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

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

DEFENDANTS'RESPONSE AND OBJECTION TO PLAINTIFF'S MOTION TO COMPEL

Defendants, Southeastern Oklahoma State University ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "Defendants"), submit the following objection and response to United States' Motion to Compel Deposition Testimony of Charles Babb and for Sanctions with Incorporated Brief [Doc. 68] submitted by Plaintiff United States ("Plaintiff") on June 24, 2016.

BACKGROUND

At various times in the mid to late 1990's, Dr. Robert Tudor presented himself to the world as a female and used the name Rachel Tudor. However, when Dr. Tudor came to SEOSU in 2004, he was male, going by Robert Tudor. In 2007, Dr. Tudor changed his name to Rachel Tudor, and once again began presenting himself as a female. Some three

(3) years later, after failing to obtain tenure at SEOSU, Tudor started complaining of discrimination, purportedly due to her Native American and transgender status. Based on Tudor's complaint, the Plaintiff (acting through its Equal Employment Opportunity Commission and the United States Department of Justice), began a multi-year investigation of Tudor's allegations. After interviewing several witnesses (including SEOSU employees, many of which were interviewed at least twice) in early 2012, Plaintiff then filed this lawsuit in spring of 2015. During Discovery herein, the Defendants have produced over 13,640 pages of documents. In addition, SEOSU has produced over 9,445 electronic mail messages, and RUSO has produced over 160,618 electronic mail messages. Further, Plaintiff's counsel, Allan Townsend, was also present for, and actively participated in, many of the witness interviews conducted by the EEOC's investigator. In addition, Plaintiff's counsel have taken fourteen (14) depositions of SEOSU's current and former employees, most of which had minimal involvement in Tudor's tenure process, and Plaintiff's counsel have demanded several more depositions.

Plaintiff alleges that during depositions in this litigation, three SEOSU employees, (Cathy Conway, former Human Resources Director; Dr. Charles Weiner, former Assistant Vice President for Academic Affairs; and Dr. Bryon Clark, administrative liaison), answered various questions regarding Dr. Tudor and their conversations with Charles Babb, Regional University System of Oklahoma General Counsel. Plaintiff claims these witnesses' testimony constituted a waiver of Defendants' attorney-client privilege with respect to Mr. Babb.

During Mr. Babb's day-long deposition, Defendants objected to a limited number of questions posed, and instructed Mr. Babb not to respond based upon the attorney-client privilege. Plaintiff's claim of surprise regarding defense counsel's instructions to Babb not to answer is completely false and made for the sole purpose of misleading the court. In at least two telephone conversations with Plaintiff's counsel, Defense counsel advised of the absurdity of the United States of America taking Mr. Babb's deposition, indicated Defendants' belief Plaintiff was doing it solely for harassment purposes, and made it extremely clear Defendants would instruct Mr. Babb not to answer questions intruding upon the attorney-client privilege. Plaintiff's counsel Allan Townsend's response each time was to state "I'm sure you will," but then stated there were many other areas, not protected by the privilege, Plaintiff's counsel wanted to explore. To now assert otherwise to this Court is disingenuous at best, and extremely unethical.

Plaintiff now seeks to compel Mr. Babb to respond to these questions, and has also requested sanctions against Defendants.

PROPOSITION I: EXISTENCE OF THE PRIVILEGE AND ETHICAL CONSIDERATIONS

In the *Davis* case cited by Plaintiff, this Court noted that the attorney-client privilege:

> Protects "confidential communications [between the attorney the client] made for the purpose of facilitating the rendition of professional legal services to the client." The privilege "encourage[s] full and frank communication between attorneys and their client," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), by "shield[ing] the client's confidential disclosures and the attorney's advice." *Chandler v. Denton*, 1987 OK 38, ¶19, 741 P.2d 855, 865. In order for the privilege to apply, the party asserting the privilege must establish: (1) the existence of an attorney-client

> relationship; (2) the confidential nature of the communication; and (3) that the communication was made for the purpose of seeking or providing legal advice. *Lindley*, 267 F.R.D. at 388-89.

