

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

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

**NOTICE OF RELATED FILING IN THE  
NORTHERN DISTRICT OF TEXAS**

Plaintiff-Intervenor Rachel Tudor hereby notifies this Court and all counsel of the filing of a Motion for Protective Order to Quash a subpoena directed to Ms. Feleshia Porter pursuant to Fed R. Civ P. 45, together with a Motion for Stay and Motion for Transfer to the Western District of Oklahoma, filed as *In Re Subpoena of Feleshia Porter*, Case No. 3:16-mc-00067-K (N.D.Tex. filed July 18, 2016). The Motions and supporting exhibits are appended hereto.

Dated: July 18, 2016

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 18, 2016, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

/s/ Ezra Young  
Ezra Young (NY Bar No. 5283114)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN RE SUBPOENA OF  
FELESHIA PORTER

)  
)  
)  
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Case No.: 3:16-mc-00067

**DR. RACHEL TUDOR'S**  
**MOTION TO QUASH SUBOENA OR, IN THE ALTERNATIVE,**  
**TO TRANSFER TO THE**  
**WESTERN DISTRICT OF OKLAHOMA**  
**WITH INCORPORATED BRIEF**

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## INTRODUCTION

Dr. Rachel Tudor is currently engaged in active litigation in the Western District of Oklahoma against her former employers, Southeastern Oklahoma State University and the Regional University System of Oklahoma (“Defendants”). *United States et al. v. Southeastern Oklahoma State University et al.*, 5:15-cv-00324-C (W.D. Okla. filed Mar. 30, 2014). The United States filed the underlying Title VII enforcement action to redress sex discrimination and retaliation that Dr. Tudor, a transgender woman, was subjected to by Defendants. Dr. Tudor intervened in the underlying case, added an additional claim alleging she was subjected to a hostile work environment, and is thus a party in that matter.

Without waiting for the court in the underlying action to resolve a pending motion regarding Dr. Tudor’s psychotherapist-patient privilege, Defendants have served the subpoena at issue to Ms. Feleshia Porter, Dr. Tudor’s former therapist (“Porter Subpoena”). Dr. Tudor now moves this Court to quash the subpoena on the grounds of psychotherapist-patient privilege, or, in the alternative, to transfer this Motion to Quash to the Western District of Oklahoma (the “Issuing Court”) so that the Issuing Court can resolve the Motion to Quash in accordance with its ruling on the pending motion related to that privilege.

Ms. Porter lives and works in Dallas, so the Northern District of Texas is the “Compliance Court” for the Porter Subpoena pursuant to Fed. R. Civ. P. 45. Ms. Porter is not a party to the underlying action and is currently unrepresented; she is in agreement with the relief sought and consents to transfer to the Western District of Oklahoma.

Dr. Tudor further requests that this Court enter a protective order and stay of the noticed July 26, 2016 deposition of Ms. Porter to allow time for this Court (or, if transferred, the Western District of Oklahoma) to consider Dr. Tudor's request.

### **CERTIFICATE OF CONFERENCE**

Pursuant to Fed. R. Civ. P. 26(c) and Local Rule 7.1, counsel for Dr. Tudor has in good faith conferred with counsel for Defendants in a sincere attempt to resolve differences without court action. Dr. Tudor's counsel's office is located in Tuxedo Park, New York, and Defendants' counsel's office is located in Oklahoma City, Oklahoma. The distances between these offices rendered an in person conference infeasible. A telephonic conference was held on the evening of July 11, 2016. Jillian Weiss, one of Dr. Tudor's personal counsel in the underlying matter, and Dixie Coffey, counsel for Defendants in the underlying matter, conferred but could not reconcile the parties' disagreement over the Porter Subpoena. Specifically, Dr. Tudor's and Defendants' counsel disagree as to whether Dr. Tudor has waived psychotherapist-patient privilege in the underlying case and whether and to what extent waiver precludes the deposition of Ms. Porter and production of documents by Ms. Porter to Defendants.

Dr. Tudor's counsel also conferred with the United States. Dr. Tudor's counsel's office is located in Tuxedo Park, New York and the United States' office is located in Washington, D.C. The distance between these offices also made an in person conference infeasible. A telephonic conference was held on July 13, 2016. Shayna Bloom, one of the United States' counsel for the underlying matter, conferred with Jillian Weiss and Ezra

Young. During the conference, Bloom advised that the United States does not oppose the relief sought by Dr. Tudor.

Dr. Tudor's counsel also conferred with Ms. Porter (who is unrepresented). Dr. Tudor's counsel's office is located in Tuxedo Park, New York and Ms. Porter lives and works in Dallas, Texas. The distance between Dr. Tudor's counsel's office and Ms. Porter also made an in person conference infeasible. A telephonic conference was held with Ms. Porter and Jillian Weiss on July 11, 2016 as well as via email on July 12 and 13, 2016. Ms. Porter is in agreement with the relief sought by Dr. Tudor.

### **STATEMENT OF FACTS**

Dr. Tudor is a transgender woman who was diagnosed with a condition now known as gender dysphoria by Ms. Feleshia Porter in April 2007. Ms. Porter is a licensed psychotherapist (Exhibit A). Shortly after her diagnosis, Dr. Tudor ended her treatment with Ms. Porter. Dr. Tudor's therapy sessions with Ms. Porter were limited in scope—these sessions were narrowly focused on diagnosing of Dr. Tudor's gender dysphoria and assisting Dr. Tudor with a referral for hormone treatment and surgical care to treat Dr. Tudor's gender dysphoria (Exhibit B, Declaration of Rachel Tudor ("Tudor Dec.") ¶ 5). Dr. Tudor's treatment by Porter ended prior to Tudor encountering the hostilities, discrimination, and retaliation at issue in the underlying case. (Exhibit B, Tudor Dec. ¶ 6).

The underlying case is a Title VII enforcement action filed by the United States against Defendants in the Western District of Oklahoma in March 2015. The United States alleges that Defendants engaged in unlawful sex discrimination and retaliation against Dr.

Rachel Tudor. Dr. Tudor intervened in the underlying case in early April 2015. As Plaintiff/Intervenor, Dr. Tudor brought claims alleging that she was subjected to sex discrimination, retaliation, and a hostile work environment that started in June 2007 and continued unabated through her termination by Defendants in May 2011. Neither the United States nor Dr. Tudor seek emotional distress damages in the underlying case.

No party in the underlying case contests in good faith that Dr. Tudor was diagnosed by Ms. Porter with gender dysphoria in April 2007. No party in the underlying case contests in good faith that Dr. Tudor's gender presentation changed to female at work starting in Fall 2007.

In November 2015, Dr. Tudor provided Defendants with discovery responses to Defendants' requests which sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor has ever undergone. In her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege. (*See generally* Exhibit C.) Without waiving these objections, Dr. Tudor produced documents to Defendants that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. Defendants did not challenge Tudor's responses or the objections contained therein at the time.

On June 7, 2016, Defendants filed a copy of the Porter Subpoena with the Issuing Court (Exhibit D). The Porter Subpoena seeks to both depose Ms. Porter about Porter's

treatment of Dr. Tudor and demands production of all of Ms. Porter's records pertaining to Dr. Tudor's treatment.

On June 9, 2016, Dr. Tudor's counsel sent a letter (Exhibit E) via email (Exhibit F) and certified mail (Exhibit G) to Defendants' counsel requesting an opportunity to meet and confer regarding the Porter Subpoena. The letter from Dr. Tudor's counsel detailed Dr. Tudor's concerns regarding the privileged nature of the information and documents sought by the Porter Subpoena. Specifically, the letter noted that Dr. Tudor did not waive psychotherapist-patient privilege and requested that Defendants' meet and confer on June 13, 14, or 15 about the Porter Subpoena. Defendants' counsel did not respond to this letter.

On June 23, 2016 Defendants filed a Motion to Compel the United States to, *inter alia*, produce all of Dr. Tudor's therapy records including those of Ms. Porter (Exhibit H). In Defendants' Motion to Compel, Defendants claim that Dr. Tudor has waived psychotherapist-patient privilege. (Exhibit H at 14–15).

On July 6, 2016, the Issuing Court granted a Joint Motion to Extend Time to File Response/Reply for the Motion to Compel (Exhibit I). Thus, the Issuing Court is currently awaiting further briefing on the same psychotherapist-patient privilege dispute that is at the heart of Dr. Tudor's present Motion to Quash.

On the same day, Dr. Tudor served additional discovery responses to Defendants' requests which also sought, *inter alia*, all of Tudor's psychotherapist records and information regarding all psychotherapy Dr. Tudor had ever undergone (Exhibit K). Once again, in her responses to Defendants' requests, Dr. Tudor raised several objections, including objections on the grounds of psychotherapist-patient privilege (*See generally* Exhibit K).

Without waiving these objections, Dr. Tudor pointed to previously produced documents that were sufficient to evidence that Dr. Tudor in fact sought treatment from Dr. Porter for gender dysphoria in mid-2007 and that the purpose of that treatment was limited in scope to diagnosis and referral out to other health providers. (*See generally* Exhibit K).

On July 11, 2016—without ever giving Dr. Tudor’s counsel the opportunity to meet and confer—Defendants served Ms. Porter with the Porter Subpoena, noticing the deposition and demanding production of all psychotherapist records held by Porter pertaining to treatment of Dr. Tudor for July 26, 2016.

Dr. Tudor’s counsel has acted with all deliberate speed to file this Motion. Between learning that the Porter Subpoena was served on Ms. Porter, and present Dr. Tudor’s counsel has: conferred with Ms. Porter; conferred with the United States; conferred with Defendants; registered for ECF access in the Northern District of Texas; retained local counsel so that a member of Dr. Tudor’s personal litigation team in the underlying matter could move to be admitted to practice in this Court; filed for admission *pro hac vice* with this Court; and filed this Motion.

### **SUMMARY OF ARGUMENT**

Dr. Tudor respectfully requests that this Court quash the Porter Subpoena on the grounds that it seeks information and documents protected by psychotherapist-patient privilege. In the alternative, Dr. Tudor requests that this Court transfer this Motion to Quash to the Western District of Oklahoma (the Issuing Court and court in the underlying action). Transfer is proper because Ms. Porter—the non-party witness subject to the subpoena—

consents to transfer and there are exceptional circumstances that weigh heavily in favor of transfer.

Dr. Tudor also requests that this Court issue a protective order or stay of the Porter Subpoena to allow either this Court or the Issuing Court to decide Dr. Tudor's Motion to Quash and protect Dr. Tudor's psychotherapist-patient privilege. Without such a stay, Ms. Porter will be required to produce all records and give a deposition on July 26, 2016, regarding Dr. Tudor's therapeutic treatment, permanently destroying Dr. Tudor's unwaived privilege.

### **ARGUMENT**

#### **I. THE PORTER SUBPOENA SHOULD BE QUASHED BECAUSE ITS SUBJECT MATTER IS PROTECTED BY PSYCHOTHERAPIST-PATIENT PRIVILEGE.**

Dr. Tudor respectfully requests that this Court quash the Porter Subpoena to preserve Dr. Tudor's unwaived psychotherapist-patient privilege. Dr. Tudor has an interest in ensuring that the privilege she holds in the subject matter of the Porter Subpoena is protected, which is sufficient good cause under Federal Rule of Civil Procedure 26(c)(1) for an order to quash.

*Psychotherapist-patient privilege exists.* The Porter Subpoena requires Ms. Porter to appear for a deposition and also directs Ms. Porter to bring to that deposition "[a]ll records, including but not limited to physician notes, office notes, reports, session notes, intake information, diagnostic information, patient charts, prescriptions, correspondence, etc. . . . ." (Exhibit D at 3.) Based upon the contents of the Porter Subpoena, and the telephone

conversations between Defendants' counsel and Dr. Tudor's counsel on this matter, it appears that Defendants are seeking to depose Ms. Porter regarding statements and records of statements made by Dr. Tudor to Dr. Porter in the course of psychotherapy sessions conducted in 2007.

The statements exchanged between Ms. Porter and Dr. Tudor during the course of psychotherapy and the records of these statements that Ms. Porter possesses are plainly protected by federal common law psychotherapist-patient privilege. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (recognizing psychotherapist-patient privilege). Dr. Tudor and Ms. Porter made oral and written statements in the course of the psychotherapy in an atmosphere of trust and with the reasonable expectation of confidentiality. The effectiveness of psychotherapy treatment depends upon robust protections of confidentiality. Indeed, this is why the Supreme Court recognized federal common law psychotherapist-patient privilege in *Jaffee*. *Jaffee*, 518 U.S. at 10; *cf. United States v. Auster*, 517 F.3d 312, 315 (5th Cir. 2008) (recognizing privilege).

***Dr. Tudor has standing.*** Dr. Tudor has standing for this Motion because she has a personal privilege and interest in the Porter Subpoena, which seeks to depose and demand production of documents pertaining statements and documents containing privileged statements made during the course of Dr. Tudor's psychotherapy with Ms. Porter. *Atlantic Inv. Mgmt., LLC v. Millennium Fund I, Ltd.*, 212 F.R.D. 395, 398 (N.D. Ill. 2002) (recognizing that party has standing to object to subpoena issued to non-party where party claims some personal right or privilege with regard to information or documents sought).

*No waiver has occurred.* Dr. Tudor’s privilege stands unless Dr. Tudor, as holder of the privilege, either expressly waives the privilege or places her mental condition into issue by seeking relief for extraordinary emotional distress. *See, e.g., Huck v. City of Oak Forest*, 185 F.R.D. 526, 529 (N.D. Ill. 1999) (analogizing to waiver of attorney-client privilege, and reasoning that psychotherapist privilege waived when plaintiff has taken affirmative step in litigation to place her diagnosis or treatment in issue, but recognizing mere assertion that defendant’s alleged misconduct caused emotional harm is insufficient to waive privilege); *Ruhlmann v. Ulster Cnty. Dep’t of Social Servs.*, 194 F.R.D. 445, 450–51 (N.D.N.Y. 2000) (recognizing that request for remedy seeking something beyond garden variety emotional distress would place Title VII plaintiff’s mental condition at issue and might trigger waiver of psychotherapist-patient privilege; holding that seeking “garden variety” emotional distress damages does not trigger waiver). Neither situation has occurred.

At no point during the course of the underlying case has Dr. Tudor expressly waived psychotherapist-patient privilege. Indeed, throughout the litigation Dr. Tudor has repeatedly, clearly, and consistently invoked psychotherapist-patient privilege to shield statements and records of statements related to her psychotherapy treatment with Ms. Porter. For example, Dr. Tudor has gone to great lengths to exactly clarify in her discovery responses that she believes, *inter alia*, statements made to and records of such statements made to Ms. Porter are protected. (*See* Exhibit C [Discovery Responses dated Oct. 28, 2015], at Response Nos. 63 (“Plaintiff/Intervenor objects to this Request for Production on the ground that it seeks records protected by psychotherapist-patient privilege.”); Exhibit

K [Discovery Responses dated July 6, 2016], at Response Nos. 64 (“Plaintiff/Intervenor also objects to this Request because it seeks information protected by the psychotherapist-patient and/or physician-patient privilege and interferes with the Plaintiff/Intervenor’s recognized privacy interest in one’s medical care and medical records.”), 65 (similar), 66 (similar).) Dr. Tudor’s counsel has also repeatedly clarified Dr. Tudor’s position to Defendants’ counsel. (*See, e.g.*, Exhibit E [Ltr. from Ezra Young to Dixie Coffey dated June 9, 2016]).

Moreover, at no point has Dr. Tudor or the United States done anything that put Dr. Tudor’s mental condition into issue such that waiver of the privilege was triggered. For example, neither Dr. Tudor nor the United States are seeking emotional distress damages in the underlying action. (*See* Exhibit L [United States’ Complaint], at 19–20 (emotional distress damages not sought); Exhibit M [Dr. Tudor’s Complaint in Intervention], at 33–35 (same).) (Even if remedies like emotional distress damages were sought in the underlying action, many federal courts are clear that a request for *garden variety* emotional distress damages does not trigger waiver of psychotherapist-patient privilege.<sup>1</sup>) Moreover, contrary to the baseless assertions Defendants have made in filings before the Issuing Court (*see, e.g.*, Exhibit H at 14 (“Plaintiff and Intervenor have placed the medical and psychological

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<sup>1</sup> *Ortiz-Carballo v. Ellspermann*, No. 08-165, 2009 WL 961131, at \*2 (M.D. Fla. Apr. 7, 2009) (“The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or ‘garden variety’ emotional distress.”); *Ruhlmann*, 194 F.R.D. at 450 (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”); *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553 (N.D. Ga. 2001) (similar); *Fitzgerald v. Casil*, 216 F.R.D. 632, 634-40 (N.D. Cal. 2003) (medical records irrelevant and psychotherapy records protected by psychotherapist-patient privilege).

condition of Dr. Tudor at issue in both the claims asserted in this action as well as the request for damages”), the mere fact that Dr. Tudor and the United States have filed Title VII claims and sought remedies does not itself trigger waiver of Dr. Tudor’s psychotherapist-patient privilege.<sup>2</sup>

*An order to quash the Porter Subpoena is an appropriate means of protecting Dr. Tudor’s privilege.* The relief Dr. Tudor seeks is appropriate because Dr. Tudor can demonstrate that she has good cause for the relief requested and specific need for the protection sought. Fed. R. Civ. P. 26(c)(1) (authorizing protective orders where good cause is shown); *Landry v. Air Line Pilots Ass’n*, 901 F.2d 404, 435 (5th Cir. 1990). In addition, Dr. Tudor respectfully requests an order to stay or protective order relieving Ms. Porter from compliance with the Porter Subpoena until this Court or the Issuing Court can rule on the underlying issue of Dr. Tudor’s psychotherapist-patient privilege.

Good cause exists because, if this Court does not quash the Porter Subpoena in advance of July 26, 2016, or issue a stay pending a decision on this Motion to Quash, it is clear that Defendants will orally question Ms. Porter about privileged statements Dr. Tudor made during psychotherapy sessions and seek production of records from Ms. Porter which contain privileged statements at the noticed July 26, 2016 deposition.

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<sup>2</sup> Cf. *Shirazi v. Childtime Learning Center, Inc.*, No. 07-1289, 2008 WL 4792694, at \*1 (W.D. Okla. Oct. 31, 2008) (Cauthron, J.) (recognizing that aggrieved employee in Title VII suit does not waive right to privacy by simply filing lawsuit); *Roberts v. Clark Cnty. Sch. Dist.*, 312 F.R.D. 594, 606 (D. Nev. 2016) (declining to find “legitimate interest” in employer obtaining privileged medical records of aggrieved transgender employee to, *inter alia*, establish the timeline of the employee’s medical transition and/or establish timeline of physiological changes).

