

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

UNITED STATES OF AMERICA and	)	
DR. RACHEL TUDOR,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. CIV-15-324-C
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY and	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**ORDER**

Plaintiffs filed the present action asserting Defendants engaged in unlawful discrimination. According to Plaintiffs, Dr. Tudor was denied tenure at Defendant Southeastern Oklahoma State University due to her status as a transgender person. During the course of discovery, Plaintiffs served upon Defendants Requests for Production seeking electronically-stored information (“ESI”). The parties have had multiple discussions about Plaintiffs’ Request for Production and the manner in which Defendants would respond to it. Despite their negotiations, the parties have been unable to reach an agreement on production of the requested information. In the most recent round of discussions, the parties discussed providing a Fed. R. Evid. 502(d) Order, which would permit Defendants to first submit the information and then later retain any privilege rights if it was discovered they had erroneously produced information. This process was designed to permit Defendants to minimize the burden on production of the records and allow production in bulk with claims

of privilege arising after the documents were produced and Plaintiffs reviewed them, identifying first those which Plaintiffs find useful. Once Plaintiffs identify a document intended for use in the case, Defendants may then assert a claim of privilege for that document. This process would shift the burden of review of the documents to Plaintiffs rather than Defendants.

In response to the Motion to Compel, Defendants argue that Plaintiffs' request does not meet the relevance test because it seeks documents occurring prior to September 9, 2009, one year prior to the date on which Dr. Tudor filed her gender discrimination claim. Defendants also complain that much of the documentation requested by Plaintiffs lacks relevance to the claims at issue. Finally, Defendants offer the wholly conclusory argument that production of the ESI would be overly burdensome.

The Court rejects Plaintiffs' argument that any objection has been waived. While the objections and arguments raised by Defendants could have been clearer and more direct, Defendants' protest to Plaintiffs' discovery was made. Given the relatively short time period since the requests were made and the ongoing nature of the parties' negotiations, the Court will not hold that Defendants waived their right to object.

Turning to those objections, the Court finds Defendants fail to offer any meaningful argument or legal authority in support of their position. As Plaintiffs note in their Reply, the temporal scope of relevant discovery extends beyond the time suggested by Defendants as it is necessary for Plaintiffs to obtain any available evidence demonstrating how comparable professors' tenure process has been handled. As for Defendants' argument that responding

to the request would be unduly burdensome, that argument fails for lack of proof. Further, it is apparent to the Court that production of documents under the Rule 502(d) Order would alleviate much of this burden, if not eliminate it altogether. Finally, given the nature of the claims in this action, the Court finds Plaintiffs' requests do not lack the proportionality required by Fed. R. Civ. P. 26. In short, the Court finds that the documents requested by Plaintiffs fall within the scope of discoverable material under Fed. R. Civ. P. 26 and that Defendants have failed to satisfy their burden to obtain protection from that discovery.

Accordingly, Plaintiff's Motion to Compel Defendants' Production of Electronically Stored Information (Dkt. No. 52) is GRANTED. Production shall be made by June 21, 2016. If Defendants elect to take advantage of Plaintiff's proposed Fed. R. Evid. 502(d) Order, they must submit an approved Order within five days.

IT IS SO ORDERED this 7th day of June, 2016.

  
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ROBIN J. CAUTHRON  
United States District Judge