conway for her work, we have no evidence (reliable or otherwise) that Intervenor ever complained about the supposed restrictions on restroom use, attire, and make-up to the school's administration, the RUSO governing board, or any investigative body (State or Federal), until after the denial of tenure and promotion at least three (3) years later. In fact, in the "Declaration" offered as an exhibit to Intervenor's Response to Defendants' Motion for Summary Judgment, Intervenor indicates that she made the decision to "keep silent for as long as possible" and that she "did not complain about hostilities." [Doc. 205-2, section 4(a)].

Clearly, Intervenor either (a) agreed with, or did not actually object to any of, the alleged conditions offered (or imposed) during the 2007 conversation with Cathy Conway, or (b) objected, but said nothing. The undisputed fact that Intervenor did not complain about the supposed conversation and conditions for some three (3) years means that despite sworn testimony from Ms. Conway that Intervenor was

advised of the presence of the anti-discrimination and anti-harassment policies and their availability to everyone, Intervenor failed to timely exhaust administrative remedies and her claims in this regard are fatally flawed. If something were truly wrong, then Intervenor intentionally denied Defendants the meaningful opportunity to address and correct it. This concept is fundamental to Title VII law. Summary judgment in Defendants' favor is appropriate.

II. NO EVIDENCE SHOWING SEX STEREOTYPING IN DECISIONS

There is no evidence of sex stereotyping in Defendants' decision-making in this case. In its Order regarding Defendants' motion to partially dismiss Intervenor's complaint, the Court found that Intervenor "alleges Defendants took [actions] against her [] based on their dislike of her presented gender." [Doc. 34, p. 5]. The Supreme Court has stated that in order to rely on a theory of sex stereotyping, a "plaintiff must show that the employer actually relied on her gender in making its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251, 109 S.Ct. 1775, 1791 (1989).

Intervenor holds herself as female, (a protected class under Title VII). If Intervenor is relying upon the protected class of female, and acknowledging the non-protected class status of "transgender" *per se*, Intervenor's Response brief fails to address Defendants' argument in the Motion for Summary Judgment [Doc. 177] that Intervenor has failed to carry the burden to show sex stereotyping. In fact, Intervenor's Response brief does not mention sex stereotyping by name even once. Intervenor's Response does contend that she was subject to "policies because she

presented herself as female but Defendants treated her as if she were male." [Doc. 205, p. 21]. Intervenor references materials in footnote 4 of the Response brief to support this contention, but those references merely list such things as former HR Director Cathy Conway's supposed "discomfort" with, then-RUSO General Counsel Charlie Babb's acknowledgment of the uncertainty in the law in 2007 regarding the status of transgender persons, then-President of SEOSU Larry Minks' lack of personal knowledge one way or another about Intervenor's gender, and then-Vice-President for Academic Affairs Douglas McMillan's personal consideration of and reflection upon changes in gender. But none of these supposed items show that the University or RUSO actually relied on Intervenor's gender in making decisions about Intervenor's work, promotion, or tenure. Intervenor's burden is not carried, and summary judgment is appropriate.

III. LATE BLOOMING DECLARATIONS SUBMITTED BY INTERVENOR

As support for the Response in Opposition to Defendants' Motion for Summary Judgment, Intervenor attaches three (3) declarations (as opposed to witnessed affidavits) from (a) Daniel Althoff, [Doc. 205-17] signed on October 10, 2017, (b) Meg Cotter-Lynch, [Doc. 205-18] signed on October 12, 2017, and (c) Intervenor herself [Doc. 205-2] signed on October 12, 2017.[1] All three were signed

[1] In addition to the three (3) "Declarations" discussed above, there is a fourth such document offered as an exhibit to Intervernor's Response. The "Declaration of Mark Spencer" [Doc. 205-25], a four (4) page document apparently signed on May 2, 2016. However, this document is not Bates stamped, nor was it ever produced by Plaintiff, USA, or Plaintiff-Interevenor, Tudor. The first time Defendants or their counsel saw this document was upon Intervenor's filing of her Response [Doc. 205] on October 13, 2017, nearly a full month after the close of Discovery, and over sixteen (16) months after the document was apparently signed. Assuming that

after the close of Discovery on September 22, 2017, and none of them were produced as supplementation to Intervenor's responses to written Discovery requests. Although Althoff and Cotter-Lynch had not been deposed, Intervenor had. The description of events in her "Declaration" go far beyond what she deigned to provide during her oral deposition by Defendants' counsel.

Declarations submitted by a party must be made on personal knowledge and must set forth facts that would be admissible in evidence. Fed. R. Civ. P. 56(c)(4). Just as the requirements for the form of a statement should not be relaxed, evidentiary requirements also should be strictly enforced. Failure to analyze the substance of a declaration, in light of the requirements of the Rules of Evidence, can undermine the integrity of the process.

