

**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.

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO LIFT STAY

Plaintiff prematurely moves to lift the stay issued by this Court [Doc. 123] and to resume litigation in this case.¹ The Court's Order staying the case succinctly stated that "[i]f the Texas court rules that its injunction covers this case, the United States may seek additional scheduling relief from this Court." [Doc. 123 at 1-2]. In the case of *Texas v. United States*, Case No. 7:16-cv-00054 (N.D. Tex), ("*Texas*"), the court there issued an injunction against Plaintiff's investigation and enforcement actions related to certain issues *nationwide*. Based on Plaintiff's motion for clarification in that case, the *Texas* court indisputably ruled the injunction applies in part to this case, and thus, pursuant to

¹ Contrary to the timelines set forth in LCvR7.1(e) and (i), Plaintiff's Motion to Lift Stay inexplicably requests "expedited briefing." Paradoxically, while Plaintiff asks that Defendants' customary twenty-one (21) day response time be reduced to eight (8) days to "reduce any further delay," Plaintiff asks for no change to its own seven (7) day Reply deadline.

this Court's Order, Plaintiff's available remedy is to seek additional scheduling relief. Instead, Plaintiff is improperly attempting to proceed as if the injunction has no application to this case. Plaintiff compounds this error by improperly seeking an interpretation by this Court of the *Texas* court's Clarification Order. (*Texas v. U.S.*, [Doc. 86]). As discussed more fully below, lifting the stay prior to the *Texas* court fully addressing all pending issues is likely to cause a multitude of unnecessary problems and confusion as to how this case can proceed. Therefore, Defendants object to lifting the stay at this time.

I. ADDITIONAL RULINGS BY THE *TEXAS* COURT ARE NECESSARY BEFORE THE STAY SHOULD BE LIFTED.

At the request of Plaintiff, this Court granted a stay of this litigation pending clarification by the *Texas* court regarding the applicability of the nationwide preliminary injunction to this action. This Court's Order granting the stay (which is almost identical to the proposed order submitted by Plaintiff) stated "[i]f the Texas court rules that its injunction covers this case, the United States may seek additional scheduling relief from this Court." [Doc. 123 at 1-2]. The *Texas* court's clarification ruling regarding the nationwide preliminary injunction on pending litigation, (*Texas v. U.S.* [Doc. 86])², specifically states that it applies in part to this lawsuit, addressing both Plaintiff's claims and Plaintiff's scope of permitted discovery:

² On October 20, 2016, the United States filed a Notice of Appeal of both the Preliminary Injunction Order, [Doc. 58], and the Clarification Order, [Doc. 86]. On November 3, 2016, Dr. Tudor filed a Notice of Protective Appeal, [Doc. 94], appealing these same two orders.

The injunction applies in part to *United States v. Southeastern Okla. Univ.*, a case filed by DOJ against a public university in Oklahoma (a plaintiff state here) more than a year before the Court's August 21, 2016 injunction. No. 5:15-cv-324 (W.D. Okla.). Although the DOJ did not make the issue at the heart of this injunction (access to intimate facilities) a central feature of the complaint, the aggrieved private party has now intervened and introduced new claims that involve access to intimate facilities. No. 15:15-cv-324, ECF No. 23. Because litigation in *Southeastern* was substantially underway before the issuance of this injunction, DOJ's legal arguments in this case fall outside the scope of this injunction. However, Defendants (including DOJ) are still "enjoined from enforcing the Guidelines against Plaintiffs and their respective schools, school boards, and other public, educationally-based institutions" (including Southeastern Oklahoma State University) and "enjoined from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex".

State of Texas et al. v. United States of America, et al., No. 7:16-cv-00054-O, [Doc. 86 at p. 6, fn. 2].

