

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

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|---------------------------|---|--------------------------|
| 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. |) | |

**PLAINTIFF/INTERVENOR’S MOTION IN LIMINE TO EXCLUDE
DEFENDANTS’ WITNESS HOLLY NEWELL
WITH INCORPORATED BRIEF**

NOW COMES Plaintiff/Intervenor, Rachel Tudor (Tudor), by and through undersigned counsel, and for her Motion in Limine to Exclude Defendants’ Witness Holly Newell, states as follows:

I. Background Information

Plaintiff/Intervenor brought this action against Defendants’ Southeastern Oklahoma State University (Southeastern) and Regional University System of

Oklahoma (RUSO) regarding sex discrimination that she suffered as an employee at Southeastern, up to and including the denial of tenure and her non-renewal with the university. Following her separation from employment with Southeastern, Tudor applied at several universities and colleges, including Seminole State College, wherein she interviewed with Holly Newell. Neither Holly Newell, nor Seminole State College are parties to this action.

II. Argument

A. Holly Newell’s testimony must be excluded as not relevant pursuant to Fed. R. Evid. 401

The Federal Rules of Evidence state that “[e]vidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” Fed. R. Evid. 401. Holly Newell’s testimony, to the extent it is proffered to support Defendants’ claims that its actions were non-discriminatory, regarding Tudor’s subsequent employment application and interview with Seminole State College is not relevant at all. Unless Defendants have access to a time machine, there is no way the Defendants could have used that knowledge or gained it at the time Tudor was applying for tenure at Southeastern.

B. Tudor’s mitigation efforts are not admissible as after-acquired evidence

In special circumstances, employers may proffer so-called “after-acquired evidence” to limit liability and damages. After-acquired evidence is evidence of the employee’s wrongdoing that comes to light after the date of an adverse action that,

if known by the employer, might have served as a nondiscriminatory or nonretaliatory rationale supporting the adverse action. *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 360 (1995).

The Tenth Circuit explicates the two-step process district courts should undertake to apply *McKennon* in *Perkins v. Silver Mount. Sports Club and Spa, LLC*, 557 F.3d 1141 (10th Cir. 2009). First, the employer must establish that the “wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.” *Perkins*, 557 F.3d at 1145–46 (quoting and citing *McKennon*, 513 at 362–63; see *Ricky v. Mapco, Inc.*, 50 F.3d 874, 876 (10th Cir. 1995) (employer must not only show it was unaware of the misconduct, but that it was “serious enough to justify discharge” and that it would have discharged the employee had it known about the misconduct))). Second—and only after the employer has satisfied the first step—the after-acquired evidence may be considered only to limit the damages remedy available to the employee. *Perkins*, 557 at 1146–47 (citing *McKennon*, 513 U.S. at 362). Moreover, there is no absolute right to introduce after-acquired evidence under *McKennon*. *Perkins*, 557 F.3d at 1148.

Here, Defendants are seeking to have Holly Newell testify relating to Tudor’s application and interview process for job she sought after Defendant’s separated her from employment at Southeastern. In effect, they argue Tudor’s mitigation efforts should be converted to after-acquired evidence, which they appear to argue both

settles her merits claims and, in the alternative, totally cuts off Tudor's recovery if she prevails on the merits. Not so.

First, Tudor's mitigation efforts are not admissible as after-acquired evidence. In the case at bar, Defendants do not accuse Tudor of committing wrong-doing at all at Southeastern let alone accuse her of misconduct "serious enough to justify discharge" as is required by *Ricky*, 50 F.3d at 876. Thus, the evidence is not admissible as after-acquired evidence.

Second, Defendants have failed to demonstrate how Tudor's mitigation efforts relate to their proffered nondiscriminatory and nonretaliatory rationales. For after-acquired evidence be admitted, the employer must articulate how the after-acquired evidence—based on other evidence in the record—justifies the adverse action(s) it took. *Perkins*, at 1148. Of course, bare "lawyer argument is not admissible evidence." *Id.* Here, Defendants have failed to show (and cannot show) the relevance of Tudor's mitigation efforts to Defendants' decisions to deny Tudor's 2009-10 application for tenure and promotion and their refusal to let her reapply in the 2010-11 cycle. Tudor has only ever sought tenure and promotion at Southeastern. Given the foregoing, Defendants fail under the first step of *McKennon*. See *Perkins*, 557 F.3d at 1145.

Wherefore, Plaintiff/Intervenor Rachel Tudor respectfully prays that this Court enter the following Order:

- A. Excluding the testimony of Holly Newell at trial of this cause;

- B. Alternatively, limiting Newell's testimony explicitly to mitigation of damages only;
- C. Ordering any and all other relief this Court deems fair and just.

Dated: October 10, 2017

/s/ Brittany M. Novotny
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CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2017, 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/ Brittany M. Novotny
Brittany M. Novotny (OBA 20796)