Dr. Tudor's concern that the Porter Subpoena will result in revelation of privileged information and records is substantiated by specific facts that show that protection is necessary to preserve her psychotherapist-patient privilege. *See In re Terra Int'l*, 134 F.3d 302, 306 (5th Cir. 1998). For example, Dr. Tudor points to the Porter Subpoena itself, which expressly states that Defendants intend to use it to seek production of documents from Ms. Porter that contain privileged statements. (Exhibit D at 3 (directing Ms. Porter to produce "All records, including but not limited to **physician notes**, office notes, reports, **session notes**, intake information, diagnostic information, **patient charts**, prescriptions, **correspondence** etc., relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor.") (emphasis added).) Defendants' absolute disregard for Dr. Tudor's claims of privilege is further evidence by Defendants' past filings in the Issuing Court, wherein Defendants have stated that they seek to uncover all details about Dr. Tudor's psychotherapy treatment from Ms. Porter and others because the defendants believe no privilege exists. (*See, e.g.*, Exhibit H at 15 ("Plaintiff should be compelled to disclose any medical or medical health records . . .").) Accordingly, intervention from this Court is necessary to maintain the *status quo* and preserve Dr. Tudor's psychotherapist-patient privilege pending fuller consideration of the merits of her claim of privilege, and an order to quash from either this Court or the Issuing Court is ultimately required to preserve that privilege.

## II. TRANSFER OF THIS MOTION TO THE WESTERN DISTRICT OF OKLAHOMA IS APPROPRIATE

Transfer of this Motion to the Issuing Court is appropriate for at least two reasons. Federal Rule of Civil Procedure 45(f) states that "[w]hen the court where compliance is

required did not issue the subpoena, it may transfer a motion under this rule to the issuing court if the person subject to the subpoena consents or if the court finds exceptional circumstances.” Furthermore, the Advisory Committee Notes on the most recent change to Rule 45 note that when considering a request for transfer, the court of compliance’s “prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not assumed that the issuing court is in a superior position to resolve subpoena-related motions.” Both potential conditions of transfer under the rule (and both policy considerations outlined in the Advisory Committee Notes) apply here.

First, Ms. Porter—the non-party subject to the Porter Subpoena—has consented to transfer to the Court of Issuance (Exhibit J). Pursuant to the plain text of Rule 45(f), Ms. Porter’s consent to transfer alone is sufficient for transfer of the Porter Subpoena related motions to the Court of Issuance. Ms. Porter would not be burdened by transfer, thus satisfying the “prime concern” of this Court.

Second, there are also exceptional circumstances that justify transferring the Porter Subpoena related motions to the Western District of Oklahoma. The parties in the underlying case have heavily litigated this case in the Issuing Court, through a resolved Motion to Dismiss. *See United States et al. v. Southeastern Oklahoma State University et al.*, 2015 WL 4606079 (W.D. Okla. July 10, 2015). There are also currently several interconnected discovery disputes pending, including a Motion to Compel that is still in the process of being briefed which directly concerns the psychotherapist privilege issue at the heart of the Porter Subpoena and this Motion to Quash. (Exhibit H at 15 (Defendants’ argument for waiver in Motion to Compel in the Issuing Court.)) Thus, the Issuing Court already has

familiarity with the specific dispute and claim of privilege at issue, which strongly weighs in favor of permitting transfer back to the Court of Issuance. *See, e.g., In re Subpoena to Paul G. Cassell*, No. 15-7433, 2016 WL 3645166, at \*2 (D. Utah June 30, 2016) (noting that court of issuance judge's familiarity with specific privilege being asserted is one exceptional ground for transferring matter to court of issuance). Given that the Issuing Court will rule on discovery requests made to the United States covering the precise documents requested in the Porter Subpoena, the Issuing Court is in a better position to rule on Dr. Tudor's Motion to Quash with a full understanding of the discovery requests made to Dr. Tudor and the United States, their compliance with those requests, and the appropriateness of those requests in the context of the overall underlying litigation.

### **CONCLUSION**

For the foregoing reasons, Dr. Tudor respectfully requests that this Court quash the Porter Subpoena, or, in the alternative, transfer this Motion to Quash to the Western District of Oklahoma. Dr. Tudor additionally requests that Ms. Porter's noticed deposition for July 26, 2016, be stayed pending the resolution of this motion, and that Ms. Porter be instructed that she need not comply with provisions of the Porter Subpoena which demand that she produce her psychotherapist records pertaining to Dr. Tudor's care.

Respectfully submitted,

Dated: July 18, 2016

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[Jennifer.Arendes@eoc.gov](mailto:Jennifer.Arendes@eoc.gov)  
***Attorney for the U.S. EEOC***

Ms. Feleshia Porter, MS, LPC  
3530 Forest Lane, #55  
Dallas, Texas 75234  
[feleshia@aol.com](mailto:feleshia@aol.com)  
***Pro Se***

/s/ Ezra Young  
\_\_\_\_\_  
Ezra Young (NY Bar No. 5283114)

# **Exhibit A**



[Contact your licensing board or program](#) | [Internet Policy](#)  
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**License Details**

"License" means a license, certificate, registration, permit, or other form of authorization, including a renewal of the authorization, that: a person must obtain to practice or engage in a particular business, occupation, or profession; or a facility must obtain before a particular business, occupation, or profession is practiced or engaged in within the facility. A "License Rank" is the level of license; a "License Modifier" provides additional information on the scope of the license.

A license may have one or two statuses. The first status is normally "Current" which means the license is in good standing. If the first status is "Expired" or "Null and Void", or if either status shows "Inactive", the licensee may not practice in the profession and/or operate as a licensed business.

For more information regarding this license, including any disciplinary information displayed below, please contact the appropriate board or program office. A list of DSHS licensing board and programs may be found at: <http://www.dshs.state.tx.us/Licensee-Registrant-Permittee.aspx> or click the link at the bottom of this page.

Press "Previous Record" to display the previous license.

Press "Next Record" to display the next license.

Press "Search Results" to return to the Search Results list.

Press "New Search Criteria" to do another search of this type.

Press "New Search" to start a new search.

**License Number: 15736**

**Current Date: 07/12/2016 05:56 AM**

Name: PORTER, FELESHIA  
 License Type: Licensed Professional Counselor  
 License Status: Current, Active  
 Expiry Date: 03/31/2017  
 Effective Rank Date: 07/27/1999  
 Modifier(s): Approved Supervisor

**Addresses**

<b>Work Address</b>	Address	3530 FOREST LANE, SUITE 188 DALLAS , TX DALLAS 75234 US
<b>Main Address</b>	Address	DALLAS , TX DALLAS 75234 US
<b>Mailing Address</b>	Address	DALLAS , TX DALLAS 75234 US

**LPC Supervisor**

Licensee's Role: Professional Counselor Supervisor  
 Related Party Role: Professional Counselor Intern

**Related Party Name**

License	Address
Licensed Professional Counselor Intern #73836	PLANO , TX COLLIN 75025 US
<b>BERGER, RACHEL M</b>	
Status: Current	
Expiration Date: 04/01/2020	

[Previous Record](#) [Next Record](#) [Search Results](#) [New Search Criteria](#) [New Search](#) [Print](#)

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Last Updated Mar 27, 2013

# **Exhibit B**



for my gender dysphoria. During the course of my treatment with Ms. Porter, there were oral communications between myself and Ms. Porter regarding my psychological condition.

6. To my recollection, my treatment with Ms. Porter ended prior to me encountering the hostilities, discrimination, and retaliation that I and the United States allege in the underlying case.
7. It is my hope that the Court will take into account my interest in preserving my psychotherapist-patient privilege as it pertains to my sessions with Ms. Porter and the records that Ms. Porter has retained which touch on my treatment.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: July 15, 2016

  
\_\_\_\_\_  
Rachel Tudor

# Exhibit C

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  
SECOND SET OF DISCOVERY REQUESTS**

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

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

**REQUESTS FOR PRODUCTION**

**Request for Production No. 61:** *Please produce all medical documents and/or medical bills which demonstrate or otherwise show Intervenor’s transition from male to female.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request for Production on the grounds that it is unduly burdensome, cumulative, and duplicative to the extent that it requests all medical documents and/or medical bills “which demonstrate or otherwise show Intervenor’s transition from male to female.”

Plaintiff/Intervenor further objects to this Request for Production on the ground that it is overbroad as to temporal scope to the extent that it seeks all medical documents and/or medical bills that pertain to Plaintiff/Intervenor’s transition-related care without limit. *See, e.g., EEOC v. Midwest Regional Medical Center, LLC*, 2014 WL 1745081 at \*2 (W.D. Okla. Apr. 30, 2014) (holding that proper temporal scope of medical records pertaining to relevant medical condition is one year prior to and one year subject to plaintiff’s employment with defendant).

Plaintiff/Intervenor further objects to this Request for Production on the ground that it is intended to harass and humiliate in the sense that medical documents and/or medical bills, which would be responsive to this request, are not necessary to establish the fact that Plaintiff/Intervenor transitioned during her employment with Defendants and began to present as female.

Subject to and without waiving these objections, please see documents bates stamped with the prefix “PI” including, but not limited to: Diagnostic Laboratory of Oklahoma bill (Apr. 9, 2007); Letter from Feleshia Porter, M.S., L.P.C. (Apr. 4, 2007).

**Request for Production No. 62:** *Please produce all documents and/or other materials (other than medical documents requested in Request for Production No. 61, above) documenting or otherwise showing Intervenor's transition from male to female.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request for Production on the grounds that it is unduly burdensome, cumulative, and duplicative to the extent that it requests all documents and/or other materials “which demonstrate or otherwise show Intervenor’s transition from male to female” without limit.

Plaintiff/Intervenor further objects to this Request for Production on the ground that it is overbroad as to temporal scope to the extent that it seeks all documents and/or other materials that pertain to Plaintiff/Intervenor’s transition without limit. *See, e.g., EEOC v. Midwest Regional Medical Center, LLC*, 2014 WL 1745081 at \*2 (W.D. Okla. Apr. 30, 2014) (holding that proper temporal scope of medical records pertaining to relevant medical condition is one year prior to and one year subject to plaintiff’s employment with defendant).

Plaintiff/Intervenor further objects to this Request for Production on the ground that it is intended to harass and humiliate in the sense that “all documents and/or other materials,” which would be responsive to this request, are not necessary to establish the fact that Plaintiff/Intervenor transitioned during her employment with Defendants and began to present as female.

Subject to and without waiving these objections, please see documents bates stamped with the prefix “PI” including, but not limited to: Letter by John Mischo (Feb. 11, 2007); Letter by John Mischo (Aug. 24, 2011).

**Request for Production No. 63:** *Please produce all medical documents and/or bills generated by, or related to, mental health treatment(s) received by Intervenor since January 1, 1997.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request for Production on the ground that it seeks records protected by psychotherapist-patient privilege. *See, e.g., Jaffee v. Redmond*,

518 U.S. 1, 15 (1996) (observing that federal common law recognizes psychotherapist-patient privilege); *Ruhlmann v. Ulster County Dep't of Social Servs.*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”).

Plaintiff/Intervenor further objects to this Request for Production on the ground that it is overbroad as to temporal scope to the extent that it seeks all “medical documents and/or bills generated by, or related to, mental health treatment(s)” since January 1, 1997 without limit. *See, e.g., EEOC v. Midwest Regional Medical Center, LLC*, 2014 WL 1745081 at \*2 (W.D. Okla. Apr. 30, 2014) (holding that proper temporal scope of medical records pertaining to relevant medical condition is one year prior to and one year subject to plaintiff’s employment with defendant).

Plaintiff/Intervenor further objects to this Request for Production to the extent it seeks psychotherapist records pertaining to Plaintiff/Intervenor’s transition on the ground that it is intended to harass and humiliate in the sense that materials which would be responsive to this request, are not necessary to establish the fact that Plaintiff/Intervenor transitioned during her employment with Defendants and began to present as female.

Subject to and without waiving these objections, please see documents bates stamped with the prefix “PI” including, but not limited to: Letter from Feleshia Porter, M.S., L.P.C. (Apr. 4, 2007).

**CERTIFICATE OF SERVICE**

This is to certify that on the 28<sup>th</sup> day of October, 2015, a true and correct copy of the above and foregoing discovery responses were electronically transmitted, and mailed via U.S. Postal Service to the following interested parties:

Kindanne C. Jones, Dixie L. Coffey, and Jeb Joseph  
Assistant Attorneys General  
Oklahoma Attorney General's Office  
Litigation Section  
313 N. E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
[Kindanne.Jones@oag.ok.gov](mailto:Kindanne.Jones@oag.ok.gov)  
[Dixie.Coffey@oag.ok.gov](mailto:Dixie.Coffey@oag.ok.gov)  
[Jeb.Joseph@oag.ok.gov](mailto:Jeb.Joseph@oag.ok.gov)  
***Attorneys for Defendant State of Oklahoma  
Ex rel. Regional University System of Oklahoma  
& Southeastern Oklahoma State University***

Allan Townsend  
Delora Kennebrew  
Meredith Burrell  
Shayna Bloom  
U.S. Dep't of Justice, Civil Rights Division-DC  
950 Pennsylvania Avenue NW  
Room 49258 PHB  
Washington, DC 20530  
[Allan.Townsend@usdoj.gov](mailto:Allan.Townsend@usdoj.gov)  
[Delora.Kennebrew@usdoj.gov](mailto:Delora.Kennebrew@usdoj.gov)  
[Meredith.Burrell@usdoj.gov](mailto:Meredith.Burrell@usdoj.gov)  
***Attorneys for United States of America***

*/s/ Ezra Young*  
\_\_\_\_\_  
Ezra Young

# **Exhibit D**

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

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

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM  
OF OKLAHOMA,

Defendants.

**NOTICE TO TAKE DEPOSITION**

**TO: All Counsel of Record**

NOTICE IS HEREBY GIVEN pursuant to Rule 30(b)(1) of the Federal Rules of Civil Procedure, that Defendants Southeastern Oklahoma State University and the Regional University System of Oklahoma will take the deposition of the following individuals at the following dates, times, and locations listed below:

<b>NAME</b>	<b>DATE</b>	<b>TIME</b>	<b>LOCATION</b>
Feleshia Porter, M.S., L.P.C. Park Forest Office Bldg. 3530 Forest Ln., #55 Dallas, TX 75234	July 26, 2016, and each day thereafter as necessary	9:00 a.m.	Southwest Reporting & Video Services 3010 LBJ Freeway, Ste. 1200 Dallas, TX 75234 866.650.1800

Dated this 6th day of June 2016.

Respectfully submitted,

/s/ Jeb E. Joseph

**DIXIE L. COFFEY, OBA #11876**

**JEB E. JOSEPH, OBA #19137**

**KINDANNE JONES, OBA #11374**

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

*Attorneys for Defendants Southeastern Oklahoma  
State University and The Regional University System  
of Oklahoma*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 6th day of June 2016, 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:

Allan Townsend  
Delora Kennebrew  
Meredith Burrell  
US DEPT. OF JUSTICE CIVIL RIGHTS DIVISION-DC  
950 Pennsylvania Avenue NW Rm 49258 PHB  
Washington, DC 20530  
Email: allan.townsend@usdoj.gov  
delora.kennebrew@usdoj.gov  
meredith.burrell@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*

Jillian Weiss  
Ezra Young  
LAW OFFICE OF JILLIAN T. WEISS, P.C.  
PO Box 642  
Tuxedo Park, NY 10987  
Email: jtweiss@jtweisslaw.com  
Email: eyoung@jtweisslaw.com  
*Attorney for Intervenor Plaintiff*

/s/Jeb E. Joseph  
Jeb E. Joseph

UNITED STATES DISTRICT COURT

for the

\_\_\_\_\_ District of \_\_\_\_\_

\_\_\_\_\_  
Plaintiff )  
v. ) Civil Action No.  
\_\_\_\_\_  
Defendant )

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To:

\_\_\_\_\_  
(Name of person to whom this subpoena is directed)

**Testimony:** YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
--------	----------------

The deposition will be recorded by this method: \_\_\_\_\_

**Production:** You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: \_\_\_\_\_

CLERK OF COURT

OR

\_\_\_\_\_  
Signature of Clerk or Deputy Clerk

\_\_\_\_\_  
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) \_\_\_\_\_, who issues or requests this subpoena, are:

**Notice to the person who issues or requests this subpoena**

If this subpoena commands the production of documents, electronically stored information, or tangible things, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* \_\_\_\_\_  
on *(date)* \_\_\_\_\_ .

I served the subpoena by delivering a copy to the named individual as follows: \_\_\_\_\_

\_\_\_\_\_ on *(date)* \_\_\_\_\_ ; or

I returned the subpoena unexecuted because: \_\_\_\_\_

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also  
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of  
\$ \_\_\_\_\_ .

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_ .

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc.:

**Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**

**(c) Place of Compliance.**

**(1) For a Trial, Hearing, or Deposition.** A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
  - (i) is a party or a party's officer; or
  - (ii) is commanded to attend a trial and would not incur substantial expense.

**(2) For Other Discovery.** A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

**(d) Protecting a Person Subject to a Subpoena; Enforcement.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

**(e) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(g) Contempt.**

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

# **Exhibit E**

LAW OFFICE OF JILLIAN T. WEISS

P.O. Box 642  
TUXEDO PARK, NEW YORK 10987

JILLIAN T. WEISS  
SHAREHOLDER  
TEL: (845) 709-3237  
FAX: (845) 915-3283  
JWEISS@JTWEISSLAW.COM  
ADMITTED IN NY & NJ ONLY

EZRA YOUNG  
ASSOCIATE  
TEL: (949) 291-3185  
FAX: (917) 398-1849  
EYOUNG@JTWEISSLAW.COM  
ADMITTED IN NY ONLY

June 9, 2016

**VIA EMAIL & CERTIFIED U.S. MAIL**

Jeb Joseph  
Dixie Coffey  
Oklahoma Attorney General's Office  
313 N.E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
[jeb.joseph@oag.ok.gov](mailto:jeb.joseph@oag.ok.gov)  
[dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)

**Re: Defendants' Deposition Notice and Subpoena of Ms. Feleshia Porter**

Dear Jeb and Dixie:

I am writing in regard to your Deposition Notice and Subpoena for Feleshia Porter, M.S., L.P.C., filed via ECF on June 6, 2016 (ECF No. 64). In ECF No. 64, you state you intend to take Ms. Porter's deposition on July 26, 2016 "and each day thereafter as necessary." You further request that Ms. Porter bring "[a]ll records, including but not limited to physician notes, office notes, reports, session notes, intake information, diagnostic information, patient charts, prescriptions, correspondence, etc. relating to T.R. Tudor a/k/a Robert Tudor a/k/a Rachel Tudor." For the reasons outlined below, Plaintiff/Intervenor objects to Defendants' proposed deposition and subpoena seeking privileged information and documents from Ms. Porter. This letter is sent pursuant to Local Rule 37.1, seeking a written response and a time to meet and confer within a reasonable time period, prior to our filing of a motion to quash your subpoena and deposition notice.

Based upon the contents of ECF No. 64, it appears that you are seeking to depose Ms. Porter regarding statements and records of statements made by Dr. Tudor to Dr. Porter. Such statements and records are protected by the psychotherapist-patient privilege. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15 (1996); *Plascencia v. City of St. George*, 2009 WL 562263, at \*5-6 (D. Utah Mar. 3, 2009) (recognizing that requester in Title VII action must establish basis for waiver of psychotherapist-patient privilege); *United States v. Carter*, 2014 WL 5469750 (W.D. Okla. Oct. 28, 2014) (Cauthron, J.) (recognizing similar burden on requester). *See also Ponca Tribe of Indians v. Oklahoma v. Cont'l Carbon Co.*, 2008 WL 1732947, at \*1 (W.D. Okla. Apr. 10, 2008) (Cauthron, J.) (recognizing that Fed. R. Civ. P. 45 authorizes a person to withhold subpoenaed information under an express claim that it is privileged and to move to quash or modify a subpoena that would require disclosure of privileged or other protected matter); *Shirazi v. Childtime Learning Center, Inc.*, 2008 WL 4792694 (W.D. Okla. Oct. 31, 2008) (Cauthron, J.)