Intervenor appears to be attempting to correct or supplement prior sworn testimony by way of declaration and therein create an issue of fact. This directly undermines the integrity of the process. Where a party submits an affidavit to the court that contains information inconsistent with the party's prior deposition testimony or other sworn submission, courts hold that these contradictory affidavits should be disregarded as "shams" or "competing affidavits." *See Margo v. Weiss*, 213 F.3d 55, 63 (2nd Cir. 2000); *Rohrbough v. Wyeth Labs. Inc.*, 916 F.2d 970, 976 (4th Cir. 1990); *Martin v. Merrell Dow Pharms.*, Inc., 851 F.2d 703, 705 (3rd Cir. 1988). Courts will disregard a subsequent affidavit as a sham— that is, as not creating an issue of fact for purposes of summary judgment—in the event that it contradicts the

---

counsel for USA or Tudor generated, crafted, or assisted in the production of this document in May 2016, the non-production of this document suggests an improper

party's own prior sworn statement. All federal circuits and most state jurisdictions have adopted the sham affidavit doctrine in some form. *Cain v. Green Tweed & Co., Inc.*, 832 A.2d 737, 740 (Del. 2003) (citing *Shelcusky v. Garjulio*, 172 N.J. 185, 797 A.2d 138 (N.J. 2002).

Essentially, this doctrine provides that Intervenor cannot submit a sworn declaration in which she alleges new or different facts from those previously asserted in an attempt to create a material issue for trial. Intervenor's sworn declaration indicates that Cathy Conway stated to her that any violation of the alleged restrictions on bathroom usage, dress code, or make-up would be construed as sexual harassment and could result in disciplinary measures. [Doc. 205-2, pp. 1-2]. This directly conflicts with her deposition testimony wherein Intervenor never mentioned that Ms. Conway said if Intervenor did not conform to the alleged restrictions it could be considered harassment by Intervenor of her coworkers, or that deviation from these supposed restrictions would result in termination, restrictions that have still not ever been proven with any evidence beyond Intervenor's own testimony. As noted above, Intervenor testified that she agreed to the terms discussed by Conway and then commended Conway on her professionalism.

In distinguishing between a sham sworn declaration versus one that merely corrects or clarifies an issue previously addressed by the party, some courts have developed the following considerations for guidance: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the

---

attempt at litigation by surprise.

importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; and (6) when, in relation to summary judgment, the second affidavit is submitted. *Cothran v. Brown*, 357 S.C. 210, 218, 592 S.E.2d 629, 633 (S.C. 2004) (citing *Pittman v. Atl. Realty Co*., 754 A.2d 1030, 1042 (Md. 2000)). Where a party submits a competing affidavit that attempts to create an issue of fact, the court may properly disregard the party's subsequent conflicting affidavit or sworn statement.

IV. TOO MUCH RELIANCE ON HEARSAY GENERALLY BY RESPONSE

Intervenor's response to Defendants' Motion for Summary Judgment is based largely on hearsay evidence that would not be admissible at trial under the standard set forth in Fed. R. Civ. P. 56(c)(4).

In order to survive summary judgment, the content of the evidence to which the nonmoving party points must be *admissible. Adams v. American Guarantee and Liability Ins. Co.,* 233 F.3d 1242, 1246 (10th Cir. 2000) (citing *Wright–Simmons v. City of Oklahoma City,* 155 F.3d 1264, 1268 (10th Cir.1998) ("'It is well settled in this circuit that we can consider only admissible evidence in reviewing an order granting summary judgment.'") (quoting *Gross v. Burggraf Const. Co.,* 53 F.3d 1531, 1541 (10th Cir.1995)). Hearsay testimony that would be inadmissible at trial

cannot be used to defeat a motion for summary judgment because "a third party's description of a witness' supposed testimony is 'not suitable grist for the summary judgment mill.' " *Wright–Simmons,* 155 F.3d at 1268 (quoting *Thomas,* 48 F.3d at 485).

Intervenor's heavy reliance on hearsay evidence, (and attributed to Defendants), but without supporting witness or documents to verify the veracity of statements alleged by Intervenor, is not enough to defeat Defendants' Motion. Specifically, Intervenor has accused Defendants of threatening termination or other disciplinary measures without any proof. She has further attributed religious context to alleged statements made between Doug McMillan and Jane McMillan, without any proof, direct evidence, or circumstantial evidence. It is as though Intervenor is simply trying to speak these facts into existence or to convince the Court they are true simply because she wants them to be true. The facts in this case are not malleable regardless of how hard Intervenor tries to make them so.

V. INTERVENOR'S FACTS PRECLUDING SUMMARY JUDGMENT

On pages 8-18 of the Response, Intervenor offers a list of seventeen (17) supposed facts ("PIF") precluding summary judgment. Defendants dispute the accuracy and validity of most of them. Several simply reflect the fluctuating state of public discourse on transgender issues over the past decade, (PIF 1-4); several engage in wild speculation or are irrelevant, (PIF 7, 10, 11, 13, 14, 17); several grossly mischaracterize legitimate process or business decisions (PIF 5, 15,) and others are simply denied by Defendants or are the subject of pending motions in

limine or *Daubert* motions (PIF 6, 8, 9, 12). At PIF 16, assuming arguendo this is accurate, Intervenor is alleging that she was replaced by someone (female) in the same protected class. Further, there is no evidence proffered that Dr. Shires presents as any more or less feminine that Intervenor.

