

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. 15-cv-324-C

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY
SYSTEM OF OKLAHOMA,

Defendants.

**DEFENDANTS' REPLY TO UNITED STATES'
RESPONSE TO DEFENDANTS' SECOND MOTION IN LIMINE**

Southeastern Oklahoma State University ("SEOSU") and The Regional System of Oklahoma ("RUSO") (collectively "Defendants") submit their Reply to Plaintiff United States of America's Response [Doc. 147] to Defendants Second Motion in Limine concerning the proposed expert testimony of Dr. Parker ("Parker") [Doc. 98]. In further support of their Motion, Defendants submit the following reply.

1. The United States of America has failed to show Parker's testimony is relevant.

As the proponent of the proposed expert testimony, Plaintiff, the United States of America (hereinafter "U.S.A."), has the burden of demonstrating the admissibility of Parker's expert testimony. The U.S.A. has not, and cannot meet its burden. Courts have routinely rejected U.S.A.'s argument that whether a candidate "deserved"

tenure is relevant to the pivotal question of whether the candidate was discriminated against. It is undisputed that Parker's proposed testimony will not help the jury in determining whether one or more members involved in the tenure review process lied about their rationale for denying tenure to Dr. Tudor, or whether the tenure decision was discriminatory. This is the question to be determined, and is a question inappropriate for expert testimony under Fed. R. Evid. 702.

By their very nature, tenure decisions are subjective. The U.S.A. does not dispute the well-reasoned, comprehensive analysis set forth in *Goswami v. DePaul University*, 8 F.Supp. 3d 1019 (N.D. Ill. 2014), cited and discussed in Defendants' Second Motion in Limine, [Doc. 98]. Noting "the uniform line of authority explicitly holding that evaluations of scholarship are inherently subjective" and "the absence of fixed, objective criteria for tenure decisions," the *Goswami* court held the proffered experts' testimony failed to provide evidence that the Universities' decision was objectively wrong, much less discriminatory. Thus, the testimony was inadmissible because it did not meet the standards of Rule 702. *Id.* at 1033-35.

Where the expert testimony sought to be introduced addresses the quality of the plaintiff's abilities and qualifications for tenure, the testimony is irrelevant. "Absent evidence of discrimination or substantial departure from academic norms, a university' assessment of a candidate's scholarly excellence is a matter within the professional judgment of a university." *Figal v. Vanderbilt University*, 2013 WL 5459021 (Tenn. Ct.App.2013), denying the use of expert opinion regarding tenure.

Here, despite the U.S.A.'s attempts to argue otherwise, the U.S.A.'s entire justification for Parker's testimony is to convince a jury that Dr. Tudor deserved tenure. The case law makes it clear that this type of testimony is so fundamentally subjective that it is irrelevant, and therefore inadmissible. Dr. Parker's subjective opinions do not meet the reliability standards of 702.

2. The U.S.A. fails to show that Parker's testimony is reliable.

Even if this Court were to recognize an expert in the field of tenure, which the Tenth Circuit has not done, Parker's testimony would still be unreliable. The U.S.A. has not provided any caselaw in its Response so as to support its assertion that Parker's testimony would be reliable. Plaintiff improperly relies on *Siring v. Oregon State Bd. of Higher Educ. ex rel. Eastern Oregon University*, 927 F.Supp. 2d. 1069 (D. Or. 2013) for its contention that Parker's testimony would be reliable. However, that case is readily distinguishable from the case at hand. In *Siring*, the case dealt with termination of a tenure-track professor in the Oregon higher education system. The proposed expert had worked at the University of Oregon for nearly forty years, and possessed "substantial experience in the Oregon University System as a faculty member and member of personnel committees, many professional appointments relating to educational policy and management, and extensive scholarly activities and publications in relevant research areas [which] qualif[ied] [the proposed expert] to opine about tenure-track faculty and evaluation and review policies and procedures in general and the specific evaluation and review of [the plaintiff]." *Id.* at 1074. In addition, all of the universities in Oregon were required to follow the OARS, and their

tenure polices were required to comply with the OARS. The court found that the proposed expert had “significant knowledge and experience in the Oregon University System and in implementing the OARS in the context of tenure reviews, evaluations, appeals, and grievances.” *Id.* at 1075.

Here, Parker has zero experience in the Oklahoma higher education system, the RUSO universities, or even other comparable universities. In contrast to the expert in *Siring*, Parker lacks the personal knowledge and experience needed to make his testimony anything but highly subjective and unreliable. In *Siring*, the expert’s significant personal knowledge and experience in the Oregon University System, including the implementation of its tenure processes, were pivotal to the court’s determination of reliability. Parker has no experience in Oklahoma at all. In addition, Parker lacks the personal experience such as drafting and reviewing tenure policies and advising on tenure policies the expert in *Siring* possessed. The U.S.A. is simply asking this Court to improperly supplant SEOSU’s professional, academic assessment of all the tenure applicants (including Dr. Tudor) with that of Parker’s determination.

Parker’s report is filled with self-serving determinations about whether Tudor should have been granted tenure by subjectively comparing the portfolios of five individuals with the portfolio of Dr. Tudor. The *Siring* Court determined such subjective determinations to be inappropriate, holding an expert may not opine about the unexpressed reasons for the decision makers’ decisions, or the decision makers’ states of mind. *Id.* at 1078.

Here, unlike in *Siring*, Parker is comparing portfolios of professors in a system with which he has zero experience or operational familiarity. Parker has neither been a faculty member or administrator in the Oklahoma higher education system generally, nor in the RUSO or SEOSU systems specifically. The U.S.A. is sponsoring him here to opine without particularized expertise or acceptable reliability that Tudor met SEOSU's standards for tenure, and "should" have been granted tenure based on her comparisons with others. Such speculative testimony is unreliable and would only serve to confuse and unduly prejudice the jury. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590 (1993).

CONCLUSION

The proposed testimony of U.S.A.'s expert, Parker, is unreliable, irrelevant, and unfairly prejudicial. Therefore, it fails to meet the rigorous admissibility standards of Fed. R. Evid. 702. Defendants SEOSU and RUSO respectfully request that this Honorable Court completely bar the use, introduction, admission, and reliance upon the reports, testimony, and opinions of U.S.A.'s proffered tenure expert, Dr. Parker, and grant any further relief this Court deems just and proper.

Respectfully submitted,

/s/ Dixie L. Coffey

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of August 2017, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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