As previously raised in connection with her responses to Defendants' First and Second Discovery Requests (dated October 21 and October 28, 2015), Dr. Tudor sought treatment from Ms. Porter in 2007 for gender dysphoria a/k/a gender identity disorder. In her written discovery responses, Dr. Tudor raised psychotherapist-client privilege and other objections to requests seeking myriad medical records without temporal limit and subject-matter which were calculated to harass or humiliate Dr. Tudor in the sense that the medical information and documents sought which were responsive were not necessary to establish the fact that Dr. Tudor transitioned during her employment with Defendants and began to present as female at work in 2007. Despite raising good faith objections including psychotherapist-client privilege, Dr. Tudor produced several documents authored by Ms. Porter that memorialize Dr. Tudor's treatment by Ms. Porter as well as Dr. Tudor's diagnosis. *See, e.g.*, PI000429 (Apr. 4, 2007 Letter from Feleshia Porter "certify[ing] that TR Tudor aka Rachel is a transsexual woman"); PI000430 (May 11, 2007 invoice from Feleshia Porter); PI000431 (April 4, 2007 invoice from Feleshia Porter); PI000432 (Apr. 4, 2007 Letter from Feleshia Porter expressing approval, *inter alia*, for Dr. Tudor to begin "HRT").

To my knowledge, no party disputes that Dr. Tudor transitioned to female during her employ with Defendants, that Dr. Tudor sought (and received) hormone therapy after receiving her diagnosis from Ms. Porter, or the fact that Dr. Tudor was assigned male at birth but identifies as female. Beyond these very basic facts that are not in dispute, Ms. Porter has no other knowledge relevant to claims and defenses in this litigation. To the extent you want to authenticate Ms. Porter's records, we could seek to obtain a declaration from her which does that.

In your written response to this letter, I ask that you clearly articulate what specific relevant facts you seek, explain how these facts are relevant to claims and defenses raised in this litigation, and/or explain what contested issue(s) of material fact your deposition and subpoena possibly resolve. Further, I ask that you articulate the grounds Defendants believe entitle them to seek information and records protected by psychotherapist-patient privilege.

Pursuant to Local Rule 37.1, I request that you provide your response to this letter in writing, and that you make yourself available for a meet and confer conference within a reasonable period of time. Given the distance between our offices, I request that we conduct this meeting over the telephone sometime on June 13, 14, or 15. Please advise of your availability.

Regards,



Ezra Young

Cc:

Allan Townsend  
Shayna Bloom  
Valerie Meyer

*Via email:* [Allan.Townsend@usdoj.gov](mailto:Allan.Townsend@usdoj.gov)  
*Via email:* [Shayna.Bloom@usdoj.gov](mailto:Shayna.Bloom@usdoj.gov)  
*Via email:* [Valerie.Meyer@usdoj.gov](mailto:Valerie.Meyer@usdoj.gov)

# Exhibit F



**From:** Ezra Young [eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com) 

**Subject:** Deposition and Subpoena of Ms. Porter

**Date:** June 9, 2016 at 11:13 AM

**To:** Jeb Joseph [jeb.joseph@oag.ok.gov](mailto:jeb.joseph@oag.ok.gov), Dixie Coffey [dixie.coffey@oag.ok.gov](mailto:dixie.coffey@oag.ok.gov)

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Jeb and Dixie:

Please see the attached letter addressing your notice of deposition and subpoena for Ms. Felecia Porter. A copy of this letter has also been sent to you via certified mail. Please advise of your availability for a meet and confer on June 13, 14, or 15.



Best,

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# **Exhibit H**

CASE NO. CIV-15-324-C

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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.

---

REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION  
TO COMPEL DISCOVERY RESPONSES AND BRIEF IN SUPPORT

---

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June 23, 2016

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. CIV-15-324-C

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM  
OF OKLAHOMA,

Defendants.

**REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S MOTION  
TO COMPEL DISCOVERY RESPONSES AND BRIEF IN SUPPORT**

Defendant Regional University System of Oklahoma (hereinafter "RUSO"), by and through its attorneys of record and pursuant to Fed. R. Civ. P. 37(a)(3)(B), submits its Motion to Compel Discovery Responses. In support hereof, Defendant shows the Court as follows:

**BACKGROUND**

Rachel Tudor failed to take advantage of the academic and professional opportunities offered to her by the University Defendants in her pursuit of a tenured position at Southeastern Oklahoma State University (hereinafter "SEOSU"). Instead, Tudor ignored the academic and professional advice she received from University leadership, pushed forward with a premature application for tenure, and ultimately failed to attain tenure as a result. Rather than taking responsibility for her cavalier approach to an important and detail-

oriented process, Tudor filed grievances and complaints alleging that she was denied tenure due to the fact that she is male-to-female transgender. Now the Defendants are called upon to defend claims instigated by a disgruntled former employee. Complicating this task, however, is Plaintiff's refusal to respond to valid discovery requests.

### **COMPLIANCE WITH LCvR 37.1**

On September 4, 2015, Defendant RUSO served upon Plaintiff, United States of America, its first set of written discovery requests. Plaintiff's responses were submitted on or about October 21, 2015. Exhibit 1. On January 5, 2016, undersigned counsel sent written correspondence to Plaintiff's counsel detailing numerous deficiencies in the discovery responses. Exhibit 2. Defendant specifically asked Plaintiff to better articulate its numerous claims of privilege, identify what documents were responsive to each request for production, and provide an adequate privilege log. Defendant also requested Plaintiff to supplement certain discovery responses with complete answers. *Id.*

On January 28, 2016, Plaintiff submitted a letter in response, suggesting in part that its discovery responses were sufficient and requesting a telephone conference to discuss any remaining issues. Exhibit 3. On February 2, 2016, the parties conferred by phone and Plaintiff agreed to consider supplementing its discovery requests and privilege log. Exhibit 4. On March 4, 2016, Plaintiff submitted supplemental responses to Defendant's discovery requests. Exhibit 5. *See also* accompanying correspondence at Exhibit 6. However, Plaintiff's discovery responses still fail to comply with the Federal Rules of Civil Procedure governing disclosures and discovery.

## ARGUMENT AND AUTHORITY

Rule 37(a) provides that a party may move for an order compelling disclosure or discovery after the party has conferred or made a good faith effort to confer with the non-disclosing party. Fed. R. Civ. P. 37(a). This Rule applies where a party has not disclosed any information, or has disclosed evasive or incomplete answers. *Id.*

“[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). In employment cases, the need for broad discovery is crucial. In fact, the Tenth Circuit has stated that “discovery in [employment] discrimination claims should not be narrowly circumscribed.” *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1520 (10th Cir. 1995) (citation omitted). Broad discovery is necessary in employment cases because “the testimony of other employees about their treatment by the defendant is relevant to the issue of the employers discriminatory intent.” *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1156 (10th Cir. 1990). While the Court may be cognizant of a plaintiff’s concerns that the discovery requests are invasive, embarrassing or of a sensitive nature, discovery plays a significant role in the adversarial system and interference with a defense strategy is not contemplated by the Federal Rules of Civil Procedures. *F.D.I.C. v. Daily*, 973 F.2d 1525, 1530 (10th Cir. 1992).

Interrogatories should be answered directly and without evasion. 8B Wright, Miller & Marcus, Federal Practice and Procedure § 2177. “[T]he longstanding judicial inclination has been that discovery should be allowed unless the court is satisfied that the administration of justice will be impeded...The burden is therefore upon a party objecting to interrogatories ... to show why discovery should not be permitted.” 8B Wright, Miller & Marcus, Federal

Practice and Procedure § 2176. Requests for Production of documents are “designed to permit the broadest sweep of access, inspection, examining, testing, sampling, copying, and photographing of documents, electronically stored information, or objects in the possession or control of another party.” 8B Wright, Miller & Marcus, Federal Practice and Procedure § 2206. “The purpose of Rule 34 is to make relevant and nonprivileged documents and objects in the possession of one party available to the other.” *Id.* at § 2202.

### **PROPOSITION I. PLAINTIFF’S CLAIMS OF PRIVILEGE MUST FAIL.**

In *Peat, Marwick, Mitchell & Co. v. West*, 748 F.2d 540, 542 (10th Cir. 1984), the Tenth Circuit held as follows:

A party seeking to assert [attorney-client] privilege must make a clear showing that it applies. Failure to do so is not excused because the document is later shown to be one which would have been privileged if a timely showing had been made. Even though it does not seem seriously disputed that the privilege would have attached if the objection had been timely and adequately asserted, that such a showing had not been made when the trial court was called upon to make its ruling defeats the privilege. It is not enough that a document would have been privileged if an adequate and timely showing had been made. The applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document.

*See also King v. Glanz*, 2013 WL 6627979, at \*1 (N.D. Okla. Dec. 16, 2013) (“To qualify for protection under the privilege, the party seeking to invoke the privilege bears the burden of proving” its applicability.)

In this action, Plaintiff has asserted a variety of privileges in response to Defendant’s Interrogatories and Requests for Production. Specifically, Plaintiff claimed Interrogatories 4, 18 and 20 solicited privileged information. Those discovery requests sought the following: (Interrogatory 4) identities of any individuals who told Plaintiff they witnessed discrimination or harassment directed at Intervenor; (Interrogatory 18) the identities of

individuals with whom Plaintiff consulted in forming its opinion that Intervenor should have been awarded tenure; and (Interrogatory 20) the identities of all witnesses Plaintiff intends to call to testify on its behalf in this action. Plaintiff also claimed the responses to Requests for Production (RFP) Nos. 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15a, 16, 17, 18, 19, 21, 25, 26, 27, 30 and 31 were privileged. Those requests sought the following: (RFP 1) documents, recordings or transcripts that served as the basis of Plaintiff's contention that Intervenor is male-to-female transgender; (RFP 2) reports or records relating to this case produced by potential witnesses; (RFP 3) copies of all factual and opinion reports, records or statements regarding the events in this lawsuit; (RFP 4) copies of statements made by Defendants' agents or employees regarding Intervenor or the matters at issue in this action; (RFP 5) copies of all records relating to any criminal history, activity and/or background checks regarding Intervenor; (RFP 6) copies of all statements and media posts regarding or created by Intervenor; (RFP 8) documents evidencing complaints made by Intervenor; (RFP 9) documents evidencing admissions by Defendants' agents or employees of discrimination or harassment; (RFP 10) documents identifying persons who told Plaintiff that he or she personally witnessed discrimination or harassment directed at Intervenor; (RFP 11) documents identifying individuals who were permitted to reapply for tenure after denial; (RFP 12) documents demonstrating that Intervenor's qualifications were comparable if not superior to three similarly situated non-transgender individuals who applied for and received tenure; (RFP 13) all documents or records supporting Plaintiff's contention that Intervenor is male-to-female transgender; (RFP 14) documents supporting Plaintiff's denial of Request for Admission No. 1, which asked that Plaintiff admit that it had no evidence to support its

claims that Intervenor's rights were violated by Defendants, its agents or employees; (RFP 15a) copies of all notes, transcripts and recordings of interviews conducted by United States officials in the investigation of Intervenor's claims against Defendants; (RFP 16) a copy of the Plaintiff's entire investigation file regarding EEOC Charge No. 564-2011-00849; (RFP 17) a copy of the United States Department of Justice – Civil Right's Division's investigation file regarding EEOC Charge No. 564-2011-00849; (RFP 18) copies of statements relating to Intervenor's claims given by specified individuals; (RFP 19) copies of all non-privileged documents sent to or from EEOC relating to its investigation of Intervenor's charge of discrimination against Defendants; (RFP 21) copies of all non-privileged documents sent to or from the Department of Education relating to Intervenor's charge of discrimination against Defendants; (RFP 25) copies of all correspondence between Intervenor and Dr. Lisa Coleman; (RFP 26) copies of all correspondence between Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2009-2010 academic year; (RFP 27) copies of all correspondence between Defendants and Intervenor regarding Intervenor's application for tenure and promotion during the 2010-2011 academic year; (RFP 30) copies of all documents used by Plaintiff to calculate damages; and (RFP 31) copies of all documents showing attorney fees, court costs, litigation and related fees incurred by Plaintiff in this litigation.

For reasons more fully described below, Plaintiff should be required to respond in full to these discovery requests as it has wholly failed to meet its burden of establishing the applicability of any privilege.

## A. Work-Product Doctrine

“At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he[/she] can analyze and prepare his[/her] client’s case.” *United States v. Nobles*, 422 U.S. 225, 238 (1975). However, see *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir.1995) (“Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product.”). The party asserting work-product protection bears the burden of establishing its applicability. *Barclaysamerican Corp. v. Kane*, 746 F.2d 653, 656 (10th Cir.1984). Specifically, a party that withholds otherwise discoverable information claiming work-product protection must: “(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Fed. R. Civ. P. 26(b)(5). However, a requesting party can still obtain discovery of information otherwise protected by the work-product doctrine if it has a substantial need of the material or information for preparation of its case. Fed. R. Civ. P. 26(b)(3).

Plaintiff claimed the work-product doctrine applied to Interrogatories 4, 18 and 20 and Requests for Production 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15a, 16, 17, 18, 25, 26, 27, 30 and 31. However, none of these requests sought divulgence of attorney’s strategies or legal impressions. See *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2006) (“[W]ork product protection only applies to attorneys’ or legal representatives’ mental impressions, conclusions, opinions, or legal theories authored in anticipation of

litigation.”) To the contrary, the discovery requests sought production of factual information and Plaintiff has failed to meet its burden demonstrating otherwise.

## **B. Attorney-Client Privilege**

State law controls the application of the attorney-client privilege in this case. *See* Fed. R. Evid. 501. *See also* *Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.*, 136 F.3d 695, 699 (10th Cir.1998). Under Oklahoma law, attorney-client privilege protects confidential communications between an attorney and a client “who consults [the] attorney with a view towards obtaining legal services or is rendered professional legal services by an attorney.”

OKLA. STAT. tit. 12 § 2502(A) and (B). Moreover,

“[T]he protection of the privilege extends only to *communications* and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, ‘What did you say or write to the attorney?’ but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.”

*Upjohn Co. v. United States*, 449 U.S. 383, 395–96 (1981) (citation omitted).

Communications not made in furtherance of professional services are not privileged. *Self & Associates, Inc. v. Jackson*, 2011 OK CIV APP 126, 269 P.3d 30, 31. As a general rule, attorney billing information reflecting the fees, the general nature of the services performed, and the case on which the services were performed is not privileged. *United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974) (matters relating to receipt of fees from a client are not usually privileged); *Clarke v. American Commerce Nat'l Bank*, 974 F.2d 127, 129–30 (9th Cir. 1992). However, where such documents include confidential communications, such as litigation strategy or details of research, they may be deemed privileged. *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir.1990).

To establish the “common interest rule”, the claimant must demonstrate (1) that the requested documents were made in the course of a joint-defense or prosecution effort and (2) that they were designed to further that effort. *In re Qwest Commc'ns. Int'l. Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006); *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1142-43 (10th Cir. 1998). However, the “common interest rule is not really a separate privilege. Rather, it is a limited exception to the general rule that the attorney-client privilege is waived when a protected communication is disclosed to a third party outside the attorney-client relationship.” *U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00CIV.4763(RMB)(JCF), 2002 WL 31296430, at \*3 (S.D.N.Y. Oct. 11, 2002) (citation omitted).

Plaintiff stated that the attorney-client privilege applied to Interrogatories 4, 18 and 20. Plaintiff also invoked attorney-client privilege in response to Requests for Production 1, 2, 3, 6, 8, 9, 10, 11, 12, 13, 14, 16, 17, 18, 19, 21, 25, 26, 27 and 30. However, none of the afore-mentioned requests contemplates disclosure of confidential communications between an attorney and a client. Specifically, attorney-client privilege does not extend to the facts or communications between third-parties and an attorney. *In re Grand Jury Proceedings*, 616 F.3d 1172 (10th Cir. 2010). The party seeking to invoke the attorney-client privilege has the burden of establishing its applicability. *See Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir.1995). To satisfy this burden, it is insufficient merely to contend that documents or information are privileged. That is precisely what Plaintiff has done, and its claim of privilege must accordingly fail.

### C. Deliberative Process Privilege

The deliberative process privilege may apply to disclosure of communications or other “material reflecting deliberative or policy-making processes...” *EPA v. Mink*, 410 U.S. 73, 89 (1973). Specifically, “deliberative process privilege protects communications that are part of the decision-making process of a governmental agency.” *United States v. Farley*, 11 F.3d 1385, 1389 (7th Cir. 1993 ). For the deliberative process to apply, a document or information must be both predecisional and deliberative. *Trentadue v. Integrity Comm.*, 501 F.3d 1215, 1227 (10th Cir. 2007). “[P]redecisional memoranda prepared in order to assist an agency decision maker in arriving at his decision ... are exempt from disclosure, and post decisional memoranda setting forth the reasons for an agency decision already made ... are not.” *Renegotiation Bd. v. Grumman Aircraft Eng’g Corp.*, 421 U.S. 168, 184 (1975). As to the second element, the Court must distinguish between “deliberative” and “factual” material. The deliberative process privilege does not protect discovery of documents and information “consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context.” *EPA v. Mink*, 410 U.S. at 87-88. Specifically, the privilege “does not justify the withholding of purely factual material, nor of documents reflecting an agency’s final policy decisions ... .” *Enviro Tech Int’l, Inc. v. U.S. E.P.A.*, 371 F.3d 370, 374–75 (7th Cir. 2004).

Plaintiff claims deliberative process privilege in its responses to Interrogatories 4, 18 and 20. Plaintiff also invoked deliberative process privilege in response to Requests for Production 1, 3, 8, 9, 10, 11, 12, 14, 15a, 16, 17, 25, 26, 27 and 30. However, these discovery requests sought the identities of witnesses, statements of witnesses, copies of investigatory

files, copies of medical records, evidence of complaints, evidence of Intervenor's qualifications, copies of correspondence, etc. Thus, all of the requested discovery pertained to factual as opposed to deliberative information and records. Furthermore, if any of the information requested may be characterized as pre-decisional, it cannot be said to have been prepared specifically to assist the Plaintiff at arriving at any particular decision, and therefore, it is not deliberative.

However, if the Court is inclined to find that the requested discovery is protected by the deliberative process privilege, Plaintiff should still be required to respond to the discovery requests as the Plaintiff's interest in maintaining the privilege is outweighed by Defendant's need to access the information to pursue its defense. In *Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155 (D.N.M. 2004), the district court considered the following factors when weighing the need for disclosure vs. the need preserve privilege:

- (1) relevance of the evidence;
- (2) availability of other evidence;
- (3) Government's role in the litigation; and
- (4) extent to which disclosure would hinder frank and independent discussion regarding contemplative policies and decisions.