CONCLUSION

Although female, and thus a member of a protected class, Intervenor, by virtue of her transgender status does not, *per se*, belong to a class protected under Title VII. For the reasons set forth previously, summary judgment should be granted in favor of the Regional University System of Oklahoma and Southeastern Oklahoma State University.

Respectfully submitted,

/s/ Jeb E. Joseph
DIXIE L. COFFEY, OBA #11876
JEB E. JOSEPH, OBA #19137
KINDANNE JONES, OBA #11374
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
Email: jeb.joseph@oag.ok.gov
Email: kindanne.jones@oag.ok.gov
Email: tim.bunson@oag.ok.gov
Attorneys for Defendants Southeastern Oklahoma State University and The Regional University System of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October 2017, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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

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

Marie E. Galindo
1500 Broadway, Ste. 1120
Lubbock, TX 79401
Email: megalindo@thegalindolawfirm.com
Attorney for Plaintiff

/s/Jeb E. Joseph
Jeb E. Joseph

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 1

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 1

MS. COFFEY: Object to form.

A. Those weren't the titles of the forms, but the two forms if you're referring to what we discussed before, yes.

Q. (By Mr. Townsend) The handicapped restroom that you mentioned, where was that restroom located in proximity to Dr. Tudor's office?

A. She would take a few steps down the hall, the elevator. Right outside the elevator was the handicapped, unisex bathroom.

Q. So it was on the same floor as her office?

A. No. She took the elevator down. I think her office was the third floor.

Q. What floor was the handicapped restroom?

A. Second floor.

Q. Were there any policies in place at Southeastern regarding who could and couldn't use the handicapped restroom?

A. No.

Q. Was it not supposed to be reserved for handicapped people?

MS. COFFEY: Object to form.

A. It was available for handicapped people, for family, to be used as a family restroom. Anyone could use it. It was not solely limited to handicapped.

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 I
TAKEN ON BEHALF OF THE DEFENDANTS
IN OKLAHOMA CITY, OKLAHOMA
ON MARCH 7, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

Exhibit 2

A In a telephone conversation before the beginning of the fall semester '07.

Q What was your response to Cathy Conway?

A To that particular information?

Q Uh-huh.

A Did I have a -- you're asking, did I have a verbal response or emotional response?

Q What was your response to Cathy Conway? Did you say anything to Cathy in response to that statement regarding Doug McMillan's inquiry if you could be fired?

A That information was within --

Q My question --

A -- a number --

Q -- is, did you say anything to Cathy Conway in response to her statement to you about Dr. McMillan's inquiry regarding whether you could be fired?

A I responded to information that she gave me that included that Dr. McMillan asked if I could be fired simply for being transgender.

Q What was your response?

A She also listed some odious restrictions that Dr. McMillan insisted on for my continued employment, and so my response to that was that I

Exhibit 2

would abide by those odious conditions.

Q Okay. I believe that -- that subject area is going to take a little while, so let me go back because we had been discussing your -- we had been talking about your discussions with Dr. Mischo. And you said that some discussion regarded Scoufos, some regarded McMillan and some regarded them both.

Have we talked about all of your discussions with Dr. Mischo about your concerns that their decisions -- decisions were discriminatory? Meaning Scoufos and McMillan's.

A Did we include the fact that Dr. McMillan would not share his rationale for denying me tenure and promotion, either? That --

Q Okay. Is this a discussion you had with Dr. Mischo?

A Yes.

Q That's what -- I'm just trying to find out everything --

A Yes.

Q -- all the discussions. Okay. You shared that with Dr. Mischo, but what was his response to you?

A That I should follow policy and procedure and exercise the rights that I have.

Exhibit 2

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 2

acknowledged that you thanked her for professionalism; is that true?

A And I said I may or may not.

Q Who at Southeastern, that would have the ability to make any changes, did you complain to about these alleged odious conditions that were placed on you?

MS. WEISS: Objection.

Q (By Ms. Coffey) Nobody. Isn't that the correct answer?

MS. WEISS: Objection.

THE WITNESS: I was contemplating whether or not Jane McMillan, for example, could have made --

Q (By Ms. Coffey) I'm sorry, are you claiming that Jane McMillan could have reported it?

A I was considering whether or not she -- she could have -- in her capacity as a counselor, could have intervened.

Q The only comment you ever had with Jane McMillan about it was when she said -- what you claim to have happened is that she said, "Let's step into the bathroom," and you told her you couldn't go into that bathroom, correct?

A Yes.

Q No other conversations with Jane McMillan

Exhibit 2