Further, the *Texas* court recognized the relevance and interplay of laws beyond Title IX which require additional examination. To that end, as part of the *Texas* court's clarification order, the parties therein were ordered to provide additional briefing on (a) whether the United States Defendants' guidelines are enjoined in total or in several pieces, (b) "whether Title VII is implicated by [the nationwide] injunction," and (c) whether or not the injunction applies to OSHA or DOL activity. (*Texas v. U.S.*, [Doc. 86, p. 2]). Pursuant to that directive, both the plaintiffs (including the State of Oklahoma), and the defendants (including the United States of America) therein submitted briefing. The *Texas* court has not yet passed ruling on these issues.

In its Motion to Lift Stay, Plaintiff highlights that its legal claims do not involve access to intimate facilities, and thus, its legal arguments fall outside the scope of the

injunction. However, Plaintiff deceptively omits from its discussion the injunction's **application** to this lawsuit, enjoining Plaintiff **"from initiating, continuing, or concluding any investigation"** based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex". (*Texas v. U.S.*, [Doc. 86 at fn 2, citing [Doc. 58 at 37]. (Emphasis added.) Noticeably absent from Plaintiff's Motion to Lift the Stay is any assertion that Title VII is not actually implicated by the *Texas* injunction. While Plaintiff may disagree with what should or should not be enjoined, that is a matter for the appellate process already in motion in the *Texas* litigation. Lifting the stay here before the appellate court in *Texas* makes a determination is likely to create undue confusion and potentially contradictory rulings, leaving the parties unable to proceed with clarity and economy of resources.

In its Motion to Lift the Stay, Plaintiff weakly offers that it will "not seek to assert a new claim that is prohibited by the injunction," but in the same sentence's footnote asserts that Plaintiff is appealing the *Texas* rulings and seeks to not be bound by them. That posture casts doubt upon Plaintiff's intended course of action herein, as further described, below. In Plaintiff's Complaint, the titles of both Count One and Count Two define unlawful conduct under Title VII to include Gender Identity. The *Texas* court has ordered the parties to submit supplemental briefing on various issues, including "whether the injunction implicates Title VII in any manner (and specifically where school employees and staff may share intimate facilities with students)". (*Texas v. U.S.*, [Doc.86, at 7]). Presumably, the *Texas* court will soon rule on this issue, and a ruling that the injunction implicates Title VII may have additional effects on these proceedings. It is also

somewhat predictable that however the *Texas* court rules, this issue will join the others on appeal to the Fifth Circuit.

Plaintiff has also designated a purported expert witness in this case to testify about Gender Identity Disorder. Since Plaintiff is enjoined from asserting that Title VII's definition of sex includes gender identity, there is no justification for expert testimony on this topic.³ The scope of the injunction clearly covers **any attempted discovery** by Plaintiff relating to access to intimate facilities, as well as proposed trial evidence. In issuing its partial injunction regarding this case, the *Texas court* placed no limitations on its ban against the United States' use of the Guidelines or its interpretation that the definition of sex includes gender identity. Both uses are fully enjoined.

In determining the applicability of the injunction to this case, The *Texas court* likely relied upon Plaintiff's Notice of Pending Litigation, (*Texas v. U.S.* [Doc. 64]). The *Texas* plaintiffs asserted the preliminary injunction impacts Plaintiff's ability to continue here because Plaintiff has repeatedly made access to intimate facilities a significant feature in this case. The *Texas* plaintiffs relied upon the fact that Plaintiff's attorneys have deposed no less than thirteen (13) current and former university employees about "this subject" (whether federal law permits entities subject to Titles VII and IX to separate the sexes in intimate facilities. *Id.*, at 1), and presented specific examples of Plaintiff's questioning, evidencing Plaintiff's active pursuit of "this subject":

³This expert testimony should be excluded for additional reasons as well, which Defendants will subsequently address in a motion to exclude testimony of George R. Brown, MD.

“Under the injunction, Defendants [United States’ entities] are prohibited from action regarding “this subject” in Oklahoma, a Plaintiff State, and “their respective schools, school boards, and other public, educationally-based institutions.” Accordingly, Defendants must cease requesting information through interrogatories, deposition testimony, or any other means. Further, they should cease seeking relief in the Oklahoma case based on “this subject” as long as the injunction remains in place.