Davis v. PMA Companies, Inc., No. CIV-11-359-C, 2012 WL 3922967, at *1 (W.D. Okla. Sept. 7, 2012).

Plaintiff admits in its motion that an attorney-client relationship exists here. (*See* [Doc. 68, p. 1], wherein Plaintiff refers to "Regional University System of Oklahoma ***General Counsel*** Charles Babb.") Plaintiff also appears to concede that these confidential communications about which it seeks testimony were instances of university employees seeking legal advice. (*See* [Doc. 68], wherein Plaintiff admits "Ms. Conway testified about questions she asked Mr. Babb and information and **advice** he provided to her." (p. 6); "Dr. Weiner testified that Mr. Babb provided him **advice**," (p. 8); and "Dr. Clark contacted Mr. Babb . . . and asked for **advice**. . ." (p. 10). The nature of the relationship is not in dispute here. The only dispute is whether or not the United States of America may intrude upon the privilege by forcing an attorney to testify about his client's business, and advice relating thereto.

Plaintiff claims that there is something improper about asserting objections contemporaneously to objectionable questions. However, setting aside for a moment the nature of the client's privilege, (which has not been waived by any client herein), there is also the issue of the individual attorney's ongoing ethical obligation. Those contemporaneous objections had to be made as each objectionable question was posed.

According to the Oklahoma Rules for Professional Conduct, "A lawyer should keep in confidence information relating to representation of a client except so far as

disclosure is required or permitted by the Rules of Professional Conduct or other law." Title 5 Okla. Stat. Appendix 3-A[4]. Those same rules also instruct all lawyers practicing in the State of Oklahoma that, ". . . a lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private." *Id.* at [8]. Any failure by Mr. Babb to keep the confidences of his clients could well result in his personal sanction by the Oklahoma Bar Association. At the time of his deposition, he had not requested (or been given) his client's permission to divulge their confidences. If this Court sees fit to find a client's waiver of privilege, such waiver should be narrowly construed as to the particular client and issue(s) involved, and should be clearly outlined so that Mr. Babb can testify only so far as the edges of the waiver. However, Defendants maintain that no waiver has been granted, and Plaintiff's Motion to Compel should be denied.

PROPOSITION II: SEOSU EMPLOYEES DID NOT HAVE THE ABILITY TO WAIVE THE ATTORNEY-CLIENT PRIVILEGE, AND THEREFORE THE PRIVILEGE WAS NOT WAIVED

The power to waive attorney-client privilege is normally exercised by the officers and directors. A corporate employee cannot waive the corporation's privilege. *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996), cert. denied, 520 U.S. 1167, 117 S.Ct. 1429 (1997). A former officer or director cannot assert or waive a corporation's privilege and has no control over the privilege. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 349 n.5 (1985). In the University context, the Board members would be the

keepers of the attorney-client privilege, and the only people who can waive attorney-client privilege.

As employees, (or former employees in the case of Conway and Weiner), and not board members, Ms. Conway, Dr. Weiner, and Dr. Clark do not have the authority to waive the attorney-client privilege with respect to Defendants. *See Denman v. Youngstown State University*, 2007 WL 2781351 *5 (September 21, 2007). Any such waiver would need to come from the Defendants' Board of Directors. Plaintiff has not provided any evidence of any such waiver from the Board of Directors. Nor is there any evidence that the board or directors authorized any of these individuals to waive the attorney-client privilege before their depositions. *See Alexandar v. F.B.I.,* at 316. As such, the attorney-client privilege has not been waived, and Defendants were proper in their instructions to Mr. Babb not to answer questions.