*Id.* at 1161.

Clearly, all of the information requested is relevant to the claims asserted in the above-styled action and the availability of alternative sources of the information are non-existent. Furthermore, because the government is a party to this litigation, if it is allowed to use the deliberative process privilege without limitation, the Defendants' discovery efforts may be unfairly thwarted at every turn. Finally, disclosure of the information requested in discovery would not hamper the way the government makes future decisions regarding pursuing claims such as the instant action, and Plaintiff cannot prove otherwise. This Court

should therefore find the deliberative process privilege inapplicable to the discovery responses at issue.

#### **D. Plaintiff's Privilege Log**

If a party withholds a document as privileged, the party must expressly assert the privilege and, in doing so, describe the “nature of the documents, communications, or tangible things not produced or disclosed ....” Fed. R. Civ. P. 26(b)(5)(A). Production of a sufficiently detailed privilege log satisfies this requirement if it identifies each document for which the defendant asserts a privilege. *United Food v. Chesapeake Energy Corp.*, No. 09–1114, 2012 WL 2370637, at \*8 (W.D.Okla. Jun. 22, 2012). *See also In re Application of Michael Wilson & Partners*, No. 06–02575, 2009 WL 1193874, at \*6 (D.Colo. Apr. 30, 2009) (“In the typical case, a Rule 26(b)(5) privilege log will individually list withheld documents and provide pertinent information for each document.”). The purpose of the privilege log is to allow the requesting party to assess the validity of the claim to privilege. The party asserting the privilege must establish that the privilege applies to avoid production of the records. *FDIC v. United Pac. Ins. Co.*, 152 F.3d 1266, 1276 n. 6 (10th Cir.1998).

Plaintiff's privilege log crudely describes discovery it deems protected, but it fails to match the privileged documents or information to any particular discovery request, as required. Exhibit 7. Furthermore, each “entry” on the log consists of unidentified documents with generic labels, such as “emails, memoranda and invoices.” This clearly runs afoul of the requirement that a privilege log be sufficiently detailed with individual documents listed therein. Because Plaintiff's privilege log is inadequate, so are its claims of

privilege. Plaintiff should therefore be ordered to respond to all discovery requests upon which it claimed privilege.

**PROPOSITION II. THE COURT SHOULD COMPEL PLAINTIFF TO RESPOND TO DEFENDANT'S DISCOVERY REQUEST FOR MEDICAL RECORDS AND INFORMATION.**

Discovery of medical records is governed by Fed. R. Civ. P. 26(b) and (c) concerning relevancy and protection from annoyance, embarrassment, oppression, or undue burden. The threshold requirement of discoverability under the Federal Rules of Civil Procedure is whether the information sought is “relevant to any party’s claim or defense.” Fed. R. Civ. P. 26(b)(1). To be discoverable, the information “need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.” *Id.* The relevance standard, therefore, is commonly recognized as one that is necessarily broad in scope in order “to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 (1978) (citation omitted).

In this action, Plaintiff’s claim turns on the fact that Intervenor is a male-to-female transgender. Plaintiff specifically alleges that Intervenor was treated in a certain manner due to a physical/medical “transition”. Thus, evidence of said “transition” is clearly relevant to the claims and defenses of the parties herein. At Interrogatory No. 10 and Request for Production No. 13, Defendant sought discovery of all facts and records supporting Plaintiff’s claim that Intervenor “is a male-to-female transgender” as alleged at Paragraph 2 of Plaintiff’s Complaint. In response, Plaintiff objected to disclosing medical and psychological records on the basis that the discovery requests were intended to harass and

humiliate Intervenor. However, the requested discovery is relevant for a number of compelling reasons, including but not limited to the ability to determine whether Intervenor is, in fact, transgender and to establish the timeframe for when Intervenor actually began the male-to-female transition and any correlation to Defendants and their agents/employees' conduct toward Intervenor. In addition, Intervenor has requested a variety of documents regarding Defendant's health insurance benefits, exemptions, negotiations of health insurance policies, and communications regarding policy exclusions. The discovery is also necessary to establish the existence of the damages alleged, including but not limited to Intervenor's humiliation and loss of enjoyment of life.

Neither Plaintiff nor Intervenor can claim that the requested discovery is privileged. Specifically, "[n]either the Supreme Court nor the Tenth Circuit ... has recognized a physician-patient privilege under federal common law." *LeFave v. Symbios, Inc.*, 2000 WL 1644154, at \*2 (D. Colo. Apr. 14, 2000). *See also Gilbreath v. Guadalupe Hosp. Found. Inc.*, 5 F.3d 785 (5th Cir. 1993) and *Vondrak v. City of Las Cruces*, 760 F. Supp. 2d 1170, 1178 (D.N.M. 2009). Also, because Plaintiff and Intervenor have placed the medical and psychological condition of Dr. Tudor at issue in both the claims asserted in this action as well as the request for damages, any existing privilege is waived. OKLA. STAT. tit. 12 § 2503. *See also Fisher v. Sw. Bell Tel. Co.*, 361 F. App'x 974, 978 (10th Cir. 2010). In the absence of a valid claim of privilege, issues of relevance control disclosure. *Morris v. City of Colorado Springs*, No. 09-CV-01506-PAB-MEH, 2009 WL 4927618, at \*1 (D. Colo. Dec. 18, 2009). Because the discovery is clearly relevant, Plaintiff must be compelled to fully respond to Defendant's requests.

Finally, courts have concluded that an emotional damages claim puts at issue a party's physical or mental medical condition:

[T]his evidence is relevant to the issue of damages and, particularly, the extent to which, if any, [the person alleging discrimination] sustained emotional injuries. The EEOC made this issue material by seeking damages for emotional harm in its Complaint.

*E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 2008 WL 2229489, at \*4 (D.N.M. Feb. 14, 2008)(Browning, J.). *See also Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir.1997)(noting that “the testimony of a treating physician or psychologist ... is one suggested method of proving emotional damages”) and *E.E.O.C. v. BCI Coca-Cola Bottling Co. of Los Angeles*, 2008 WL 2229489, at \*4 (evidence of counseling is relevant to prove damages in claim where plaintiff alleged emotional harm.) In this case, Intervenor has made numerous allegations that insults, harassment and humiliation at the hands of Defendants resulted in emotional damages. For the foregoing reasons, Plaintiff should be compelled to disclose any medical or mental health records or related information responsive to Defendant's discovery requests.

**PROPOSITION III. THE COURT SHOULD REQUIRE PLAINTIFF TO RESPOND TO THE FOLLOWING REQUESTS FOR NON-PRIVILEGED, RELEVANT DISCOVERY.**

The question of relevance should be broadly construed, and a request for discovery should be deemed relevant if there is any possibility that the information sought may be relevant to the claim or defense of any party. *Millennium Mktg. Grp., Ltd. v. Simonton Bldg. Products, Inc.*, 2009 WL 2407723, at \*8 (D. Kan. Aug. 4, 2009). In this action, Plaintiff has objected to the following discovery requests on grounds other than privilege. However,

Plaintiff should be compelled to fully respond as the following requests are relevant to the claims and defenses asserted in this action.

At **Interrogatory No. 2**, Defendant requested the following: *Please identify and describe all complaints, (as per definition nos. 8 and 9, above), made by Intervenor about sexual discrimination or harassment perpetrated by Defendants and/or their agents.* Plaintiff's response was deficient because many of the identified complaints in Plaintiff's original response did not pertain to sexual discrimination or sexual harassment. Plaintiff was asked to narrow its response to include only sexual discrimination and harassment complaints, as requested, and to include a description of each complaint. However, in a teleconference between the attorneys on February 2, 2016, Plaintiff indicated that their original response was final.

At **Interrogatory No. 3**, Defendant requested the following: *Please identify each RUSO or SEOSU agent or employee who has admitted to you that he or she discriminated against, or harassed, Intervenor.* **Answer:** Plaintiff's response was vague and non-responsive as it did not identify specific individuals who admitted to Plaintiff United States of America that he or she had harassed or discriminated against Intervenor. Plaintiff's counsel subsequently indicated, during the Rule 37 teleconference, that Scoufos, McMillan and Minks indicated to Plaintiff that they discriminated against Plaintiff. However, as of the date of this filing, Plaintiff has not yet submitted a supplemental response to Interrogatory No. 3 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 6**, Defendant requested the following: *Please describe with particularity each instance of Dean Scoufos "intentionally" referring to Intervenor as "he" and "him" after Intervenor's transition to a transgender woman, as alleged in Paragraph 26 of Plaintiff's Complaint.*

Plaintiff's original response identified only one instance of Dean Scoufos "intentionally" referring to Plaintiff/Intervenor as "he" and "him". During the Rule 37 conference, Plaintiff's counsel agreed that there were other instances. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 6 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 8**, Defendant requested the following: *Please identify and describe, (as per definition no. 8, above), all factual details supporting your contention that Intervenor's "qualifications for promotion and tenure were comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure," as stated in Paragraph 46 of Plaintiff's Complaint.* Plaintiff objected to the request as overbroad and then listed the contents of Rachel Tudor's portfolio. However, Plaintiff wholly failed to include any explanation as to how Dr. Tudor's qualifications matched those of the other professors receiving tenure, as the Interrogatory requested, or how the contents of her portfolio were responsive to the request. Plaintiff submitted a supplemental response to this discovery request on March 4, 2016 identifying other professors who had received tenure. However, the supplement again failed to explain how Dr. Tudor's qualifications were comparable.

At **Interrogatory No. 11**, Defendant requested the following: *Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU violated any of its own policies with regard to Intervenor.* Plaintiff's response and its supplement identify general violations of policy but fail to set forth any factual details to support the allegations of policy violations.

At **Interrogatory No. 12**, Defendant requested the following: *Please identify and describe in detail, (as per definition no. 8, above), all facts supporting your contention that RUSO or SEOSU refused to permit Intervenor to re-apply for tenure specifically because of Intervenor’s “gender and gender identity,” as alleged in Paragraph 71 of Plaintiff’s Complaint.* Plaintiff’s response included broad accusations and several hearsay statements but failed to set forth any factual detail to support the allegation that Dr. Tudor was not permitted to reapply for tenure because of her gender and gender identity. Plaintiff makes the conclusory statement that other non-transgender employees were permitted to reapply for tenure, but fails to identify those employees. Plaintiff’s response also states that Defendant refused to allow Dr. Tudor to re-apply for tenure contrary to the FAC’s recommendation. However, Plaintiff fails to provide any factual detail to support the contention that the Defendant’s conduct was motivated by Dr. Tudor’s gender identity.

At **Interrogatory No. 16**, Defendant requested the following: *Please identify and describe in detail the “new policies, practices, and programs” you contend RUSO or SEOSU should “institute and carry out,” according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff’s response states that it needs “more information” before it can state, in detail, what new policies, practices and programs Defendants should institute. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 16 as required by Fed. R. Civ. P. 26(e).

At **Interrogatory No. 17**, Defendant requested the following: *Please identify and describe in detail the training you contend RUSO or SEOSU should implement according to Paragraphs (d) and (e) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff’s response states that it

needs “more information” before it can state, in detail, what new policies, practices and programs Defendants should institute. However, as of the date of this filing, Plaintiff has not yet served a supplemental response to Interrogatory No. 16 as required by Fed. R. Civ. P. 26(e).

At **Request for Production No. 5**, Defendant requested the following: *Please produce copies of all records relating to any criminal history, criminal activity, and/or background checks conducted by you regarding Intervenor.* Plaintiff responded that Defendants were capable of purchasing the same records. However, if they are in Plaintiff’s possession, custody and control they must be produced or, at the very least, identified.

At **Request for Production No. 7**, Defendants requested the following: *Please produce copies of all documents, receipts, and records evincing the damages, (including but not limited to doctors, hospitals, medical, mental or physical health care providers, etc.) for which you are seeking relief in this lawsuit.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff’s possession, custody and control, they must be produced.

At **Request for Production No. 15**, Defendant requested the following: *Please produce copies of the “new policies, practices, and programs” you contend RUSO or SEOSU should “institute and carry out,” according to Paragraphs (b) and (c) of the PRAYER FOR RELIEF in Plaintiff’s Complaint.* Plaintiff responded that the request was premature. Plaintiff, together with EEOC, have been investigating Tudor’s allegations since 2010. Yet, 6 years later, contends, with no justification, that this request is premature. Defendant is clearly entitled to discover the basis of Plaintiff’s requests for relief.

At **Request for Production No. 23**, Defendant requested the following: *Please produce a copy of any and all award nominations received by Intervenor relating to Intervenor's teaching or research service to any university in the past fifteen (15) years.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 24**, Defendant requested the following: *Please produce a copy of any and all correspondence between Intervenor and Dr. John Mischo.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced and identified as responsive to this request.

At **Request for Production No. 25**, Defendant requested the following: *Please produce a copy of any and all correspondence between Intervenor and Dr. Lisa Coleman.* In response, Plaintiff referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 28**, Defendant requested the following: *Please produce a copy of any and all documents reflecting Intervenor's earnings since separation from employment with SEOSU and/or RUSO.* Plaintiff responded that the request was overly broad and unduly burdensome. Plaintiff also referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 29**, Defendant requested the following: *Please produce a copy of any and all documents reflecting Intervenor's non-salary benefits from employment with employers since Intervenor's separation from employment with SEOSU and/or RUSO.* Plaintiff responded that the request was overly broad and unduly burdensome. Plaintiff also referred Defendant to documents it assumed Intervenor would produce. However, if the requested documents are in Plaintiff's possession, custody and control, they must be produced.

At **Request for Production No. 31**, Defendant requested the following: *Please produce a copy of any and all document(s) showing the amount of attorney fees, court costs, costs of litigation, and other related fees and costs incurred by Plaintiff in this litigation.* Plaintiff responded that the request was not reasonably calculated to lead to admissible evidence as damages do not have to be proven as an element of a claim at trial. However, to the extent that attorney fees are an element of damages sought in this action, they are relevant and must be produced. *See E.E.O.C. v. BNSF Ry. Co.*, No. 12-02634-JWL-KGG, 2014 WL 1571278, at \*6 (D. Kan. Apr. 18, 2014).

## CONCLUSION

The Court should grant Defendants' Motion to Compel for the above and foregoing reasons.

Respectfully submitted,

/s/ Dixie L. Coffey

**DIXIE L. COFFEY, OBA #11876**

**JEB E. JOSEPH, OBA #19137**

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*Attorneys for Defendants Southeastern Oklahoma State  
University and The Regional University System of  
Oklahoma*

### **CERTIFICATE OF SERVICE**

I hereby certify that on this 23rd day of June 2016, 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:

Allan Townsend  
Delora Kennebrew  
Meredith Burrell  
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*Attorney for Intervenor Plaintiff*

/s/Dixie L. Coffey

Dixie L. Coffey

# **Exhibit I**

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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff	)	
	)	
RACHEL TUDOR,	)	
	)	
Plaintiff-Intervenor	)	
v.	)	CASE NO. CIV-15-324-C
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**ORDER**

Without objection, the Joint Motion to Extend Deadlines to File Response Briefs in Opposition to Parties’ Motions to Compel (ECF No. 69) is GRANTED. The United States may file its response brief in opposition to Defendant RUSO’s motion to compel (ECF No. 67) on or before July 21, 2016. The Defendants may file their response brief in opposition to Plaintiff’s motion to compel (ECF No. 68) on or before July 22, 2016.

Dated this 7th day of July, 2016.

  
 \_\_\_\_\_  
 ROBIN J. CAUTHRON  
 United States District Judge

# **Exhibit J**

From: **Jillian T. Weiss, Esq.** [jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)   
Subject: Fwd: Deposition  
Date: July 13, 2016 at 6:43 PM  
To: Ezra Young [eyoung@jtweisslaw.com](mailto:eyoung@jtweisslaw.com)

JT

----- Forwarded message -----

From: **Feleshia Porter** <[feleshia@aol.com](mailto:feleshia@aol.com)>  
Date: Wed, Jul 13, 2016 at 6:30 PM  
Subject: Re: Deposition  
To: [jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)

You have my consent to file the motion in Oklahoma

Feleshia Porter, MS, LPC  
3530 Forest Lane, #55  
Dallas, Texas 75234  
[214-454-8144](tel:214-454-8144)  
[www.FeleshiaPorter.com](http://www.FeleshiaPorter.com)

-----Original Message-----

From: Jillian T. Weiss, Esq. <[jweiss@jtweisslaw.com](mailto:jweiss@jtweisslaw.com)>  
To: Feleshia Porter, MS LPC <[feleshia@aol.com](mailto:feleshia@aol.com)>  
Sent: Tue, Jul 12, 2016 6:47 pm  
Subject: Deposition

Dear Dr. Porter,

I plan to file a motion with the court to stop the deposition based on psychotherapist patient privilege. I would like your consent to file the motion in Oklahoma, where this lawsuit is filed, instead of in Dallas, where the deposition was to take place. Please let me know if I have your consent.

Thank you

Jillian Weiss

--

---  
Jillian T. Weiss  
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P.O. Box 642  
Tuxedo Park, NY 10987  
Tel: [\(845\) 709-3237](tel:845-709-3237)  
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Web: [jtweisslaw.com](http://jtweisslaw.com)

NOTICE: This email and attachments are confidential, intended solely for listed recipients. No permission is given to forward this email or attachments without written consent. I use email for your convenience, but note that email is inherently insecure, with significant risk of third-party interception. If you prefer not to take the risk, please let me know in writing, and I will use fax or mail for all communications. Email, including personal email accessed via the web, created or viewed through employer-provided systems, including smartphones, can be viewed by the employer. See [ABA Opinion No. 11-459](#).

Jillian T. Weiss is admitted to practice law in New York and New Jersey only, and any statements in reference to laws or legal requirements outside of those states are not intended as legal advice unless and until representation by this firm is accepted by a court or government agency operating in your state. Consult an attorney admitted to practice in your state for qualified legal advice. Statements herein are not intended as legal advice or to create an attorney-client relationship unless and until you and this firm have signed a written retainer agreement.

# **Exhibit K**

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  
THIRD SET OF DISCOVERY REQUESTS**

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

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

## REQUESTS FOR PRODUCTION

**Request for Production No. 64:** *Please produce all documents and materials regarding your transitioning process, including, but not limited to the following standards of care:*

- 1) *Initial psychiatric testing;*
- 2) *Ongoing psychiatric monitoring and counseling to assess the extent of condition and reaction to physical changes;*
- 3) *Health evaluations for hormone therapy;*
- 4) *Administration of female hormones; and*
- 5) *Surgical construction.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request on the grounds that it is unduly burdensome, cumulative, and duplicative to the extent that it requests all documents and/or other materials “regarding your transitioning process” without limit.