In its motion to lift the stay, Plaintiff states “the limitations identified by the Clarification Order are inapplicable to **the United States’ intended course of litigation** of the instant case, ...”. The first problem with this assertion is that the United States **has never actually identified its intended course of litigation**, and thus, neither Defendants nor this Court can determine whether the Clarification Order is applicable to this aspect of Plaintiff’s case. Defendants have repeatedly asked Plaintiff to identify the injunctive relief sought in this case, yet Plaintiff has continually refused to provide this information.⁴ In addition, Plaintiff refuses to acknowledge any limitations on its discovery, merely asserting that it will not seek to assert a new claim that is prohibited by the injunction.

DOJ openly admits its intention to violate the preliminary injunction by stating,

“Furthermore, evidence of the Defendants’ decision to deny Dr. Tudor access to women’s restrooms may be relevant to the claims that the U.S. has asserted for purposes of proving, among other things, motive and

⁴ “The United States requires more information before it can state, in detail, what new policies, practices and programs RUSO and SEOSU should institute to remedy their violations of Title VII.” [Doc. 67-1 at pp. 15-16]. “The United States requires more information before it can state, in detail, what training RUSO and SEOSU should implement to remedy their violations of Title VII. *Id.* at p. 16. Defendants asked “Responses to Interrogatories #16 and 17: What additional information is needed? If you cannot identify new policies, practices and programs that are needed, you must state. [Doc. 67-2 at p. 3]. Plaintiff failed to respond. [Doc. 67-3].

credibility. For example, Dr. Tudor and some of the Defendants' witnesses disagree on whether the Defendants barred Dr. Tudor from women's restrooms and that factual dispute is relevant to the credibility of Dr. Tudor and these witnesses. So long as the United States does not amend its Complaint to assert that the Defendants violated Title VII or Title IX by barring Dr. Tudor from women's restrooms, it may use this evidence regarding Dr. Tudor's restroom access to support its claims without running afoul of the Texas injunction.

Understandably, Plaintiff provides no justification for these blanket assertions. If Plaintiff's "intended course of litigation" is to contend the alleged denial of access to the female restroom proves motive for discrimination, (because such denial violates Title VII), then Plaintiff intends to engage in the very conduct prohibited by the *Texas* injunction. As to credibility, again, any argument that conflicting testimony as to whether Tudor was denied access to intimate facilities,⁵ affects witnesses' credibility is nothing more than a disguised attempt to argue that five (5) or six (6) years ago it was discriminatory to deny Tudor access to women's intimate facilities based upon her gender identity – the identical "subject" that Plaintiff is enjoined from litigating.

In essence, Plaintiff has applied its own slanted and extremely narrow interpretation to the injunction and Clarification Order so that Plaintiff can continue pursuing in discovery, and present at trial, irrelevant evidence related to Tudor's access to intimate facilities. The Clarification Order contains no such limitation, and it would be inappropriate for Plaintiff to seek an interpretation by this Court of the *Texas* court's rulings.

⁵ Dr. Tudor has not, and cannot identify a single witness that supports her contentions regarding denial of access to intimate facilities.

II. DISCOVERY (OR EVIDENCE AT TRIAL) BY PLAINTIFF REGARDING DR. TUDOR'S ACCESS TO INTIMATE FACILITIES IS IRRELEVANT AND PROHIBITED.

This case centers around SEOSU's decision to deny tenure to a candidate that was determined to be unqualified in two of the four significant categories evaluated during the tenure review process. Since the onset of this case, Defendants SEOSU and RUSO have steadfastly maintained that Dr. Tudor's use of the women's bathroom facilities was never an issue during her employment, and more importantly, is a nonfactor in this lawsuit. The most telling evidence that it played no role in the events relevant to this case is that Dr. Tudor **never** submitted any type of complaint or grievance to SEOSU regarding her use of bathroom facilities. The significance of the complete absence of any such complaint is exacerbated by these facts: over an approximate fourteen (14) month period, Dr. Tudor filed multiple internal complaints and grievances regarding her tenure process. Similarly, Tudor repeated this tactic at her subsequent employer, (Collin College in Texas), when her teaching appointment there was not renewed. In fact, it is doubtful that there was any internal grievance tool she did not utilize in an attempt to obtain tenure at SEOSU. Tudor also enlisted internet blogs and other social media to persuade her peers throughout the country that she had been discriminated against, and sought their assistance in an email/letter-writing campaign to persuade and possibly threaten RUSO. **Conspicuously absent** from all of these internal grievances, appeals, and social media postings were allegations that Tudor was prohibited from using the public women's restrooms that were accessible to all females – faculty and students - on SEOSU's campus. In fact, Dr. Tudor's complaint of SEOSU's allegedly inappropriate and discriminatory handling of