PROPOSITION III: MS. CONWAY, DR. WEINER, AND DR. CLARK DID NOT WAIVE THE ATTORNEY-CLIENT PRIVILEGE

General subject matter of legal services is not protected by the attorney-client privilege, and disclosure of such does not waive the attorney-client privilege. *Ngyun v. Excel Corp.*, 197 F.3d 200, 206 (5th Cir. 1999). Assertion of the privilege is only required when there is inquiry into the actual substance of the communication such as the client's specific request to the attorney, and pertinent information including (the research undertaken by counsel) to respond to the client's request. *Id*. Revealing the general nature of consultation with counsel does not waive attorney-client privilege. *Denman* at *3. A waiver is "not likely to be found when the statements alleged to constitute waiver do not

disclose the contents of a specific conversation between client and attorney." *Genentech, Inc. v. Insmed Inc.*, 236 F.R.D. 466, 469 (N.D.Cal.2006). In addition, documents that reveal an attorney's mental process in "evaluating the communications" with a client are entitled to heightened protection. *Upjohn Co. v. United States*, 449 U.S, at 399, 101 S.Ct. 677.

Here, the University and RUSO did not waive privilege as to Mr. Babb. In the depositions cited by Plaintiff, the witnesses provided the general nature of the consultations with Mr. Babb. The witnesses do not go into detail regarding the research undertaken by Mr. Babb, or other pertinent information. By questioning Mr. Babb regarding this testimony, Plaintiff is hoping to glean his mental process and actual substance of each of these communications, which is protected under the attorney-client privilege, and/or the attorney work product doctrine.

Dr. Weiner states that Mr. Babb provided guidance on writing a letter from the Faculty Appellate Committee. However, Dr. Weiner did not testify as to the substance of Mr. Babb's advice, only that he received it. A subsequent letter, inspired by confidential communications but not revealing any confidential information, cannot waive the attorney client privilege. *Alexander v. FBI*, 198 F.R.D. 306, 315 (D.D.C. 2000). In addition, Plaintiff argues that because Mr. Babb never expressed any disagreement with what Dr. Weiner stated in his emails, that the attorney-client privilege was waived. There is simply not any legal support to this allegation. Finally, discussion regarding whether Dr. Tudor had been notified of tenure by a certain date would not be covered under attorney-client privilege, as this is an underlying fact. *See Upjohn v. U.S.*, 449 U.S. 383,

396, 101 S.Ct. 677 (1981). Plaintiff's questions for Mr. Babb went beyond these simple fact questions, and instead requested Mr. Babb to state his advice given to Dr. Weiner. *See Deposition of Charlie Babb* at pp. 68, ln. 21 – p. 69, ln. 7; p. 70, ln.1- ln. 12, attached as Exhibit 1.

With regard to Dr. Clark's deposition, Dr. Clark stated he informed Mr. Babb that he was going to draft a procedure for the next steps in the grievance process and that Mr. Babb approved it. *Deposition of Bryon Clark* at pp. 125-127, attached as Exhibit 2. However, requesting advice on drafting a procedure in a grievance process would not waive the attorney-client privilege. In addition, Dr. Clark's deposition makes no mention of any confidential statements with Mr. Babb, only that he communicated with his general counsel. Plaintiff's attempt to question Mr. Babb about these confidential statements is improper, and Defendants were correct in instructing Mr. Babb not to answer.

Ms. Conway served as the Human Resources Director at Southeastern in 2007. During her deposition, Ms. Conway stated that she contacted Mr. Babb with questions regarding a male employee who wished to present himself as female. Mr. Babb instructed her to send documents to him. *Deposition of Cathy Conway* at p. 40, ln. 1, attached as Exhibit 3. Ms. Conway does not recall if that was the conversation, or if Mr. Babb reviewed the materials and then they talked. *Id.* at p. 40, ln. 7-9. Lapses of memory are not waivers of the attorney-client privilege. *Denman v. Youngstown State Univ.,* No. 4:05CV1910, 2007 WL 2781351, at *6 (N.D. Ohio Sept. 21, 2007). In addition, the fact

that Ms. Conway stated in 2016 she requested advice from Mr. Babb in 2007 would not waive any attorney-client privilege.