Plaintiff/Intervenor also objects to this Request because it seeks information protected by the psychotherapist-patient and/or physician-patient privilege and interferes with the Plaintiff/Intervenor’s recognized privacy interest in one’s medical care and medical records. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing psychotherapist-patient privilege); Health Insurance Portability and Accountability Act (HIPAA), 110 Stat. 1936, 104 P.L. 191, § 1177 (1996); *Plascencia v. City of St. George*, 2009 WL 562263, at \*5–6 (D. Utah 2009) (recognizing that requester in Title VII action must establish basis for waiver of psychotherapist-patient privilege); *United States v. Carter*, 2014 WL 5469750 (W.D. Okla. 2014) (Cauthron, J.) (recognizing similar burden on requester). *See also Ortiz-Carballo v. Ellspermann*, 2009 WL 961131, at \*2 (M.D.Fla. 2009) (“The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or ‘garden variety’ emotional distress.”); *Ruhlmann v. Ulster County Dep’t of Social Servs.*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”); *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553 (N.D.Ga. 2001) (similar).

Plaintiff/Intervenor further objects to this Request on the ground that it is overbroad as to temporal scope to the extent that it seeks all documents and/or other materials “regarding your transitioning process” without temporal limit. *See, e.g., EEOC v. Midwest Regional Medical Center, LLC*, 2014 WL 1745081 at \*2 (W.D. Okla. Apr. 30, 2014) (holding that proper temporal scope of medical records pertaining to relevant medical condition is one year prior to and one year subject to plaintiff’s employment with defendant).

Plaintiff/Intervenor also objects to this Request because it is not proportionate to the needs of this case. Fed.R.Civ.P. 26(b)(1) (courts must consider the following factors: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”). This Request seeks production of all medical and psychological records, from any period of time, related to Dr. Tudor’s medical treatment associated with her gender

transition. This request is in no way proportionate to the claims Dr. Tudor asserts or the viable, good faith defenses that Defendants can raise in this action. *See, e.g., Rickaby v. Hartford Life and Accident Insurance Company*, 2016 WL 1597589, at \*4 (D.Colo. Apr. 21, 2016) (proportionality not satisfied where discovery requested where relevance to claims and defenses is “questionable”); *Jones v. Halliburton Energy Servs., Inc.*, 2016 WL 1179210, at \*2 (W.D. Okla. Mar. 24, 2016) (finding that proportionality fails where request seeks discovery beyond what is needed for specific time period pertinent to claims and/or defenses); Plaintiff/Intervenor’s claims in this litigation flow from allegations of discrimination, retaliation, and a hostile work environment. Among other things, Dr. Tudor alleges that she was treated poorly because she presented as female at work. *United States v. Southeastern Oklahoma State University*, 2015 WL 4606079, at \*2 (W.D.Okla. 2015) (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.”) The fact that Dr. Tudor started presenting at work as female in Fall 2007, that Dr. Tudor sought medical treatment associated with her gender transition during this same period, and that Dr. Tudor continued to both present as female and seek medical treatment through her termination in May 2011 are not contested in this litigation.

Plaintiff/Intervenor further objects to this Request on the ground that it is intended to harass and humiliate in the sense that, *inter alia*, medical documents, which would be responsive to this Request, are not necessary to establish the fact that Plaintiff/Intervenor transitioned during her employment with Defendants and began to present as female. It is incumbent upon Defendants to expressly point to information necessary for it to raise good faith defenses to Plaintiff/Intervenor’s allegations. The mere fact that Dr. Tudor transitioned to female on the job, does not open her up to invasive, superfluous discovery about her medical transition. *See, e.g., Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 606 (D.Nev. 2016) (declining to find “legitimate interest” in employer obtaining medical records of aggrieved transgender employee to, *inter alia*, establish the timeline of the employee’s medical transition and/or establish timeline of physiological changes). *See also Hofer v. Mack Trucks, Inc.*, 981 F.2d 37, 380 (8<sup>th</sup> Cir. 1992) (“While the standard of relevance in the context of discovery is broader than in the context of admissibility . . . this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.”).

Subject to and without waiving these objections, please see documents previously produced with bates stamped with the prefix “PI” including, but not limited to: PI000429 (Apr. 4, 2007 Letter from Feleshia Porter “certif[ying] that TR Tudor aka Rachel is a transsexual woman”); PI000430 (May 11, 2007 invoice from Feleshia Porter); PI000431 (Apr. 4, 2007 invoice from Feleshia Porter); PI000432 (Apr. 4, 2007 Letter from Feleshia Porter expressing approval, *inter alia*, for Dr. Tudor to begin “HRT”); PI000428 (May 2, 2007 invoice from Diagnostic Laboratory of Oklahoma).

**Request for Production No. 65:** *Please sign and return the attached Authorization to Release Protected Health Information.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request because compelling signed medical records authorizations is not an appropriate mechanism for obtaining discovery. *See, e.g., Morris v. City of Colo. Springs*, 2009 WL 4927618, \*2 (D. Colo. 2009) (“the release of medical records should not be routinely compelled, even when it may be the most efficient manner for such discovery”).

Plaintiff/Intervenor further objects to this Request because a broad Release such as that contained in this Request is not warranted. *See, e.g., Laboy v. Emeritus Corp.*, 2014 WL 1293440, at \*1 (M.D.Fla. 2014) (denying motion to compel seeking aggrieved employee agreement to sign HIPAA release for medical records relating to her mental health where only “garden variety” emotional distress damages sought).

Plaintiff/Intervenor further objects to this Request because the Release does not delineate the types of records requested, identify the doctors or other clinicians from whom records are sought, or otherwise apprise Plaintiff/Intervenor of what records are subject to the Release.

Plaintiff/Intervenor further objects to this Request because it seeks information protected by the psychotherapist-patient and/or physician-patient privilege and interferes with the Plaintiff/Intervenor’s recognized privacy interest in one’s medical care and medical records. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1 (1996) (recognizing psychotherapist-patient privilege); Health Insurance Portability and Accountability Act (HIPAA), 110 Stat. 1936, 104 P.L. 191, § 1177 (1996); *Plascencia v. City of St. George*, 2009 WL 562263, at \*5–6 (D. Utah 2009) (recognizing that requester in Title VII action must establish basis for waiver of psychotherapist-patient privilege); *United States v. Carter*, 2014 WL 5469750 (W.D. Okla. 2014) (Cauthron, J.) (recognizing similar burden on requester). *See also Ortiz-Carballo v. Ellspermann*, 2009 WL 961131, at \*2 (M.D.Fla. 2009) (“The majority of federal courts that have addressed the issue have held that a party does not place his mental condition in controversy merely by requesting damages for mental anguish or ‘garden variety’ emotional distress.”); *Ruhlmann v. Ulster County Dep’t of Social Servs.*, 194 F.R.D. 445, 450 (N.D.N.Y. 2000) (“a party does not put his or her emotional condition in issue by merely seeking incidental, ‘garden-variety’, emotional distress damages”); *Stevenson v. Stanley Bostitch, Inc.*, 201 F.R.D. 551, 553 (N.D.Ga. 2001) (similar). Plaintiff/Intervenor has not waived the psychotherapist-patient or the physician-patient privileges. Moreover, Plaintiff/Intervenor does not intend to rely on any medical records, psychotherapist records, or medical provider testimony to support her claims for compensatory damages. Medical information unrelated to the hostilities, discrimination, and retaliation that occurred between 2007 and 2011 is therefore not reasonably calculated to lead to the discovery of admissible evidence, the disclosure of which would be harassing and oppressive. *See Combe v. Cinemark USA, Inc.*, 2009 U.S. Dist. LEXIS 73425, \*5 (D. Utah Aug. 18, 2009) (medical records are not available for garden variety emotional distress); *Fitzgerald v. Casil*, 216 F.R.D. 632, 634-40 (N.D. Cal. 2003) (medical records irrelevant and psychotherapy records protected by psychotherapist-patient privilege).

Plaintiff/Intervenor also objects to this Request because it is not proportionate to the needs of this case. Fed.R.Civ.P. 26(b)(1) (courts must consider the following factors: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in

resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”). This Request seeks production of all medical and psychological records, from any period of time, related to Dr. Tudor’s medical treatment associated with her gender transition. This request is in no way proportionate to the claims Dr. Tudor asserts or the viable, good faith defenses that Defendants can raise in this action. *See, e.g., Rickaby v. Hartford Life and Accident Insurance Company*, 2016 WL 1597589, at \*4 (D.Colo. Apr. 21, 2016) (proportionality not satisfied where discovery requested where relevance to claims and defenses is “questionable”); *Jones v. Halliburton Energy Servs., Inc.*, 2016 WL 1179210, at \*2 (W.D. Okla. Mar. 24, 2016) (finding that proportionality fails where request seeks discovery beyond what is needed for specific time period pertinent to claims and/or defenses); Plaintiff/Intervenor’s claims in this litigation flow from allegations of discrimination, retaliation, and a hostile work environment. Among other things, Dr. Tudor alleges that she was treated poorly because she presented as female at work. *United States v. Southeastern Oklahoma State University*, 2015 WL 4606079, at \*2 (W.D.Okla. 2015) (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.”) The fact that Dr. Tudor started presenting at work as female in Fall 2007, that Dr. Tudor sought medical treatment associated with her gender transition during this same period, and that Dr. Tudor continued to both present as female and seek medical treatment through her termination in May 2011 are not contested in this litigation.

Plaintiff/Intervenor further objects to this Request on the ground that it is intended to harass and humiliate in the sense that, *inter alia*, medical documents, which would be responsive to this Request, are not necessary to establish the fact that Plaintiff/Intervenor transitioned during her employment with Defendants and began to present as female. It is incumbent upon Defendants to expressly point to information necessary for it to raise good faith defenses to Plaintiff/Intervenor’s allegations. The mere fact that Dr. Tudor transitioned to female on the job, does not open her up to invasive, superfluous discovery about her medical transition. *See, e.g., Roberts v. Clark Cty. Sch. Dist.*, 312 F.R.D. 594, 606 (D.Nev. 2016) (declining to find “legitimate interest” in employer obtaining medical records of aggrieved transgender employee to, *inter alia*, establish the timeline of the employee’s medical transition and/or establish timeline of physiological changes). *See also Hofer v. Mack Trucks, Inc.*, 981 F.2d 37, 380 (8<sup>th</sup> Cir. 1992) (“While the standard of relevance in the context of discovery is broader than in the context of admissibility . . . this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case.”).

**Request for Production No. 66:** *Please sign and return the attached Authorization to Release Protected Health Information.*

**RESPONSE:** Plaintiff/Intervenor objects to this Request because compelling signed medical records authorizations is not an appropriate mechanism for obtaining discovery. *See, e.g., Morris v. City of Colo. Springs*, 2009 WL 4927618, \*2 (D. Colo. 2009) (“the release of medical records should not be routinely compelled, even when it may be the most efficient manner for such discovery”).

Plaintiff/Intervenor further objects to this Request because a broad Release—containing no limits as to subjectmatter, temporal scope, and not specifying any specific providers—such as that contained in this Request is not warranted. *See, e.g., Laboy v. Emeritus Corp.*, 2014 WL 1293440, at \*1 (M.D.Fla. 2014) (denying motion to compel seeking aggrieved employee agreement to sign HIPPA release for medical records relating to her mental health where only “garden variety” emotional distress damages sought).

Plaintiff/Intervenor further objects to this Request because the Release does not delineate the types of records requested, identify the doctors or other clinicians from whom records are sought, or otherwise apprise Plaintiff/Intervenor of what records are subject to the Release.

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Plaintiff/Intervenor also objects to this Request because it is not proportionate to the needs of this case. Fed.R.Civ.P. 26(b)(1) (courts must consider the following factors: “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit”). This Request seeks production of all medical and psychological records, from any period of time, related to Dr. Tudor’s medical treatment associated with her gender transition. This request is in no way proportionate to the claims Dr. Tudor asserts or the viable,

good faith defenses that Defendants can raise in this action. *See, e.g., Rickaby v. Hartford Life and Accident Insurance Company*, 2016 WL 1597589, at \*4 (D.Colo. Apr. 21, 2016) (proportionality not satisfied where discovery requested where relevance to claims and defenses is “questionable”); *Jones v. Halliburton Energy Servs., Inc.*, 2016 WL 1179210, at \*2 (W.D. Okla. Mar. 24, 2016) (finding that proportionality fails where request seeks discovery beyond what is needed for specific time period pertinent to claims and/or defenses); Plaintiff/Intervenor’s claims in this litigation flow from allegations of discrimination, retaliation, and a hostile work environment. Among other things, Dr. Tudor alleges that she was treated poorly because she presented as female at work. *United States v. Southeastern Oklahoma State University*, 2015 WL 4606079, at \*2 (W.D.Okla. 2015) (“Here, it is clear that Defendants’ actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender.”) The fact that Dr. Tudor started presenting at work as female in Fall 2007, that Dr. Tudor sought medical treatment associated with her gender transition during this same period, and that Dr. Tudor continued to both present as female and seek medical treatment through her termination in May 2011 are not contested in this litigation.

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/s/ Ezra Young  
Ezra Young

**CERTIFICATE OF SERVICE**

This is to certify that on the 6<sup>th</sup> day of July, 2016, a true and correct copy of the above and foregoing discovery responses were electronically transmitted, and mailed via U.S. Postal Service to the following interested parties:

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*/s/ Ezra Young* \_\_\_\_\_  
Ezra Young

# **Exhibit L**

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

1. UNITED STATES OF AMERICA,

Plaintiff,

v.

1. SOUTHEASTERN OKLAHOMA  
STATE UNIVERSITY, and

2. THE REGIONAL UNIVERSITY  
SYSTEM OF OKLAHOMA,

Defendants.

Case No. CIV-15-324-C

Jury Trial Demanded

**COMPLAINT**

Plaintiff, the United States of America, alleges:

1. This action is brought on behalf of the United States to enforce Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). As set forth below, the United States alleges that Defendants Southeastern Oklahoma State University (“Southeastern”) and the Regional University System of Oklahoma (“RUSO”) subjected Dr. Rachel Tudor, a professor who is transgender, to unlawful sex discrimination and retaliation in violation of Title VII.

**PARTIES**

2. Dr. Rachel Tudor is a male-to-female transgender English professor who worked for Southeastern as a tenure track Assistant Professor from 2004 to 2011.

3. Defendant Southeastern is a member of the Oklahoma state system of higher education and is part of the Regional University System of Oklahoma (“RUSO”).

4. Defendant RUSO's Board of Regents is the governing board for several Oklahoma state universities, including Southeastern. RUSO's Policy Manual explains how the operations of RUSO and Southeastern interrelate. RUSO has the power to fix compensation and duties of personnel at its regional universities, including Southeastern. RUSO has the power and duty to adopt rules and regulations to govern its regional universities, including Southeastern. Southeastern's President has to report to RUSO on all matters related to employment, discipline, and termination of faculty. For these reasons, Southeastern and RUSO are a single employer for all relevant purposes.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action under 42 U.S.C. § 2000e-5(f) and 28 U.S.C. § 1345.

6. Venue is proper in this judicial district under 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1391(b). Both Southeastern and RUSO are agencies of the State of Oklahoma. At all relevant times, RUSO's principal place of business has been in Oklahoma City, Oklahoma, and Southeastern's principal place of business has been in Durant, Oklahoma.

7. Southeastern and RUSO are "persons" within the meaning of 42 U.S.C. § 2000e(a) and "employers" within the meaning of 42 U.S.C. § 2000e(b).

8. On or about September 9, 2010, Dr. Tudor filed a timely charge of discrimination alleging, among other things, that Southeastern subjected her to sex discrimination when it denied her application for promotion and tenure during the 2009-10 academic year. Dr. Tudor filed this charge with the U.S. Department of Education

Office for Civil Rights (“DOE”). After notifying Southeastern of the charge, DOE referred the charge to the U.S. Equal Employment Opportunity Commission (“EEOC”) for investigation of Dr. Tudor’s Title VII claim.

9. On or about July 12, 2011, Dr. Tudor supplemented her charge of discrimination filed with the EEOC. She alleged, among other things, that Southeastern subjected her to sex discrimination and retaliated against her because she complained about Southeastern’s discrimination. Specifically, Dr. Tudor alleged that Southeastern unlawfully refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year. Dr. Tudor’s supplemented charge was simultaneously filed with the EEOC and with the Oklahoma Human Rights Commission.

10. Pursuant to Section 706 of Title VII, the EEOC notified the Defendants of Dr. Tudor’s supplemented charge of discrimination. After conducting an investigation of Dr. Tudor’s charges, the EEOC found reasonable cause to believe that Southeastern discriminated against Dr. Tudor because of her sex and retaliated against her because she engaged in protected activity. The EEOC notified the Defendants of its reasonable cause findings, unsuccessfully attempted to conciliate the charges, and subsequently referred the charges to the U.S. Department of Justice.

11. All conditions precedent to the filing of suit have been performed or have occurred.

## FACTS

### *Dr. Tudor's Employment at Southeastern*

12. In 2004, Dr. Tudor began working at Southeastern as a tenure track Assistant Professor in the Department of English, Humanities, and Languages (the "English Department"). At that time, she presented as a man and went by a traditionally male name.

13. Dr. Tudor was the first transgender professor ever to work at Southeastern.

14. In the summer of 2007, Dr. Tudor notified Southeastern that she planned to transition from male to female and begin to present as a woman at work during the 2007-08 academic year.

15. After she informed Southeastern about her transition, Dr. Tudor received a phone call from an employee of Southeastern's human resources office to discuss various issues related to her gender transition. During that time, the human resources employee warned Dr. Tudor that Southeastern's Vice President for Academic Affairs, Dr. Douglas McMillan, had inquired whether Dr. Tudor could be fired because her "transgender lifestyle" offended his religious beliefs. The human resources employee told Dr. Tudor that Vice President McMillan had been told that Southeastern could not fire her because she was transgender.

16. During the 2007-08 academic year, Dr. Tudor began to present as a woman at work by, among other things, wearing women's clothing, styling her hair in a feminine manner, and going by the traditionally female name Rachel.

17. After Dr. Tudor began presenting as a woman, Jane McMillan, the director of Southeastern's Counseling Center, told her that she should take safety precautions because some people were openly hostile towards transgender people. She also told Dr. Tudor that Vice President McMillan (who is her brother) considered transgender people to be a "grave offense to his [religious] sensibilities."

***Southeastern's Process for Promotion and Tenure***

18. At Southeastern, Assistant Professors must obtain tenure before the end of their seventh year as an Assistant Professor or else their employment is terminated.

19. The process governing applications for promotion and tenure is set forth in Southeastern's "Procedure for Granting Promotion and Tenure." First, the applicant must submit a written application to her Department Chair, along with a portfolio that contains documentation pertinent to an assessment of her qualifications. Second, the applicant is reviewed by a Promotion and Tenure Review Committee ("P&T Review Committee") comprised of tenured faculty in the applicant's Department. Next, the application is reviewed sequentially by the Department Chair, the Dean of the applicant's school, and the Vice President for Academic Affairs, each of whom must consider whether to recommend the applicant to receive promotion and tenure and then forward his or her recommendation to the next reviewing official. Following the Vice President for Academic Affairs' review, the President of SOSU decides whether to approve or deny the application for promotion and tenure and, if the President approves the application, he submits his recommendation to the RUSO Board of Regents for their approval.

20. It is Southeastern's policy to notify applicants of the intermediate decisions

in the process as they occur. On a candidate's request, administrators may provide explanations of negative recommendations so that candidates for promotion and tenure can address deficiencies before the next level of review.

