

**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 SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S
MOTION FOR ENTRY OF PROTECTIVE ORDER**

Defendants, Southeastern Oklahoma State University, ("SEOSU" or "University"), and The Regional University System of Oklahoma ("RUSO"), ("Defendants"), pursuant to Fed. R. Civ. P. 26(c), file this Motion for Protective Order to maintain confidentiality of Defendants' settlement agreement with the United States of America ("USA") until after Plaintiff/Intervenor ("Tudor") and Defendants have concluded trial on the merits of this action or otherwise resolved their dispute, whichever occurs first. In support hereof, Defendants submit the following:

INTRODUCTION

1. Dr. Rachel Tudor (“Tudor”) began working for SEOSU in the year 2004. Tudor notified the University that she would be undergoing male-to-female transition in or around the year 2007.

2. After failing to demonstrate her worthiness to receive tenure, Tudor filed multiple internal grievances, and external charges against SEOSU. In addition to formal steps, Dr. Tudor and persons on her behalf took additional steps such as online petitions, writing Wikipedia entries, and comments to the media in an attempt to force SEOSU and RUSO to yield to her demands for tenure, despite her lack of merit.

3. After nearly five (5) years of delay, Plaintiff, USA, filed suit against SEOSU and RUSO pursuant to Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e-2(a) and 3(a), *et seq.* (“Title VII”), alleging two claims, that SEOSU engaged in sex discrimination in their decision not to award Tudor tenure, and retaliation in their non-renewal of Tudor’s employment with the University. Tudor then intervened as an individual.

4. Defendants cooperated in the investigation of Tudor’s claims, but consistently and vehemently maintained that they had treated Tudor fairly and without any unlawful discrimination. Once the Complaints were filed by USA and Tudor in this lawsuit, and litigation began, RUSO and the University maintained their position that Tudor had been treated without any unlawful discrimination.

5. Defendants, the USA, and Tudor engaged in settlement discussions both as part of the EEOC conciliation process, then informally, and then under the

purview of a settlement judge after litigation had been ongoing for some two years. Although Tudor and the Defendants have not yet been able to reach any resolution of their differences, the USA and Defendants have reached an agreement in principle. Tudor is not a party to that agreement.

6. USA has informed Defendants that, absent any Order to the contrary, any settlement agreement document(s) will not be held confidential, and will be readily disseminated to any press/media outlets seeking such materials for publication.

7. USA communicated to Defendants that per 28 CFR § 50.23, USA is not capable of entering into final settlement agreements that are subject to confidentiality agreements and cannot concur with the sealing of such documents.

8. Absent the Protective Order requested by this motion, it is clear that USA will release the full settlement agreement to persons requesting it, including but not limited to Tudor and Tudor's counsel, and representatives from the media.

9. Due to Tudor's history of attempting to use publicity and varied media to influence this matter, including but not limited to Tudor's inclusion of settlement-related communications in pleadings¹, RUSO and the University ask this Court for

¹ "Dr. Tudor, the EEOC, and the United States have worked closely with Defendants since the letter of determination finding fault was issued in September 2012. For example, the parties attempted to conciliate in March 2013. In January 2014 Southeastern initiated settlement talks. In April 2014 mediation was attempted. Lines of communication remained intact for several months thereafter. In February 2015 the United States informed Defendants that it intended to file suit sometime in March if a settlement could not be reached. On March 9, 2015 Defendants' counsel sent a letter to the United States indicating interest in settlement and requested further information. The United States returned a letter to Defendants on March 18.

an Order so that the reliability and impartiality of the jury pool will be preserved. It is anticipated that if Tudor or her agents receive a copy of the USA's agreement with RUSO and the University that she or her agents will disseminate the document immediately. It is anticipated that if USA does not actively publicize the contents of the agreement that it will be forced to release the agreement to members of the media which request it from the USA.

10. This matter has already been reported in the media, and with a trial set for November, it is anticipated that media coverage will only increase in the next two months.

11. Plaintiff's counsel has informed Defendants of their objection to any protective order regarding the settlement agreement. Due to the circumstances regarding the settlement agreement, Defendants have not yet consulted with Plaintiff/Intervenor's counsel regarding this motion.

ARGUMENT AND AUTHORITY

I. DISSEMINATION OF A SETTLEMENT AGREEMENT WOULD UNFAIRLY PREJUDICE DEFENDANTS FROM RECEIVING A FAIR TRIAL WITH AN UNBIASED JURY.

Pursuant to Fed. R. Civ. P. 26(c), Defendants move for this Court to enter a Protective Order prohibiting dissemination of the agreement between Defendants and USA until after Tudor and Defendants have gone to trial or otherwise resolved their claims finally, whichever occurs first.

It was determined by all parties shortly thereafter that a settlement could not be reached; the United States then filed suit." [Doc. 31, p. 24, fn. 17].

“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Communications Inc.*, 435 U.S. 589, 597 (1978) (footnotes omitted). “It is uncontested, however, that the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes.” *Id.* at 598. Courts of appeals have determined that the common law presumption of access applies to documents filed with the court, ***although it does not apply to documents such as settlement agreements not filed with the court***, *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781–83 (3d Cir. 1994) (emphasis added).

In the present case, the need for the entry of a Protective Order, (for a limited amount of time), is to eliminate the potential of unfairly prejudicing the potential jury pool should this matter proceed to trial. Any dissemination of the settlement agreement documents reached between Defendants and USA would greatly prejudice Defendants’ ability to receive a fair trial with an unbiased jury pool.