Further, Ms. Conway states that Mr. Babb reviewed the policies with her, including sexual harassment, nondiscrimination, and affirmative action. (Ex. 3, at p. 40, ln. 11-12; p. 41, ln. 24 – p. 42, ln. 6). Such general statements regarding her conversations with Mr. Babb are not enough to waive any attorney-client privilege. *See Denman*, supra, at *3. Finally, Ms. Conway states that she informed Mr. Babb of her conversation with Dr. Tudor regarding the restrooms. (Ex. 3, at p. 44, ln. 8-18). Ms. Conway does not state any advice or comment Mr. Babb made to her regarding the restrooms. Therefore no privilege was waived. In Mr. Babb's deposition, Plaintiff was attempting to ascertain what advice was given, which is clearly protected under the attorney-client privilege. Therefore Defendants were proper in instructing Mr. Babb not to respond.

PROPOSITION IV: PLAINTIFF'S ATTEMPT TO VIOLATE THE ATTORNEY-CLIENT PRIVILEGE FAILS THE REQUIREMENTS OF PROPORTIONALITY UNDER RULE 26

Plaintiff and its counsel have had many, many opportunities to discover relevant, admissible evidence which might tend to show that RUSO or SEOSU unlawfully discriminated against Tudor. Plaintiff has been unable to find such evidence because none exists. As illustrated above, Plaintiff's counsel and investigators have already received excessively large amounts of information from a variety of sources.

In a federal civil proceeding, parties "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense **and proportional to**

the needs of the case . . . ." Fed. R. Civ. P. 26(b)(1). [Emphasis added]. "Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged." *Fisher v. United States,* 425 U.S. 391, 403 (1976). "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981).

Plaintiff's attempt to intrude upon the attorney-client privilege between RUSO and its general counsel borders on bullying. Plaintiff's Motion to Compel fails to demonstrate that this intrusion to the oldest of privileges is necessary. Plaintiff argues that it is the burden of the Defendants to establish the asserted privilege, but Plaintiff cannot honestly argue that Mr. Babb was not, (as is not still), the RUSO general counsel. There is no dispute about this. What is in dispute is whether or not the relationship between the State's Regional University system (which oversees multiple institutions of higher education) and its general counsel is important enough to protect when there are numerous other sources of information that the Plaintiff has already exploited. Defendants maintain that the assertion and recognition of Mr. Babb's privilege, (and the privileges of his clients), is appropriate, and should not be disregarded due to Plaintiff's hostile tactics. There is something fundamentally different about requiring an entity's attorney to testify, particularly when the entity's other (non-attorney) employees have been interviewed and deposed on multiple occasions. It is not proportionate to the needs of Discovery in this case. As noted above, over 170,000 individual email messages, and over 13,000 pages of documents have already been produced by Defendants to Plaintiff. According to the undersigned's calculation of time, Mr. Babb has already been deposed

for six (6) hours and twenty-seven (27) minutes of actual questioning. Under Fed. R. Civ. P. 30(d)(1), a witness is only expected to have to testify for seven (7) hours anyway. Multiple other witnesses have been deposed (most all of which also took a full 7 hours), and more depositions are expected. Plaintiff's attempt to compel further testimony by the RUSO general counsel is unnecessary in proportion to the needs of the case and unwarranted as to the important privileges at risk, and thus, Plaintiff's motion should be denied.

PROPOSITION V: SANCTIONS ARE NOT WARRANTED

Plaintiff repeatedly acknowledges that the instruction not to answer is appropriate to protect the attorney client privilege. As previously discussed, Plaintiff was fully aware (weeks before Mr. Babb's deposition) of Defendants' intention to assert the attorney-client privilege to questions intruding upon that privilege, but Plaintiff chose to proceed, deposing Mr. Babb for more than six (6) hours on multiple areas that are completely irrelevant to this litigation. Plaintiff has shown no justification for sanctions, and should be admonished for its misleading statements, as well as even asserting such a request.