21. According to Southeastern's Academic Policies and Procedures, to attain a promotion to the position of Associate Professor an applicant must have: (1) an earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher learning; (2) five years of successful higher education teaching experience in full-time appointments; (3) five years of experience at the Assistant Professor rank; (4) demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession (also referred to as "service"), and, in appropriate instances, successful performance of non-teaching or administrative duties; and (5) noteworthy achievement in classroom teaching, research/scholarship, and service, or, in appropriate instances, performance of non-teaching or administrative duties.

22. According to Southeastern's Academic Policies and Procedures, to attain tenure a professor must have: (1) five years of service at Southeastern in a tenure-track appointment as an Assistant Professor, Associate Professor, or Professor; (2) demonstrated effective classroom teaching, research/scholarship, service, and, in appropriate instances, successful performance of non-teaching or administrative duties; (3) demonstrated ability to work cooperatively to strengthen the academic quality of the institution; and (4) noteworthy achievement in classroom teaching and on at least one

other criterion: research/scholarship, service, or, in appropriate instances, performance of non-teaching or administrative duties.

23. Southeastern's Academic Policies and Procedures state that, "[f]aculty status and related matters are primarily faculty responsibility; this area includes...promotions [and] the granting of tenure." The Academic Policies and Procedures further state that, in considering applications for promotion and tenure, the "governing board and president should...concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."

***Dr. Tudor Prepares to Apply for Promotion and Tenure***

24. In the summer of 2009, as Dr. Tudor was about to enter her sixth year as an Assistant Professor, she made preparations to apply for tenure and promotion to the position of Associate Professor.

25. At the end of August 2009, Dr. Tudor met with the Dean of the School of Arts and Sciences, Dr. Lucretia Scoufos. It was Dean Scoufos's customary practice to meet with professors applying for promotion and tenure to discuss the format and content of the portfolio that they had to prepare in support of their applications.

26. At this meeting, Dean Scoufos learned for the first time that Dr. Tudor was a transgender woman. Despite being informed of this fact, Dean Scoufos intentionally referred to Dr. Tudor by male pronouns such as "he" and "him."

27. During this meeting, Dr. Tudor told Dean Scoufos that she believed another faculty member in her Department had been discriminating against her since she had begun to present as a woman at work. Dr. Tudor said that she would prefer if this faculty

member did not serve on the Faculty Committee that would review her portfolio. Dean Scoufos did not report Dr. Tudor's concern to Southeastern's Affirmative Action Officer—the person at Southeastern responsible for investigating discrimination complaints.

***Dr. Tudor's Application for Promotion and Tenure***

28. In October 2009, Dr. Tudor submitted her application for tenure and promotion to the position of Associate Professor to the Chair of the English Department, Dr. John Mischo.

29. Both the P&T Review Committee assigned to review Dr. Tudor's application and portfolio as well as Dr. Mischo recommended that she receive promotion and tenure.

30. On or about November 29, 2009, Dr. Mischo notified Dean Scoufos that he and the P&T Review Committee recommended that Dr. Tudor receive a promotion to the tenured position of Associate Professor.

31. In January 2010, Dean Scoufos sent Dr. Tudor a letter informing her that, despite the recommendations of Dr. Tudor's Department Chair and the P&T Review Committee, she had decided to oppose Dr. Tudor's application for promotion and tenure. Dean Scoufos's letter contained no explanation for her decision.

32. Dean Scoufos passed her recommendation that tenure and promotion be denied and Dr. Tudor's portfolio along to Vice President McMillan.

33. In February 2010, Vice President McMillan sent Dr. Tudor a letter informing her that he also had decided to oppose her application for promotion and

tenure. Like Dean Scoufos's letter, Vice President McMillan's letter contained no explanation for his decision.

34. Shortly afterwards, Vice President McMillan forwarded Dr. Tudor's portfolio to the President of Southeastern, Dr. Larry Minks. He also forwarded to President Minks his own negative recommendations for Dr. Tudor's promotion and tenure, as well as the recommendations of the P&T Review Committee, the Chair of the English Department, and Dean Scoufos.

35. Dr. Tudor asked Vice President McMillan and Dean Scoufos to explain why they had decided to oppose her application. That information would have enabled Dr. Tudor to supplement her portfolio before the President reviewed it.

36. Both Vice President McMillan and Dean Scoufos refused to explain to Dr. Tudor why they decided to oppose her application.

37. In refusing to discuss with Dr. Tudor why he opposed her application, Vice President McMillan treated Dr. Tudor differently than a similarly-situated, non-transgender male English professor. Vice President McMillan met with the other professor to discuss how that professor could strengthen his portfolio. The other professor followed Vice President McMillan's advice and supplemented his portfolio before it was submitted to the President of Southeastern for a final decision on his application. Based on his supplemented portfolio—and the guidance that he received from Vice President McMillan—the non-transgender professor received promotion and tenure.

38. In February 2010, Dr. Tudor filed a grievance with President Minks and requested a hearing before Southeastern's Faculty Appellate Committee ("FAC"). In her grievance, she alleged that Dean Scoufos and Vice President McMillan had denied her the due process provided by Southeastern's policies when they refused to explain why they had opposed her application for promotion and tenure.

39. The following month, the FAC ruled in Dr. Tudor's favor and recommended to President Minks's designee that Vice President McMillan and Dean Scoufos explain to Dr. Tudor why they had opposed her application.

40. Pursuant to Southeastern policy, President Minks designated the Assistant Vice President for Academic Affairs ("Assistant Vice President") to communicate to Dr. Tudor both the FAC's recommendation and his decision whether to comply with that recommendation. Southeastern policy also required that Dr. Tudor receive this information within ten workdays. Dr. Tudor would have the right to appeal the Assistant Vice President's decision to President Minks.

41. The Assistant Vice President decided not to follow the FAC's recommendation. Vice President McMillan directed the Assistant Vice President to wait until after President Minks made his decision on Dr. Tudor's promotion and tenure application before informing her that he had decided not to follow the FAC's recommendation. Thus, Dr. Tudor received no notification within the ten workday deadline.

42. By violating Southeastern policy and withholding timely notification of the Assistant Vice President's decision, Southeastern denied Dr. Tudor the ability to appeal

Vice President McMillan's and Dean Scoufos's refusals to provide explanation of their negative recommendations prior to President Minks's ultimate decision on her tenure and promotion application. Thus, she was deprived of the opportunity to supplement her portfolio to address their reasoning prior to President Minks's decision.

43. In April 2010, President Minks sent Dr. Tudor a letter informing her that he had decided to deny her application for promotion and tenure. In that letter, President Minks did not explain why Dr. Tudor's application was denied, but he did let her know that Vice President McMillan would inform her of the reasons for the denial in a separate communication.

44. President Minks's decision was the first time Southeastern had denied an English professor's application for tenure and promotion after he or she had obtained a favorable tenure recommendation from a P&T Review Committee and the Department Chair.

45. In June 2010, Dr. Tudor received a letter from Vice President McMillan. That letter—which purported to be dated over a month earlier, on April 30, 2010—stated that President Minks had denied Dr. Tudor's application because her record in the areas of “research/scholarship” and “university service” were deficient.

46. Dr. Tudor's qualifications for promotion and tenure were comparable, if not superior to, the qualifications of at least three other similarly-situated, non-transgender English professors who were considered for, and received, tenure during Dr. Tudor's time at Southeastern. For example, the number of publications Dr. Tudor had in her portfolio was greater than the number of publications that another successful applicant

had in hers. One applicant received promotion and tenure even though she, unlike Dr. Tudor, had no peer-reviewed publications. Likewise, in the area of university service, Dr. Tudor's performance was also comparable to her non-transgender departmental peers who successfully applied for promotion and tenure.

47. Vice President McMillan's criticisms of Dr. Tudor's record in the area of scholarship also rested on his assertion that the Southeastern administration had been unable to verify that Dr. Tudor had served as an editor for two symposia listed in her portfolio. However, no one in the Southeastern administration ever requested that Dr. Tudor provide additional documentation to verify that she had served as an editor of the symposia. Moreover, copies of the published proceedings from the symposia were available in a reading room on Southeastern's campus and Dr. Tudor's role as editor was prominently displayed on the covers of both publications.

***Dr. Tudor's Re-application and Grievances***

48. Southeastern permits faculty members who have been denied promotion or tenure to reapply as long as they remain within their seven year term of initial employment. In at least one other RUSO institution, professors have re-applied for promotion and tenure the year after the President denied their applications.

49. In August 2010, Dr. Tudor informed her Department Chair that she intended to re-apply for promotion and tenure during the 2010-11 academic year.

50. That same month, Dr. Tudor also filed a grievance in which she requested a hearing with the FAC so that she could dispute Southeastern's decision to deny her 2009-10 application for promotion and tenure. In September 2010, the FAC informed Dr.

Tudor that it had no authority to overrule the President's decision to deny her promotion and tenure.

51. A few weeks later, in October 2010, Vice President McMillan sent Dr. Tudor a letter stating that Southeastern would not permit her to re-apply for promotion and tenure during the 2010-11 academic year. In the letter, which had been approved by President Minks, Vice President McMillan recognized that Southeastern policy did not prohibit Dr. Tudor from re-applying. But he nevertheless announced that he had decided that it was not in the "best interests of the university" to permit her to re-apply.

52. In his letter, Vice President McMillan offered several explanations for denying Dr. Tudor's request to re-apply for promotion and tenure. Among his reasons was his belief that deficiencies in Dr. Tudor's application from the prior academic year could not be corrected that quickly. Vice President McMillan also expressed concern that if the administration once again overruled positive recommendations from the P&T Review Committee and the Department Chair, its action would potentially "inflame the relationship between faculty and administration."

53. In October 2010, Dr. Tudor filed a grievance with the FAC and President Minks challenging Southeastern's decision not to let her re-apply for promotion and tenure during the 2010-11 academic year.

54. In response to Dr. Tudor's grievance, Vice President McMillan sent a letter to the FAC stating that he had opposed Dr. Tudor's 2009-10 application for promotion and tenure because she had submitted "the poorest portfolio [he had] ever reviewed in the

20 years” he worked at Southeastern, and there was “very little chance” that Dr. Tudor could have corrected the deficiencies in the period since the initial decision.

55. In support of her grievance, Dr. Tudor submitted four letters of recommendation from tenured English professors at Southeastern detailing their positive assessments that Dr. Tudor was qualified for promotion and tenure.

56. Another tenured English professor submitted a letter to the FAC, in support of Dr. Tudor’s grievance, which pointed out that “Dr. Tudor ha[d] published more research than any other member of the [English] department, tenured or untenured.” The letter writer therefore maintained that Vice President McMillan was “clearly mistaken in his opinion that consideration of Dr. Tudor’s tenure file would be a waste of time.”

57. In December 2010, the FAC recommended that Southeastern permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year.

58. President Minks designated Southeastern’s Vice President for Business Affairs, Ross Walkup, to respond to the FAC’s decision. In January 2011, Vice President Walkup sent a letter to the FAC stating that Southeastern would not comply with the FAC’s recommendation because Southeastern policy prohibited professors from re-applying for promotion and tenure after the President denied their applications. In his letter, Vice President Walkup indicated that President Minks agreed with this interpretation of Southeastern policy.

#### ***Dr. Tudor’s Discrimination Complaint***

59. In August 2010—at the same time she was seeking to re-apply for promotion and tenure—Dr. Tudor also filed a written discrimination complaint with

Southeastern's Affirmative Action Officer, Dr. Claire Stubblefield. In that complaint, she alleged, among other things, that Southeastern had discriminated against her on the basis of her sex when it denied her 2009-10 application for promotion and tenure. Dr. Tudor filed a similar discrimination complaint with DOE; and DOE informed Southeastern of the complaint in a letter dated September 15, 2010.

60. In October 2010, Dr. Tudor supplemented the discrimination complaint that she had filed with Dr. Stubblefield. She alleged that Southeastern had retaliated against her because of her discrimination complaints when it refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year.

61. Dr. Stubblefield issued a report ostensibly addressing Dr. Tudor's discrimination and retaliation complaints in January 2011. Dr. Stubblefield found that Southeastern had not discriminated against or retaliated against Dr. Tudor.

62. Dr. Stubblefield's report did not address all of Dr. Tudor's allegations of discrimination and retaliation. For example, the report did not mention Southeastern's decision not to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, even though Dr. Tudor had expressly complained that this decision to not let her re-apply was retaliatory. Similarly, Dr. Stubblefield's report did not address Dr. Tudor's allegation that Vice President McMillan had treated her differently from one of her peers by meeting with a non-transgender English professor to discuss his portfolio before the President rendered a decision on his application for promotion and tenure, while denying Dr. Tudor the opportunity to have such a meeting.

***Dr. Tudor's Employment with Southeastern is Terminated***

63. Since Dr. Tudor failed to attain tenure before the end of her seventh year as an Assistant Professor, Southeastern terminated her employment on May 31, 2011.

64. Before Dr. Tudor's employment ended, Southeastern's Faculty Senate awarded her with the Faculty Senate Recognition Award for Excellence in Scholarship for the 2010-11 academic year.

***Sex and gender identity***

65. Individuals are typically assigned a sex at birth solely on the basis of the appearance of the external genitalia. Only in cases of infants born with ambiguous genitalia are any of the additional aspects of sex (for example, an individual's chromosomal makeup) assessed and considered at that time.

66. An individual's "sex" consists of multiple factors. Beyond an individual's genitalia (external or internal) and chromosomes, sex includes, among other things, a variety of hormonal factors, sexual differentiation within the brain, the sex of assignment and rearing, and an individual's gender identity.

67. Although there is not yet one definitive explanation for what determines gender identity, recent research points to the influence of biological factors, most notably the role of sexual differentiation in the brain in gender identity development.

68. Transgender individuals are persons who have a gender identity (that is, an internal sense of being male or female) that does not match the sex they were assigned at birth.

69. Transgender individuals will often undertake some level of gender transition, which is the process of bringing external manifestations of their gender into conformity with their gender identity. A core aspect of gender transition is that individuals present themselves in the gender role that is consistent with their gender identity.

**COUNT ONE**  
**Title VII, 42 U.S.C. § 2000e-2(a)**  
**Unlawful Discrimination Based on Sex (Gender Identity, Gender Transition, and Gender Stereotypes)**

70. The United States repeats and re-alleges each and every allegation contained in paragraphs 1-69 as if fully set forth herein.

71. Defendants denied Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and refused to permit her to re-apply during the 2010-11 academic year because of Dr. Tudor's gender and gender identity, which constitutes unlawful sex discrimination in violation of Title VII. The Defendants also denied Dr. Tudor's 2009-10 application for promotion and tenure and refused to permit her to re-apply during the 2010-11 academic year because she changed her gender, which constitutes sex discrimination in violation of Title VII.

72. In addition, Defendants denied Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and refused to permit her to re-apply during the 2010-11 academic year because Dr. Tudor did not conform to traditional gender stereotypes, which constitutes unlawful sex discrimination in violation of Title VII.

73. Defendants' purported reasons for denying Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and for refusing to allow her to re-apply in the 2010-11 academic year are a pretext for sex discrimination.

74. As a direct and proximate result of Defendants' unlawful sex discrimination, Dr. Tudor incurred damages including, but not limited to, lost income, loss of enjoyment of life, and damage to her professional reputation.

**COUNT TWO**  
**Title VII, 42 U.S.C. § 2000e-3(a)**  
**Unlawful Retaliation**

75. The United States repeats and re-alleges each and every allegation contained in paragraphs 1-74 as if fully set forth herein.

76. By refusing to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, Defendants retaliated against Dr. Tudor in violation of Title VII because she (a) opposed their discrimination against her that she reasonably believed violated Title VII; and (b) participated in a Title VII proceeding by filing a complaint with DOE.

77. Defendants' purported reasons for not allowing Dr. Tudor to re-apply for promotion and tenure in the 2010-11 academic year are a pretext for unlawful retaliation.

78. As a direct and proximate result of Defendants' unlawful retaliation, Dr. Tudor incurred damages including, but not limited to, lost income, loss of enjoyment of life, and damage to her professional reputation.

## PRAYER FOR RELIEF

WHEREFORE, the United States requests that the Court grant the following relief:

- (a) enjoin Defendants from subjecting employees to unlawful sex discrimination (including on the basis of gender identity) and retaliation that violates Title VII;
- (b) order Defendants to institute and carry out new policies, practices, and programs to prevent unlawful sex discrimination (including on the basis of gender identity) and retaliation that violates Title VII;
- (c) order Defendants to institute and carry out policies, practices, and programs to report, investigate, and effectively address complaints about unlawful sex discrimination (including on the basis of gender identity) and/or retaliation that violates Title VII;
- (d) order Defendants to train their employees on Title VII's prohibitions against unlawful sex discrimination (including on the basis of gender identity) and retaliation;
- (e) order Defendants to train their employees who investigate complaints of Title VII violations on how to conduct effective investigations;
- (f) order Defendants and their managers and supervisory employees to refrain from engaging in retaliation against any individual for giving testimony in this matter or participating in this matter in any way;

- (g) order Defendants to compensate Dr. Tudor with monetary relief for the damages she has suffered including, but not limited to, lost income, loss of enjoyment of life, and damage to her professional reputation;
- (h) order Defendants to award Dr. Tudor the position of Associate Professor with tenure;
- (i) order any further relief necessary to make Dr. Tudor whole; and
- (j) award such additional relief as justice may require, together with the United States' costs and disbursements in this action.

### **JURY DEMAND**

The United States hereby demands a trial by jury of all issues so triable pursuant to Rule 38 of the Federal Rules of Civil Procedure and § 102 of the Civil Rights Act of 1991, 42 U.S.C. § 1981a.

Respectfully Submitted,

Date: March 30, 2015

VANITA GUPTA  
Acting Assistant Attorney General  
Civil Rights Division

By:

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Chief  
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MEREDITH L. BURRELL (MD no number issued)  
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Attorneys for Plaintiff United States

# Exhibit M

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

UNITED STATES OF AMERICA, ) CASE NO. 5:15-CV-00324-C  
)  
Plaintiff, )  
)  
v. )  
)  
1. SOUTHEASTERN OKLAHOMA )  
STATE UNIVERSITY, and )  
)  
2. THE REGIONAL UNIVERSITY )  
SYSTEM OF OKLAHOMA, )  
)  
)  
Defendants. )

**COMPLAINT IN INTERVENTION OF  
PLAINTIFF/INTERVENOR DR. RACHEL TUDOR**

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). Dr. Tudor intervenes in this action as an aggrieved person pursuant to 42 U.S.C. § 2000e-5(f). As set forth below, Plaintiff/Intervenor Dr. Rachel Tudor (“Plaintiff/Intervenor”) alleges that Defendants Southeastern Oklahoma State University (“Southeastern”) and the Regional University System of Oklahoma (“RUSO”) subjected Dr. Tudor to sex discrimination, including an unlawful hostile work environment based on sex, and retaliation in violation of Title VII.

**PARTIES**

1. Plaintiff/Intervenor Dr. Rachel Tudor is an English professor who worked

for Southeastern as a tenure track Assistant Professor from 2004 to 2011.