Despite the voir dire process, Defendants will likely be unable to seat an impartial jury that has not heard of (or read the entirety of) the settlement agreement if it is allowed to be made public. Voir dire questions regarding the impact of settlement, and thoughts on settlement agreements, would immediately suggest to potential jurors that Defendants already accepted liability for this matter. That would further prejudice jurors against Defendants at trial. Even if Defendants are

capable of seating a jury that may not have heard of the settlement, terms of the agreement are likely to be available in numerous forms, including on the internet, unless there are no protections in place to prevent the distribution of the agreement. Given the current national dialogue about the issues surrounding transgender access to such things as school restrooms and service in the USA's military, as well as high profile stories in the tabloids about certain transgender celebrities, it appears likely (if not guaranteed) that potential jurors will learn of the settlement agreement.

Defendants are not seeking a protective order governing the settlement agreement for an unlimited time. Instead, Defendants seek a limited order prohibiting the dissemination and/or disclosure of any settlement agreement documents, or any terms of contained therein, until Tudor and Defendants conclude trial or otherwise resolve their claims, whichever occurs first.

II. PLAINTIFF USA'S ARGUMENT AGAINST CONFIDENTIALITY IS WITHOUT MERIT.

USA has maintained the position that per 28 CFR § 50.23, USA is not capable of entering into final settlement agreements that are subject to confidentiality agreements and cannot concur with the sealing of such documents. However, contrary to that asserted position, the USA acting through its Department of Justice ("DOJ") has entered into settlement agreements in civil suits which contain confidentiality provisions. *See Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994); *United States v. Erie County, New York*, 763 F.3d 235 (2nd Cir. 2014); *E.E.O.C. GMT, LLC*, 2012 WL 2871789 (not reported in F.Supp.2d (2012)).

Specifically, USA relies on the language set forth in 28 CFR § 50.23(a) which states:

It is the policy of the Department of Justice that, in any civil matter in which the Department is representing the interests of the United States or its agencies, it will not enter into final settlement agreements or consent decrees that are subject to confidentiality provisions, nor will it seek or concur in the sealing of such documents. This policy flows from the principle of openness in government and is consistent with the Department's policies regarding openness in judicial proceedings (see 28 CFR 50.9) and the Freedom of Information Act (see Memorandum for Heads of Departments and Agencies from the Attorney General *Re: The Freedom of Information Act (Oct. 4, 1993)*).

However, subsection (b) of 28 CFR § 50.23 maintains there are circumstances that warrant an exception to the restriction set forth above in subsection (a):

There may be rare circumstances that warrant an exception to this general rule. In determining whether an exception is appropriate, any such circumstances must be considered in the context of the public's strong interest in knowing about the conduct of its Government and expenditure of its resources. The existence of such circumstances must be documented as part of the approval process, and any confidentiality provision must be drawn as narrowly as possible. Non-delegable approval authority to determine that an exception justifies use of a confidentiality provision in, or seeking or concurring in the sealing of, a final settlement or consent decree resides with the relevant Assistant Attorney General or United States Attorney, unless authority to approve the settlement itself lies with a more senior Department official, in which case the more senior official will have such approval authority.

28 CFR § 50.23(b).

Clearly subsection (b) allows for an exception when USA weighs specific factors including the public's interest in access and knowing government conduct weighed against the particular circumstances of that case, with the proposed confidentiality

provision being narrowly tailored. *Id.* Again, Defendants are not seeking a permanent protective order for this agreement, only a temporary order until the resolution of the remainder of the issues at bar with Tudor.

Regardless of whether the USA enters into a confidentiality provision, 5 U.S.C. § 552a (the “Privacy Act”) regulates the disclosure of settlement agreements that involve individuals and have not been made part of the court record. 28 CFR § 50.23(c).

CONCLUSION

For the reasons stated above, Defendants maintain that Plaintiff USA’s rigid adherence to 28 CFR §50.23 is without merit, overly restrictive, and does not account for the enumerated exceptions within the statute. Accordingly, Defendants move for this Court to enter a Protective Order prohibiting dissemination of the settlement agreement between Defendants and USA to any press/media outlet until after Tudor and Defendants have gone to trial or resolved their claims, whichever occurs first.

A copy of the proposed Protective Order has been forwarded to the Court as required by LCvR5.5.

WHEREFORE, Defendants pray that the Court enter the attached protective order and any and all other relief the Court deems appropriate.

Respectfully submitted,

/s/ Timothy M. Bunson

DIXIE L. COFFEY, OBA #11876

JEB E. JOSEPH, OBA #19137

KINDANNE JONES, OBA #11374

TIMOTHY M. BUNSON, OBA#31004

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

Email: dixie.coffey@oag.ok.gov

Email: jeb.joseph@oag.ok.gov

Email: kindanne.jones@oag.ok.gov

Email: tim.bunson@oag.ok.gov

Attorneys for Defendants Southeastern

Oklahoma State University and The Regional

University System of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 30th 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:

Meredith Burrell
Valerie Meyer
Shayna Bloom
US DEPT. OF JUSTICE CIVIL
RIGHTS DIVISION-DC
950 Pennsylvania Avenue NW Rm 49258 PHB
Washington, DC 20530
Email: meredith.burrell@usdoj.gov
Email: valerie.meyer@usdoj.gov
Email: shayna.bloom@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

Ezra Young
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 1121
Email: ezraiyoung@gmail.com
Attorney for Intervenor Plaintiff

Allan K. Townsend
c/o Kay Sewell, Assistant U.S. Attorney
U.S. Attorney's Office for the
Western District of Oklahoma
210 W. Park Ave., Ste. 400
Oklahoma City, OK 73102
Email: allan.townsend@usdoj.gov
Attorney for United States of America

/s/Timothy M. Bunson

Timothy M. Bunson