Further, Plaintiff is aware of this Court's guidance on issues of potential privilege arising in a deposition, and was aware of such guidance prior to Mr. Babb's deposition. During Discovery herein, Defendants sought to take the depositions of two EEOC officials involved in the investigation of Tudor's complaint. Overruling the EEOC's Motion to Quash subpoenas, but noting the possibility that privileged issues might arise (and be objected to) during the investigators' depositions, this Court wrote:

> The Court acknowledges that the EEOC also argues certain topics are privileged. Nothing in this Order shall be construed as ruling on those arguments. To the extent those issues arise during the deposition they shall be addressed in the manner provided in the Federal Rules of Civil Procedure.

[Doc. 58, at p. 2], *Order filed April 28, 2016.*

Just as the Court instructed the parties to handle any privilege issues which arose "during the deposition" of the EEOC investigators, so too the Defendants expected to handle any privilege issues which arose during Mr. Babb's deposition. Plaintiff's unwillingness or inability to follow the Court's guidance on this topic is not grounds for sanctioning the Defendants.

CONCLUSION

Plaintiff's Motion to Compel acknowledges the privilege at issue, but fails to demonstrate that it has been waived. Further, Plaintiff's Motion fails to demonstrate that even if the privilege were waived that the testimony sought from Mr. Babb is proportionally necessary to Discovery in this case, especially in light of the tremendous amount of documentation and testimony that Defendants have provided to Plaintiff. Meanwhile, Plaintiff has intentionally and knowingly withheld discoverable communications it had with Dr. Tudor and with the EEOC, as well as erroneously asserted deliberative process to prevent the EEOC from producing investigation materials. Plaintiff's attempt to intrude upon the State Defendants' privilege with counsel is misplaced and abusive, and Plaintiff's request for sanctions is without merit. Plaintiff's Motion should be denied.

Respectfully submitted,

/s/ Dixie L. Coffey
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of July 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:

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

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

DEPOSITION OF CHARLES BABB

TAKEN ON BEHALF OF THE PLAINTIFF(S)

IN OKLAHOMA CITY, OKLAHOMA

ON MAY 18, 2016

REPORTED BY: LESLIE A. FOSTER, CSR

Exhibit 1

then she will not be reappointed."

Did I read that correctly?

A Yes.

Q And do you understand there to be a typo in that sentence?

MS. COFFEY: Object to the form.

Q (BY MR. TOWNSEND) Between does and get?

MS. COFFEY: Object to form.

Q (BY MR. TOWNSEND) Should it say -- sorry. Let me ask the question a different way.

If Dr. Tudor had gotten tenure the next year, then she would have been reappointed. Correct?

MS. COFFEY: Object to form.

A Yes.

Q (BY MR. TOWNSEND) So is it your understanding in this last bullet on the bulleted list on the second page of Plaintiff's Exhibit 50, Dr. Weiner was discussing options available if Dr. Tudor did not receive tenure?

MS. COFFEY: Object to form.

A That's what it appears to be, yes.

Q (BY MR. TOWNSEND) And the last paragraph of Plaintiff's Exhibit 50, it states "Charlie, I hope I have stated everything correctly."

Did I read that correctly?

A Yes.

Exhibit 1

Q Charlie is referring to you. Correct?
A Yes.
Q Did Dr. Weiner state everything correctly in his e-mail?
MS. COFFEY: Object to the form to the extent it requires you to reveal attorney-client privileged conversations.
Are you thinking? You're not answering.
THE WITNESS: I'm not answering. Okay.
MR. TOWNSEND: Oh, okay.
MS. COFFEY: We can do this for ten more minutes.
THE WITNESS: Sorry.
MS. COFFEY: So --
MR. TOWNSEND: Thank you for that, Dixie.
Q (BY MR. TOWNSEND) Second sentence of that last paragraph in Plaintiff's Exhibit 50 states "I am sure that President Minks and Drs. McMillan and Scoufos will have questions for you."
Did I read that correctly?
A Yes.
Q Did they have questions for you about Dr. Weiner's e-mails that he sent on April 1st that are in Plaintiff's Exhibit 50?
A I don't recall.