2. Defendant Southeastern is a member of the Oklahoma state system of higher education and is part of the Regional University System of Oklahoma (“RUSO”). Defendant RUSO’s Board of Regents is the governing board for several Oklahoma state universities, including Southeastern. RUSO’s Policy Manual explains how the operations of RUSO and Southeastern interrelate. RUSO has the power to fix compensation and duties of personnel at its regional universities, including Southeastern. RUSO has the power and duty to adopt rules and regulations to govern its regional universities, including Southeastern. Southeastern’s President must report to RUSO on all matters related to employment, discipline, and termination of faculty. For these reasons, Southeastern and RUSO are a single employer for all relevant purposes.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over this action under 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1345.

4. Venue is proper in this judicial district under 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. § 1391(b). Both Southeastern and RUSO are agencies of the State of Oklahoma. At all relevant times, RUSO’s principal place of business has been in Oklahoma City, Oklahoma, and Southeastern’s principal place of business has been in Durant, Oklahoma.

5. Southeastern and RUSO are “persons” within the meaning of 42 U.S.C. §2000e(a) and “employers” within the meaning of 42 U.S.C. §2000e(b).

6. On or about September 9, 2010, Dr. Tudor filed a timely charge of

discrimination alleging, among other things, that Southeastern subjected her to sex discrimination when it denied her application for promotion and tenure during the 2009-10 academic year. Dr. Tudor filed this charge with the U.S. Department of Education, Office for Civil Rights (“DOE”). After notifying Southeastern of the charge, DOE referred the charge to the U.S. Equal Employment Opportunity Commission (“EEOC”) for investigation of Dr. Tudor’s Title VII claim.

7. On or about July 12, 2011, Dr. Tudor supplemented her charge of discrimination filed with the EEOC. She alleged, among other things, that Southeastern subjected her to sex discrimination and retaliated against her because she complained about Southeastern’s discrimination. Specifically, Dr. Tudor alleged that Southeastern unlawfully refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year. Dr. Tudor’s supplemented charge was simultaneously filed with the EEOC and with the Oklahoma Human Rights Commission.

8. Pursuant to Section 706 of Title VII, the EEOC notified the Defendants of Dr. Tudor’s supplemented charge of discrimination. After conducting an investigation of Dr. Tudor’s charges, the EEOC found reasonable cause to believe that Southeastern discriminated against Dr. Tudor because of her sex and retaliated against her because she engaged in protected activity. The EEOC did not render a determination on the issue of hostile work environment based on sex raised by the facts alleged in Dr. Tudor’s original charge and supplemental charge. The EEOC notified the Defendants of its reasonable cause findings, unsuccessfully attempted to conciliate the charges, and subsequently referred the charges to the U.S. Department of Justice.

9. All conditions precedent to the filing of suit have been performed or have occurred.

### FACTS

10. Dr. Tudor is a female citizen of the Chickasaw Nation.

11. Dr. Tudor is also a female citizen of the United States.

12. Dr. Tudor has a feminine gender expression.

13. Dr. Tudor has a female gender identity.

14. Dr. Tudor is a transgender woman.

### ***Sex, Gender, Gender Expression and Gender Identity***

15. *Sex* is an ambiguous term of art that includes gender, gender expression and gender identity within its meaning.

16. *Sex stereotyping* refers to the application by an employer of stereotypes related to sex assigned at birth to restrict or disparage an employee's gender expression or gender identity.

17. *Gender* refers to cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.

18. *Gender expression* refers to a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. *Transgender expression* is a form of *gender expression*.

19. *Gender identity* refers to characteristics related to a person's internal sense of gender, being male, female, or other. *Transgender identity* is a form of gender

identity.

20. *Gender identity* is intractably rooted in the psyche by the age of two, and cannot be changed.

21. Discrimination against transgender persons for being transgender is based on their gender expression and gender identity, and the discrimination described herein against Dr. Tudor was based on her gender expression and gender identity.

22. Transgender individuals often seek out legal, social, and medical means of aligning external manifestations of their gender with their gender identity. This process is colloquially known as *gender transition* or *transition*.

23. A core component of gender transition entails publicly expressing one's gender as a member of the gender that comports with one's gender identity.

24. Transgender individuals are persons who have a gender expression or gender identity that does not match the sex they were assigned at birth.

25. Native Americans traditionally believe that transgender persons are blessed and have a spiritual responsibility to live their blessing.

26. Dr. Tudor subscribes to the traditional Native American belief that she, as a transgender woman, has a responsibility to discover the nature of her blessing and walk the sacred path set before her.

27. Scientific studies have shown that transgender persons have brain structures that are typical of nontransgender persons with the same gender identity. For example, women with transgender identity (i.e. those assigned male sex at birth but who have female gender identity) have brain structures that are similar to those of

nontransgender women. It is appropriate to refer to a transgender woman who has transitioned with female titles, honorifics (e.g., Miss, Ms. or Mrs.), and pronouns (e.g., her, hers, and she).

28. It is appropriate for a nontransgender woman to use a women's multi-stall restroom.

29. It is appropriate for a transgender woman who has transitioned to use a women's restroom.

30. It is appropriate for a nontransgender woman to wear traditionally female clothing, such as a skirt.

31. It is appropriate for a transgender woman who has transitioned to wear traditionally female clothing, such as a skirt.

32. Another core component of gender transition is utilizing medical therapies to align the patient's body with the patient's gender identity.

33. Myriad peer-review studies demonstrate that medical therapies, including hormone treatments, are one form of medically necessary care for transgender persons.

34. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health ("WPATH") have all publicly endorsed the efficacy of medical therapies, including hormone treatments, for transgender persons.

35. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of

Obstetricians and Gynecologists, and WPATH all recognize that medical therapies, including hormone treatments, are a form of medically necessary care for transgender persons.

36. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and WPATH have all publicly called for both private and public insurers to eliminate transgender-specific exclusions in health insurance plans.

***Dr. Tudor's Employment at Southeastern and Transition to Female***

37. In 2004, Dr. Tudor began working at Southeastern as a tenure-track Assistant Professor in the Department of English, Humanities, and Languages (the "English Department"). At that time, she presented as male and had a traditionally male name.

38. Dr. Tudor was the first transgender professor at Southeastern.

39. In the summer of 2007, Dr. Tudor notified Southeastern that she planned to transition from male to female and begin to present as female at work during the 2007-08 academic year.

40. After she informed Southeastern about her transition, Dr. Tudor received a phone call from an employee of Southeastern's human resources office to discuss various issues related to her gender transition. During that call, the human resources employee warned Dr. Tudor that Southeastern's Vice President for Academic Affairs, Dr. Douglas

McMillan, had inquired whether Dr. Tudor could be fired because her “transgender lifestyle” offended his religious beliefs. The human resources employee told Dr. Tudor that Vice President McMillan had been told that Southeastern could not fire her because she is transgender.

41. During the 2007-08 academic year, Dr. Tudor began to present as female at work by, among other things, wearing women’s clothing, styling her hair in a feminine manner, and going by the traditionally female name Rachel.

42. After Dr. Tudor began presenting as female, Jane McMillan, the director of Southeastern’s Counseling Center, told her that she should take safety precautions because some people were openly hostile towards transgender people. She also told Dr. Tudor that Vice President McMillan (who is her brother) considered such people to be a “grave offense to his [religious] sensibilities.”

43. After Dr. Tudor informed Southeastern about her gender identity and intent to transition, she was subjected to disadvantageous terms by unwarranted restrictions on her use of restrooms.

44. Use of male restrooms would subject Dr. Tudor to an unwarranted risk of harassment by males in those restrooms who would likely be severely surprised by her presence there, and who might thereby learn of her transgender identity. It would also subject her to humiliation as a visible woman who was forced to go into a male gender-segregated space.

45. She was instructed by an employee of Southeastern’s human resources office that, once she started presenting as female full-time at work, she should not use the

multi-stall women's restroom located on the same floor as her office or any other multi-stall women's restroom on campus.

46. The employee directed Dr. Tudor to only use a specific single-stall, all-genders restroom for persons with disabilities located on a different floor than Dr. Tudor's office. This restroom was the only single-stall, all-genders restroom for persons with disabilities located within a three-story building that served hundreds of people a day.

47. Dr. Tudor was told that she should use the only single-stall restroom for persons with disabilities in the building her office was located in because Southeastern was concerned that students or other faculty would complain if she used any of the multi-stall female-designated restrooms on campus.

48. Southeastern's human resources office has never counseled a nontransgender professor on which gender-segregated restroom they may use nor has the office ever directed a nontransgender professor to not use a gender-segregated multi-stall restroom that is immediately adjacent to the professor's office.

49. Southeastern's human resources office has never counseled a nontransgender professor to use a gender-segregated restroom that did not match the professor's gender identity.

50. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because the employee was uncomfortable with a transgender woman, based on her gender expression and gender identity, using a multi-stall women's restroom frequented by nontransgender women.

51. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because a Southeastern administrator told the human resources office that they were uncomfortable with a transgender woman using a multi-stall women's restroom frequented by nontransgender women.

52. Once Dr. Tudor transitioned to female, she followed the direction of Southeastern's human resource office and only used the single-stall, all genders restroom for persons with disabilities described above.

53. For nearly four years, whenever Dr. Tudor was on Southeastern's campus she was only permitted to use the single-stall, all genders restroom for persons with disabilities described above.

54. As a direct result of the restroom use restriction imposed by Southeastern's human resources office, Dr. Tudor was unable to use the restroom on a regular basis whenever she was on Southeastern's campus.

55. Dr. Tudor's busy class schedule made it nearly impossible for her to regularly utilize the only restroom she was permitted to use on campus. For example, Dr. Tudor's teaching schedule often left only ten to fifteen minutes between classes. On many occasions, Dr. Tudor found that she either did not have enough time to travel from the building where she was teaching classes back to the building where the single-stall restroom was located or that the only restroom she was permitted to use was in use for the duration of her break between classes.

56. On occasions where Dr. Tudor was unable to use the single-stall restroom described above, she felt great physical discomfort and humiliation.

57. On occasions where Dr. Tudor was able to use the single-stall restroom described above, she felt profound guilt and humiliation knowing that her use of the restroom for persons with disabilities often inconvenienced persons with physical disabilities including other faculty members and students.

58. On occasions where Dr. Tudor used the single-stall restroom described above and found a line outside the restroom she apologized to those waiting in line for the inconvenience. Having to routinely apologize to persons with physical disabilities whom were inconvenienced by Dr. Tudor's use of the restroom for persons with disabilities made her feel profound guilt and humiliation.

59. Starting in Summer 2007, Dr. Tudor used public women's restrooms whenever she was not on Southeastern's campus.

60. Dr. Tudor never had a negative response from women who used the women's restrooms she frequented off Southeastern's campus.

61. Transgender women routinely use multi-stall women's restrooms in the State of Oklahoma, including restrooms located in state and federal government facilities.

62. The presence of transgender women in gender-segregated multi-stall restrooms poses no threat to nontransgender women.

63. If a nontransgender woman is offended by the prospect of sharing gender-segregated facilities with transgender women, the nontransgender woman is free to seek out and use a single-stall restroom.

64. After Dr. Tudor informed Southeastern about her transition she was also

instructed by an employee of Southeastern's human resources office to not wear certain traditionally female articles of clothing going forward. Among other things, Dr. Tudor was counseled against wearing short skirts.

65. No nontransgender female professor was ever counseled by Southeastern's human resources office against wearing skirts of any length.

66. Both junior and senior female professors with traditional gender identity routinely wore traditionally female articles of clothing, including skirts of varying lengths, during the years Dr. Tudor was employed by Southeastern.

67. From the 2007-08 through the 2010-11 academic years the health insurance plan that Southeastern provided to professors, including Dr. Tudor, had an explicit exclusion that prohibited health care benefits to transgender persons.

68. As a result of the exclusion described above, Dr. Tudor was unable to get her insurance to cover various medically necessary treatments she needed as part of her medical transition to female. This included, but is not limited to, coverage for exogenous hormones and routine blood level tests needed to monitor her hormone levels.

69. Upon information and belief, the health insurance plan Southeastern provided to faculty members otherwise covered medically necessary exogenous hormone treatments and routine blood level tests needed to monitor blood levels as a result of such treatment.

70. As a result of the exclusion described above, Dr. Tudor was forced to pay for her hormone therapy and blood level tests out of pocket.

71. Upon information and belief, if Dr. Tudor were a nontransgender woman,

she could have received full coverage for her hormone treatment and blood level tests under Southeastern's health insurance plan.

***Southeastern's Process for Promotion and Tenure***

72. At Southeastern, Assistant Professors must obtain tenure before the end of their seventh year as an Assistant Professor or else their employment is terminated.

73. The process governing applications for promotion and tenure is set forth in Southeastern's "Procedure for Granting Promotion and Tenure." First, the applicant must submit a written application to her Department Chair, along with a portfolio that contains documentation pertinent to an assessment of her qualifications. Second, the applicant is reviewed by a Promotion and Tenure Review Committee ("P&T Review Committee") comprised of tenured faculty in the applicant's Department. Next, the application is reviewed sequentially by the Department Chair, the Dean of the applicant's school, and the Vice President for Academic Affairs, each of whom must consider whether to recommend the applicant to receive promotion and tenure and then forward his or her recommendation to the next reviewing official. Following the Vice President for Academic Affairs' review, the President of SOSU decides whether to approve or deny the application for promotion and tenure and, if the President approves the application, he submits his recommendation to the RUSO Board of Regents for their approval.

74. It is Southeastern's policy to notify applicants of the intermediate decisions in the process as they occur. On a candidate's request, administrators may provide

explanations of negative recommendations so that candidates for promotion and tenure can address deficiencies before the next level of review.

75. According to Southeastern's Academic Policies and Procedures, to attain a promotion to the position of Associate Professor an applicant must have: (1) an earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher learning; (2) five years of successful higher education teaching experience in full-time appointments; (3) five years of experience at the Assistant Professor rank; (4) demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession (also referred to as "service"), and, in appropriate instances, successful performance of non-teaching or administrative duties; and (5) noteworthy achievement in classroom teaching, research/scholarship, and service, or, in appropriate instances, performance of non-teaching or administrative duties.

76. According to Southeastern's Academic Policies and Procedures, to attain tenure a professor must have: (1) five years of service at Southeastern in a tenure-track appointment as an Assistant Professor, Associate Professor, or Professor; (2) demonstrated effective classroom teaching, research/scholarship, service, and, in appropriate instances, successful performance of non-teaching or administrative duties; (3) demonstrated ability to work cooperatively to strengthen the academic quality of the institution; and (4) noteworthy achievement in classroom teaching and on at least one other criterion: research/scholarship, service, or, in appropriate instances, performance of non-teaching or administrative duties.

77. Southeastern's Academic Policies and Procedures state that, "[f]aculty status and related matters are primarily faculty responsibility; this area includes . . . promotions [and] the granting of tenure." The Academic Policies and Procedures further state that, in considering applications for promotion and tenure, the "governing board and president should...concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."

***Dr. Tudor Prepares to Apply for Promotion and Tenure***

78. In the summer of 2009, as Dr. Tudor was about to enter her sixth year as an Assistant Professor, she made preparations to apply for tenure and promotion to the position of Associate Professor.

79. At the end of August 2009, Dr. Tudor met with the Dean of the School of Arts and Sciences, Dr. Lucretia Scoufos. It was Dean Scoufos' customary practice to meet with professors applying for promotion and tenure to discuss the format and content of the portfolio that they had to prepare in support of their applications.

80. Dean Scoufos learned that Dr. Tudor was a transgender woman. Despite being informed of this fact, Dean Scoufos intentionally misgendered Dr. Tudor (i.e., used inappropriate male pronouns such as he and his) in subsequent meetings.

81. Misgendering is the practice of using incorrect gender referents (e.g., pronouns, titles, and name) in describing or conversing with a transgender person. When intentional, the purpose of misgendering is to communicate one's belief that the subject is not truly a member of their post-transition gender and/or to express disregard for the

subject's gender identity.

82. During this meeting, Dr. Tudor told Dean Scoufos that she believed another faculty member in her Department had been discriminating against her since she had begun to present as female at work. Dr. Tudor said that she would prefer if this faculty member did not serve on the Faculty Committee that would review her portfolio. Dean Scoufos did not report Dr. Tudor's concern to Southeastern's Affirmative Action Officer—the person at Southeastern responsible for investigating discrimination complaints.

***Dr. Tudor's Application for Promotion and Tenure***

83. In October 2009, Dr. Tudor submitted her application for tenure and promotion to the position of Associate Professor to the Chair of the English Department, Dr. John Mischo.

84. Both the P&T Review Committee assigned to review Dr. Tudor's application and portfolio, as well as Dr. Mischo, recommended that she receive promotion and tenure.

85. On or about November 29, 2009, Dr. Mischo notified Dean Scoufos that he and the P&T Review Committee recommended that Dr. Tudor receive a promotion to the tenured position of Associate Professor.

86. In January 2010, Dean Scoufos sent Dr. Tudor a letter informing her that, despite the recommendations of Dr. Tudor's Department Chair and the P&T Review Committee, she had decided to oppose Dr. Tudor's application for promotion and tenure.

Dean Scoufos' letter contained no explanation for her decision.

87. Dean Scoufos passed her recommendation that tenure and promotion be denied and Dr. Tudor's portfolio along to Vice President McMillan.

88. In February 2010, Vice President McMillan sent Dr. Tudor a letter informing her that he also had decided to oppose her application for promotion and tenure. Like Dean Scoufos' letter, Vice President McMillan's letter contained no explanation for his decision.

89. Shortly afterwards, Vice President McMillan forwarded Dr. Tudor's portfolio to the President of Southeastern, Dr. Larry Minks. He also forwarded to President Minks his own negative recommendations for Dr. Tudor's promotion and tenure, as well as the recommendations of the P&T Review Committee, the Chair of the English Department, and Dean Scoufos.

90. Dr. Tudor asked Vice President McMillan and Dean Scoufos to explain why they had decided to oppose her application. That information would have enabled Dr. Tudor to supplement her portfolio before the President reviewed it.

91. Both Vice President McMillan and Dean Scoufos refused to explain to Dr. Tudor why they decided to oppose her application.

92. In refusing to discuss with Dr. Tudor why he opposed her application, Vice President McMillan treated Dr. Tudor differently than similarly-situated nontransgender professors. Indeed, in the previous academic term Vice President McMillan treated differently a similarly situated nontransgender male English professor, to wit: Vice President McMillan met with the other professor to discuss how that professor could

strengthen his portfolio. The other professor followed Vice President McMillan's advice and supplemented his portfolio before it was submitted to the President of Southeastern for a final decision on his application. Based on his supplemented portfolio—and the guidance that he received from Vice President McMillan—the nontransgender professor.

93. In February 2010, Dr. Tudor filed a grievance with President Minks and requested a hearing before Southeastern's Faculty Appellate Committee ("FAC"). In her grievance, she alleged that Dean Scoufos and Vice President McMillan had denied her the due process provided by Southeastern's policies when they refused to explain why they had opposed her application for promotion and tenure.

94. The following month, the FAC ruled in Dr. Tudor's favor and recommended to President Minks' designee that Vice President McMillan and Dean Scoufos explain to Dr. Tudor why they had opposed her application.