her access to intimate facilities in 2007 (all based upon a single conversation with SEOSU's HR Director) was only first brought four (4) years later, when she filed an EEOC charge, (and after she had left SEOSU). Thus, it remains Defendants' position that any discovery or presentation of evidence at trial regarding Dr. Tudor's access to intimate facilities is irrelevant, barred by the statute of limitations, enjoined by the *Texas* injunction, and should be prohibited. However, both Plaintiff and Intervenor disagree. Both have repeatedly and actively pursued discovery regarding Dr. Tudor's access to intimate facilities, and as a result, the *Texas* court ruled its injunction applies here.

III. INTERVENOR'S PENDING MOTION AND APPEAL MILITATE AGAINST LIFTING THE STAY AT THIS TIME.

Plaintiff's motion is also premature in light of Intervenor's pending Motion to Intervene in the *Texas* court. Intervenor seeks to intervene there, and seeks a declaratory judgment by the *Texas* court that it lacks jurisdiction over the parties to, and issues in, the Oklahoma Litigation. In the alternative, Intervenor seeks a determination that the Oklahoma Litigation is not enjoined.⁶ If the *Texas* court grants any of Intervenor's requested relief, it would necessarily affect the discovery, scheduling, briefing, and trial of this case. If such motion is denied, Intervenor plans to appeal that denial to the Fifth Circuit Court of Appeals.⁷ The parties in this case are then faced with the possibility of

⁶ In the *Texas* court, Dr. Tudor seeks a declaratory judgment that this Court's Order denying Defendants' Motion to Dismiss "precludes re-litigation of the scope of Title VII's sex proscription protection as to Tudor, or alternatively deny Tudor's Motion [to Intervene] as moot and find that the Oklahoma Litigation is not enjoined..." *Texas v. U.S.*, [Doc. 87 at 1].

⁷ *Texas v. U.S.*, [Doc. 91 at 2].

proceeding under the current parameters of the preliminary injunction, which could be reversed, modified, or affirmed on appeal. In any event, the United States and Intervenor will undoubtedly seek additional relief to permit them to explore areas and present evidence previously off limits due to the injunction.

CONCLUSION

Plaintiff's motion to lift stay is premature due to the application of the *Texas* court's preliminary injunction to this case, the pending issues briefed (but yet to be addressed) in the *Texas* court, and the appeals by Plaintiff and Intervenor of the *Texas* court's Preliminary Injunction Order and Clarification Order. At a minimum, the stay in this case should remain in place until the *Texas* court has ruled on whether the injunction implicates Title VII, and until Plaintiff has sought further clarification from the *Texas* court as to whether Plaintiff can continue with discovery and/or present at trial any testimony or other evidence relating to Plaintiff's interpretation that Title VII's definition of sex includes gender identity. Instead, Defendants propose that the Court lift the stay for the limited and expeditious purpose of ordering the parties to settlement conference within thirty (30) days. This will enable all parties the opportunity to fully address settlement possibilities without the distractions and time constraints often presented when the parties are struggling to complete discovery, prepare dispositive motions, and work on pretrial pleadings.

For the reasons set forth above, Defendants respectfully request the Court deny Plaintiff's Motion to Lift Stay, with the limited exception of lifting the stay for the purpose of ordering the parties to settlement conference in the next thirty (30) days.

Respectfully submitted,

/s/ Dixie L. Coffey

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November 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 all counsel of record.

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