Q And then the last sentence of that last paragraph states "If I have misspoke in any way, please correct me by providing the correct information."

Did I read that correctly?

A Yes.

Q Did you provide any information to President Minks, Dr. McMillan, or Dr. Scoufos correcting anything that Dr. Weiner said in this e-mail?

MS. COFFEY: Instruct you not to answer to the extent you would be revealing attorney-client privileged information.

A I don't recall.

Q (BY MR. TOWNSEND) What is your practice with respect to e-mails that you receive at your work e-mail address at RUSO? Do you -- well, let me strike that question.

Do you ever delete e-mails that you receive at your work e-mail account at RUSO?

A Yes.

Q Which ones do you delete?

MS. COFFEY: Object to form.

Q (BY MR. TOWNSEND) Well, let me ask it a different way, then. What is your normal practice with respect to deleting e-mails that you receive at your work e-mail address at RUSO?

Exhibit 1

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

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

****

ORAL DEPOSITION OF

BRYON K. CLARK

MAY 4, 2016

****

ORAL DEPOSITION OF BRYON K. CLARK, produced as a witness at the instance of the Plaintiff United States, and duly sworn, was taken in the above-styled and -numbered cause on the 4th day of May, 2016, from 8:30 a.m. to 5:01 p.m., before Cheryl K. Perlich, CSR in and for the State of Texas, reported by machine shorthand, at the Office of the United States Attorney, located at 600 East Taylor Street, Suite 2000, Sherman, Texas 75090 pursuant to the Federal Rules of Civil Procedure.

Exhibit 2

Committee and Vice-President Walkup that they could not reach an agreement, that they agreed to disagree.

Q. Did you have separate conversations with the Chair of the Faculty Appellate Committee and Mr. Walkup?

A. I believe so.

MR. JOSEPH: Object to form.

Q. Do you recall anything else about your meeting with the Chair of the Faculty Appellate Committee in that instance?

A. I asked both parties whether or not additional meetings between the two groups, the VP and the Faculty Appellate Committee, would bear fruit and then reach a consensus decision. Both parties indicated, no, that further deliberation would not assist in them reaching a consensus. One said they agreed; the other said they didn't agree.

Q. Anything else you recall about your conversation with the Chair of the Faculty Appellate Committee?

A. No.

Q. Anything else that you recall about your conversation with Mr. Walkup about that grievance?

A. No.

Q. After the Chair of the Faculty Appellate Committee and Mr. Walkup told you they did not believe

Exhibit 2

additional meetings would be fruitful, what happened next in the processing of that October 11th, 2010 grievance?

A. The policy, as written at that time, to my recollection, did not have a process or a follow-up of what to do if there wasn't a consensus reached between the Faculty Appellate Committee and the person responsible, in this case, Vice-President Walkup, for reaching a joint decision.

Q. Is this the first time that the Faculty Appellate Committee and the Vice-President or President's designee, where necessary, had not been able to reach a concurrence?

A. This is the only time that I was a part of the process and the only time I'm aware of this happening.

Q. Given the state of the policy as you described it, did you take any action next?

A. Yes.

Q. What action did you take?

A. I contacted general counsel about what could or should be done in terms of, for lack of better terms, getting this off the high center because a joint consensus, a joint decision could not be made between the two parties.

Q. Do you recall when you did that?

A. No, I do not.

Q. And I'm sorry, did you identify that Charlie Babb was the general counsel that you spoke with?

A. Yes, Charlie Babb was the general counsel.

Q. Did you speak to him on the telephone or in person?

A. Telephone.

Q. And did you explain the situation you were in to Mr. Babb?

MR. JOSEPH: Object to the form.

Q. You can answer.

A. Would you please clarify.

Q. What did you tell Mr. Babb specifically?

A. That the two parties involved, Faculty Appellate and Vice-President Walkup, could not reach a joint decision with regard to the appeal. And that further meeting -- both parties indicated that further meetings would not change either person's or either entity's position that they currently had.