95. Pursuant to Southeastern policy, President Minks designated the Assistant Vice President for Academic Affairs ("Assistant Vice President") to communicate to Dr. Tudor both the FAC's recommendation and his decision whether to comply with that recommendation. Southeastern policy also required that Dr. Tudor receive this information within ten workdays. Dr. Tudor would have the right to appeal the Assistant Vice President's decision to President Minks.

96. The Assistant Vice President decided not to follow the FAC's recommendation. Vice President McMillan directed the Assistant Vice President to wait until after President Minks made his decision on Dr. Tudor's promotion and tenure application before informing her that he had decided not to follow the FAC's

recommendation. Thus, Dr. Tudor received no notification within the ten workday deadline.

97. By violating Southeastern policy and withholding timely notification of the Assistant Vice President's decision, Southeastern denied Dr. Tudor the ability to appeal Vice President McMillan's and Dean Scoufos' refusals to provide explanation of their negative recommendations prior to President Minks' ultimate decision on her tenure and promotion application. Thus, she was deprived of the opportunity to supplement her portfolio to address their reasoning prior to President Minks' decision.

98. In April 2010, President Minks sent Dr. Tudor a letter informing her that he had decided to deny her application for promotion and tenure. In that letter, President Minks did not explain why Dr. Tudor's application was denied, but he did let her know that Vice President McMillan would inform her of the reasons for the denial in a separate communication.

99. President Minks' decision was the first time Southeastern had denied an English professor's application for tenure and promotion after he or she had obtained a favorable tenure recommendation from a P&T Review Committee and the Department Chair.

100. In June 2010, Dr. Tudor received a letter from Vice President McMillan. That letter—which purported to be dated over a month earlier, on April 30, 2010—stated that President Minks had denied Dr. Tudor's application because her record in the areas of “research/scholarship” and “university service” were deficient.

101. Dr. Tudor's qualifications for promotion and tenure were comparable, if

not superior to, the qualifications of at least three other similarly-situated nontransgender English professors who were considered for, and received, tenure during Dr. Tudor's time at Southeastern. For example, the number of publications Dr. Tudor had in her portfolio was greater than the number of publications that another successful applicant had in hers. One applicant received promotion and tenure even though she, unlike Dr. Tudor, had no peer-reviewed publications. Likewise, in the area of university service, Dr. Tudor's performance was also comparable to her nontransgender departmental peers who successfully applied for promotion and tenure.

102. Vice President McMillan's criticisms of Dr. Tudor's record in the area of scholarship also rested on his assertion that the Southeastern administration had been unable to verify that Dr. Tudor had served as an editor for two symposia listed in her portfolio. However, no one in the Southeastern administration ever requested that Dr. Tudor provide additional documentation to verify that she had served as an editor of the symposia. Moreover, copies of the published proceedings from the symposia were available in a reading room on Southeastern's campus and Dr. Tudor's role as editor was prominently displayed on the covers of both publications.

### ***Dr. Tudor's Re-application and Grievances***

103. Southeastern permits faculty members who have been denied promotion or tenure to reapply as long as they remain within their seven-year term of initial employment. In at least one other RUSO institution, professors have re-applied for promotion and tenure the year after the President denied their applications.

104. In August 2010, Dr. Tudor informed her Department Chair that she intended to re-apply for promotion and tenure during the 2010-11 academic year.

105. That same month, Dr. Tudor also filed a grievance in which she requested a hearing with the FAC so that she could dispute Southeastern's decision to deny her 2009-10 application for promotion and tenure. In September 2010, the FAC informed Dr. Tudor that it had no authority to overrule the President's decision to deny her promotion and tenure.

106. A few weeks later, in October 2010, Vice President McMillan sent Dr. Tudor a letter stating that Southeastern would not permit her to re-apply for promotion and tenure during the 2010-11 academic year. In the letter, which had been approved by President Minks, Vice President McMillan recognized that Southeastern policy did not prohibit Dr. Tudor from re-applying. But he nevertheless announced that he had decided that it was not in the "best interests of the university" to permit her to re-apply.

107. In his letter, Vice President McMillan offered several explanations for denying Dr. Tudor's request to re-apply for promotion and tenure. Among his reasons was his belief that deficiencies in Dr. Tudor's application from the prior academic year could not be corrected that quickly. Vice President McMillan also expressed concern that if the administration once again overruled positive recommendations from the P&T Review Committee and the Department Chair, its action would potentially "inflame the relationship between faculty and administration."

108. In October 2010, Dr. Tudor filed a grievance with the FAC and President Minks challenging Southeastern's decision not to let her re-apply for promotion and

tenure during the 2010-11 academic year.

109. In response to Dr. Tudor's grievance, Vice President McMillan sent a letter to the FAC stating that he had opposed Dr. Tudor's 2009-10 application for promotion and tenure because she had submitted "the poorest portfolio [he had] ever reviewed in the 20 years" he worked at Southeastern, and there was "very little chance" that Dr. Tudor could have corrected the deficiencies in the period since the initial decision.

110. In support of her grievance, Dr. Tudor submitted four letters of recommendation from tenured English professors at Southeastern detailing their positive assessments that Dr. Tudor was qualified for promotion and tenure.

111. Another tenured English professor submitted a letter to the FAC, in support of Dr. Tudor's grievance, which pointed out that "Dr. Tudor ha[d] published more research than any other member of the [English] department, tenured or untenured." The letter writer therefore maintained that Vice President McMillan was "clearly mistaken in his opinion that consideration of Dr. Tudor's tenure file would be a waste of time."

112. In December 2010, the FAC recommended that Southeastern permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year.

113. President Minks designated Southeastern's Vice President for Business Affairs, Ross Walkup, to respond to the FAC's decision. In January 2011, Vice President Walkup sent a letter to the FAC stating that Southeastern would not comply with the FAC's recommendation because Southeastern policy prohibited professors from re-applying for promotion and tenure after the President denied their applications. In his letter, Vice President Walkup indicated that President Minks agreed with this

interpretation of Southeastern policy.

***Dr. Tudor's Discrimination Complaint***

114. In August 2010—at the same time she was seeking to re-apply for promotion and tenure—Dr. Tudor also filed a written discrimination complaint with Southeastern's Affirmative Action Officer, Dr. Claire Stubblefield. In that complaint, she alleged, among other things, that Southeastern had discriminated against her on the basis of her sex when it denied her 2009-10 application for promotion and tenure.

115. Dr. Tudor filed a similar discrimination complaint with DOE, and DOE informed Southeastern of the complaint in a letter dated September 15, 2010. This complaint specifically referenced “odious bullying” “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.”

116. In October 2010, Dr. Tudor supplemented the discrimination complaint that she had filed with Dr. Stubblefield. She alleged that Southeastern had retaliated against her because of her discrimination complaints when it refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year.

117. Dr. Stubblefield issued a report ostensibly addressing Dr. Tudor's discrimination and retaliation complaints in January 2011. Dr. Stubblefield found that Southeastern had not discriminated against or retaliated against Dr. Tudor.

118. Dr. Stubblefield's report did not address all of Dr. Tudor's allegations of discrimination and retaliation. For example, the report did not mention Southeastern's

decision not to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, even though Dr. Tudor had expressly complained that this decision to not let her re-apply was retaliatory. Similarly, Dr. Stubblefield's report did not address Dr. Tudor's allegation that Vice President McMillan had treated her differently from one of her peers by meeting with a nontransgender English professor to discuss his portfolio before the President rendered a decision on his application for promotion and tenure, while denying Dr. Tudor the opportunity to have such a meeting.

***Dr. Tudor's Employment with Southeastern is Terminated***

119. Since Dr. Tudor failed to attain tenure before the end of her seventh year as an Assistant Professor, Southeastern terminated her employment on May 31, 2011.

120. Before Dr. Tudor's employment ended, Southeastern's Faculty Senate awarded her with the Faculty Senate Recognition Award for Excellence in Scholarship for the 2010-11 academic year.

121. Since her employment was terminated by Southeastern, Dr. Tudor has attempted to but been unable to secure a tenure-track professorship that is comparable to the one she held at Southeastern.

***Dr. Tudor's Desire To Return to Southeastern***

122. One of the remedies Dr. Tudor and the United States have requested is reinstatement as Assistant Professor, with tenure. This relief is particularly important given Dr. Tudor's connection to Oklahoma.

123. In the 1830s the Chickasaw were removed from their ancestral lands east of the Mississippi River and moved, at gunpoint, to lands in present-day Oklahoma.

124. Nearly three thousand Chickasaw traveled along the Trail of Tears; an estimated five hundred Chickasaw perished along the way.

125. Today, members of the Chickasaw Nation believe that the lands sold to the Chickasaw in Oklahoma by the federal government in the 1830s have been made sacred by the tears, sweat, blood, and bones of their ancestors.

126. Dr. Tudor believes that the land Southeastern lies upon has been made sacred by the tears, sweat, blood, and bones of her ancestors.

127. Southeastern's campus lies in the historic boundary of the lands sold to the Chickasaw and Choctaw Nations by the federal government in the 1830s. In 2004 Dr. Tudor was offered a lucrative tenure-track professorship at Northern Michigan University. Dr. Tudor was also offered a tenure-track professorship at Southeastern.

128. Dr. Tudor accepted the tenure-track professorship at Southeastern over the offer from Northern Michigan University because she wanted to spend the rest of her career teaching, working, and living on lands lying within the historic boundary of the relocated Chickasaw Nation.

129. Since her employment was terminated by Southeastern, Dr. Tudor has been unable to secure a tenure-track professorship at an institution that lies within the historic boundaries of the removed Chickasaw Nation.

**COUNT ONE**  
**Title VII, 42 U.S.C. § 2000e, et seq.**  
**Hostile Work Environment Based on Sex**  
**(Gender, Gender Expression, and Gender Identity)**

130. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

131. After Dr. Tudor disclosed her intent to transition to female during the 2007-08 school term, Southeastern’s administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping, including gender, gender expression, and gender identity, and adopted an attitude of adversarial and hostile demeanor. This harassment continued through Tudor’s termination from Southeastern in May 2011.

132. Dr. Tudor was targeted for harassment by administrators because of her sex, including gender, gender expression, and gender identity.

133. Dr. Tudor was nonetheless able to maintain cordial and productive relationships with the members of her department.

134. The discriminatory acts involved the same type of employment actions, occurred relatively frequently, were perpetuated and/or directed by the same core group of administrators, were egregious, numerous and concentrated, and formed part of the same hostile work environment, as detailed herein.

135. The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive to alter the conditions of Dr. Tudor’s employment and to create an abusive working environment, as detailed herein.

136. Dr. McMillan made statements that were repeated to Dr. Tudor that her

gender expression and gender identity were offensive to him, as detailed above.

137. Southeastern administrators, including but not limited to Dr. McMillan, openly denied the legitimacy of Dr. Tudor's feminine gender expression and female gender identity and encouraged others under their direction to do the same. This conduct includes but is not limited to: administrators directing human resources to counsel Tudor against using the multi-stall women's restroom closest to her office and against wearing skirts and other traditionally female articles of clothing in Fall 2007; administrators, including Dean Scoufos, failing to notify the Affirmative Action Office of discrimination reported by Dr. Tudor in 2009; administrators, including Dean Scoufos and Vice President McMillan, publicly and privately misgendering or otherwise expressing their distaste for persons with nontraditional gender identity and expression generally and Dr. Tudor specifically.

138. Dean Scoufos had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

139. Vice President McMillan had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

140. Dean Scoufos was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

141. Dean Scoufos was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

142. Vice President McMillan was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

143. Vice President McMillan was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

144. Southeastern administrators, including upon information and belief Dr. McMillan, repeatedly attempted to craft formal and informal policies with the intended effect of forcing Dr. Tudor to suppress her feminine gender expression and female gender identity. This conduct includes but is not limited to: administrators directing Southeastern's human resources office to counsel Dr. Tudor to use a different restroom than that used by other female faculty, causing Dr. Tudor daily humiliation for four years; administrators directing Southeastern's human resources office to counsel Dr. Tudor to not wear traditionally female or feminine articles of clothing; and administrators repeatedly interfering with the tenure review process over the course of two years.

145. The requirement that Dr. Tudor not use female restrooms, and use only a specific single-stall restroom exposed her to disadvantageous terms as detailed herein.

146. The Defendants provided and maintained a health insurance plan for all faculty, including Dr. Tudor, that had an explicit exclusion for transgender health care, as detailed herein. The health insurance policy explicitly excluded all transition-related care for transgender persons. As a result of this exclusion, the plan denied care to transgender persons, solely on the basis of sex and regardless of medical necessity. As a result of this discriminatory exclusion, Dr. Tudor was unable to receive coverage for medically necessary care, she was forced to bear out-of-pocket costs, and was subjected to humiliation which contributed to the hostile work environment.

147. This hostile environment unreasonably interfered with Dr. Tudor's ability

to perform her job duties, by the disruption of her relationship to the University Administration and her Department colleagues, by the unreasonable public criticism and questioning of her abilities as a professor, by her inability to use restrooms appropriate to her gender, by the need to spend many hours on otherwise unnecessary grievance and review processes and other means of seeking relief, and by the necessity of having to create a new tenure application, a time-intensive task involving reviewing and assembling hundreds of pages and requesting and following up on recommendation letters, and other factors.

148. Many events contributing to this hostile work environment occurred within the 300 day period prior to Dr. Tudor's first charge dated September 9, 2010, including but not limited to the daily humiliations caused by the restroom restrictions and misgendering, the maintenance of the discriminatory insurance policy exclusion, dress restrictions, administrators repeatedly interfering with the tenure review process and the constant threat of termination.

149. Dr. Tudor perceived the working environment to be abusive or hostile.

150. A reasonable person in Dr. Tudor's circumstances would consider the working environment to be abusive or hostile.

151. The actions of Defendants' agents, including but not limited to Dean Scofous and Vice President McMillan, in creating the hostile work environment resulted in tangible job consequences to Dr. Tudor, including but not limited to her termination, her denial of promotion and tenure, her inability to reapply for promotion and tenure, her restriction in regard to using restrooms and her inability to obtain health care coverage

for medically necessary treatments.

152. The Defendants did not have any policy prohibiting discrimination based on gender expression or gender identity, and there were therefore no preventive and corrective opportunities available to Dr. Tudor for discrimination based on her gender expression or gender identity.

153. In fact, the Faculty Senate unanimously approved resolutions to prevent discrimination based on gender expression and gender identity on January 19, 2011, and they were sent to Vice President McMillian, who in turn presented the resolutions to Southeastern's President. Both resolutions were rejected.

154. Dr. Tudor took advantage of the preventive and corrective opportunities available to her to the extent they existed, by complaining to Defendants of discrimination based on her sex.

155. The Defendants were on notice of the hostile work environment, including actual notice by means of complaints made by Dr. Tudor to the University detailed herein, and vicariously and constructively by means of the acts perpetrated by her direct supervisors detailed herein.

156. The Defendants should have known of the hostile work environment because of Dr. Tudor's complaints and the acts perpetrated by the administrators, as detailed herein.

157. The Defendants made no efforts to stop the hostile environment detailed herein.

158. In the alternative, the Defendants did not undertake prompt and reasonable

efforts sufficient to stop the hostile environment detailed herein.

159. As a direct and proximate result of Defendants' unlawful discrimination, Dr. Tudor incurred damages including, but not limited to humiliation, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

**COUNT TWO**  
**Title VII, 42 U.S.C. § 2000e, *et seq.***  
**Unlawful Discrimination Based on Sex**  
**(Gender, Gender Expression, and Gender Identity)**

160. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

161. Defendants engaged in adverse employment actions against Dr. Tudor because of her sex and sex stereotyping, including gender, gender expression, and gender identity, as defined and detailed below.

162. Defendants denied Dr. Tudor's application for promotion and tenure during the 2009-10 academic year.

163. Defendants refused to permit her to re-apply during the 2010-11 academic year because of Dr. Tudor's gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

164. Had Dr. Tudor been permitted to re-apply during the 2010-11 academic year, she would have obtained tenure and promotion, absent further sex discrimination by Defendants.

165. Defendants created policies and practices that had a disparate impact on

persons based on gender expression and gender identity, and had a disparate impact on Dr. Tudor.

166. Defendants created a policy and practice that required certain female persons, based on their gender identity, including Dr. Tudor, not to use any women's restrooms on campus, but to use only all genders single-stall restrooms for persons with disabilities.

167. This policy and practice had a disparate impact on certain female persons based on their gender identity, including Dr. Tudor.

168. The creation and maintenance of this policy and practice was an adverse employment action.

169. These restroom restrictions also subjected Dr. Tudor to disparate treatment.

170. These restroom restrictions subjected certain persons, based on their gender identity, including Dr. Tudor, to disadvantageous terms based on sex, as detailed herein, and constituted unlawful sex discrimination in violation of Title VII.

171. Defendants terminated Dr. Tudor because of her gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

172. Defendants' purported reasons for denying Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and for refusing to allow her to re-apply in the 2010-11 academic year are a pretext for sex discrimination.

173. As a direct and proximate result of Defendants' unlawful sex discrimination, Dr. Tudor incurred damages including, but not limited to, lost income,

humiliation, loss of enjoyment of life, damage to her professional reputation and other pecuniary and non-pecuniary losses.

**COUNT THREE**  
**Title VII, 42 U.S.C. § 2000e, et seq.**  
**Retaliation**

174. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

175. By refusing to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, Defendants retaliated against Dr. Tudor in violation of Title VII because she (a) opposed their discrimination against her that she reasonably believed violated Title VII; and (b) participated in a Title VII proceeding by filing a complaint with DOE.

176. Defendants’ purported reasons for not allowing Dr. Tudor to re-apply for promotion and tenure in the 2010-11 academic year are a pretext for unlawful retaliation.

177. But for Defendants’ unlawful retaliation, Dr. Tudor would have obtained tenure and promotion, and thereby incurred damages including, but not limited to, lost income, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff/Intervenor requests that the court grant the following relief:

- a) Enjoin Defendants from subjecting employees to unlawful sex discrimination (including on the basis of gender, gender identity, gender

- expression, and sex stereotypes) and retaliation that violates Title VII;
- b) Order Defendants to institute and carry out new policies, practices, and programs to prevent unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation that violates Title VII;
  - c) Order Defendants to institute and carry out policies, practices, and programs to report, investigate, and effectively address complaints about unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and/or retaliation that violates Title VII;
  - d) Order Defendants to train their employees on Title VII's prohibitions against unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation;
  - e) Order Defendants to train their employees who investigate complaints of Title VII violations on how to conduct effective investigations;
  - f) Order Defendants and their managers and supervisory employees to refrain from engaging in retaliation against any individual for giving testimony in this matter or participating in this matter in any way;
  - g) Order Defendants to compensate Dr. Tudor with monetary relief for the damages she suffered including, but not limited to, lost income, loss of fringe benefits, humiliation, loss of enjoyment of life, and damage to her professional reputation.
  - h) Order Defendants to award Dr. Tudor the position of Associate Professor

with tenure;

- i) Order any further relief necessary to make Dr. Tudor whole;
- j) Award such additional relief as justice may require, together with the Plaintiff/Intervenor's costs, disbursements, and attorneys' fees in this action.

Dated: May 5, 2015

Respectfully Submitted,

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