Q. And what was Mr. Babb's response?

A. I don't specifically recall.

Q. Do you recall anything else that was said during that conversation?

A. I believe I indicated if I drafted something, then, to get us off of high center, if he would review

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

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

****

ORAL DEPOSITION OF
CATHY CONWAY
MARCH 10, 2016

****

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

Exhibit 3

A. Well, he told me to send the documents to him. I told him what documents I had received. And it was a new -- a new experience and I needed some guidance, if he had any for me.

Q. What else was discussed during that conversation with Mr. Babb?

A. Well, I don't recall if it was that conversation or if Charlie reviewed the materials and then we talked.

Q. What else did you talk about at that point?

A. We talked about review of policies, any applicable policies or possibly applicable policies. He explained to me about the period of time an individual goes through prior to the sex reassignment surgery that's typically a year to give the person an opportunity to make their decision before surgery. We talked about -- or he advised me about something that was being discussed, he thought, at the time. He wasn't sure if it had been approved yet in the Tenth Circuit about the use of bathroom facilities during this time; that in another circuit or circuits, a person during the -- during the year of transition pre-op had to use a bathroom of the same biological sex.

Q. Anything else you remember about that discussion with Mr. Babb?

Exhibit 3

A. He advised me that if Dr. Tudor asked anyone, me or her supervisors, for advice about which presentation, male or female, that she should be advised to seek an opinion from and advice from her counselor or her counsel, the licensed professional counselor, perhaps, you know, that was an example, not me or her department chair or any of the supervisors or others. We may have discussed who I would advise and what I would advise them as far as letting them know she was changing her name, her presentation may change, that I was available in case they needed my assistance or needed to discuss policy with me or anything that might -- anything they might want to ask me about as human resources director regarding the policy, procedure.

Q. Who's the they in that sentence that you're referring to?

A. They would be -- at the time, it was Dr. Micho, department chair; Dr. Mangrum, dean; and Dr. McMillan, vice-president of academic affairs.

Q. Is there anything else you remember about that conversation with Mr. Babb?

A. I think I've covered -- covered it.

Q. So you had said one of the things you talked to Mr. Babb about was a review of policies. Which policies

Exhibit 3

did you review with him?

MS. COFFEY: Object to form.

A. There's a sexual harassment policy and reporting information, and the second was the nondiscrimination, equal employment, affirmative action policy.

Q. (By Mr. Townsend) Who brought those policies up during the conversation with you and Mr. Babb, you or him?

A. I don't recall.

Q. Do you remember why you were -- what the purpose was for discussing the policies?

A. Well, the policies may have been applicable and they apply to all employees with employment. They also apply to students.

Q. Was there some reason related to Dr. Tudor's gender transition that you reviewed those policies with Mr. Babb?

MS. COFFEY: Object to form.

A. Yes.

Q. (By Mr. Townsend) What was that?

A. I always discussed policies with Mr. Babb whenever there was any issue or anything new or different or any questions or concerns. It was a standard conversation with Charlie Babb.

Exhibit 3

restroom Dr. Tudor should use?

A. No.

Q. Did you discuss -- well, was there any discussion about Dr. Tudor possibly using a single-stall restroom?

MS. COFFEY: Object to form.

A. Yes.

Q. (By Mr. Townsend) What was that discussion?

A. That I let Dr. Tudor know that there was a unisex handicap bathroom available to her that was not mandatory. It was her choice. And there was another bathroom in the student union that was a family bathroom.

Q. Anything else you talked to Mr. Babb about with respect to restrooms during this conversation we've been talking about?

MS. COFFEY: Object to form.

A. No.

Q. (By Mr. Townsend) Did you talk to anyone other than Mr. Babb about -- let me strike that. Did you talk to anyone other than Mr. Babb and Dr. Tudor about Dr. Tudor's restroom use?

MS. COFFEY: Object to form.

A. Only about -- only to the extent that there was the bathroom available to her, that it was not

Exhibit 3