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

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 DR. RACHEL TUDOR'S TRIAL BRIEF

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Dr. Rachel Tudor submits the following Trial Brief to the Court in accordance with the Court's Order (ECF No. 142). Dr. Tudor would show the Court as follows:

Factual Background

Dr. Tudor claims in this suit that her former employers, Southeastern Oklahoma State University ("Southeastern") and the Regional University System of Oklahoma ("RUSO") (or collectively "Defendants"), subjected her to hostilities over a four-year period giving rise to a hostile work environment, discriminated against her and retaliated against her in violation of Title VII of the Civil Rights Act of 1964, as amended.

Tudor's start at Southeastern. Tudor was hired as a tenure-track assistant English professor by Southeastern in 2004. At the time of hire, Tudor presented herself as male and went by a stereotypically male name. At the time of hire, Southeastern and Tudor's colleagues in the English, Humanities, and Languages Department ("English Department") found Tudor to be the best qualified person for her job and raised no concerns about her ability to later pursue tenure and promotion at Southeastern.

Gender transition. In early Summer 2007, Tudor advised Southeastern administrators that she planned to start presenting herself as female and using the stereotypically female name "Rachel" starting in the Fall 2007 term.

Upon disclosure of her gender transition to administrators, Tudor was subjected to conditions on her employment. Specifically, HR Director Cathy Conway told Tudor that Southeastern administrator Douglas McMillan had inquired as to whether Tudor could be summarily fired for being transgender. Conway then told Tudor in order to keep her employment, she would be relegated to use only single-stall unisex, handicap restrooms on campus (excluding her from the women's multi-stall restrooms), and that her dress and makeup would be restricted.

Around this same time, Tudor learned that the health benefits plan Defendants provided her as a fringe benefit contained a categorical exclusion on all treatment transgender persons seek for gender dysphoria. Under the terms of the exclusion, only transgender persons were specially deprived of treatment coverage for counseling, hormones and related blood work, and reconstructive surgeries otherwise covered for others on the same plan.

Tudor was subjected to these terms of her employment every day until her termination. Tudor complained on and off about these hostilities over time to colleagues and others.

Evidence at trial will show that Tudor was subjected to the restroom restriction and that Defendants' health plan contained the illicit exclusion (indeed, they have already admitted as much). Evidence at trial will also show that other incidents and discrete acts Tudor grieves as discriminatory

and retaliatory, also contributed to the hostile work environment at Southeastern. Evidence at trial will also show that none of the hostilities Tudor endured were redressable under Defendants' policies in place at the time. Evidence at trial will also show that, after Tudor's departure, Defendants adopted new policies which expressly protect transgender people from hostilities, expressly allow restroom access according to one's presented gender, have taken steps to publish these new policies to their employees, and that Defendants' health plan no longer contains the illicit exclusion.

Standards for promotion and tenure. While Tudor worked at Southeastern, tenure and promotion to associate professor was awarded where the candidate met specific departmental guidelines and Defendants' (administrators') own standards. Both sets of standards required a demonstration that the applicant was qualified in teaching, scholarship, and service; both standards weighed teaching and required a showing in each criteria but only required that the candidate be "excellent" in two of the three criteria. During this period, scholarship could be demonstrated by specific activities keyed to the discipline, including peer review articles, editing activities, presentations, and creative activities. Similarly, service could be demonstrated by participation on work intensive departmental committees, service on the Faculty Senate and its committees, and other service work such as presentations at Southeastern.

Tudor's 2009-10 application. Tudor applied for promotion and tenure during the 2009-10 cycle. Tudor's application was approved by her departmental committee and her department chair, both of which found her portfolio merited tenure and promotion under the department's specific standards and under Defendants' policies on promotion and tenure. From there Tudor's application went on to the next step of review—proceeding from the Dean, to the Vice President of Academic Affairs, to the President.

Dean Lucretia Scoufos rejected Tudor's application and refused to tell Tudor on what basis her application was denied. Vice President for Academic Affairs Douglas McMillan (the same person who initially inquired as to whether Tudor could be fired for being transgender) also rejected Tudor's application and refused to tell Tudor why. Tudor sent both Scoufos and McMillan letters of complaint—both refused to discuss the matter with her despite policies, which obligated them to do so. Tudor then appealed Scoufos' and McMillan's refusal to provide their rationales to Tudor to the Faculty Appellate Committee ("FAC1"). Shortly thereafter, the FAC1 ordered Scoufos and McMillan to share their rationales with Tudor. The Southeastern administration refused to comply.

After the FAC1's order—but before the President rendered a decision on Tudor's 2009-10 portfolio—Scoufos pulled Tudor and her department chair John Mischo into a meeting and told Tudor to withdraw her 2009-10

application and that she (Tudor) must make a decision immediately that same day. Scoufos implied Tudor might be given tenure in the next cycle if she complied; Scoufos implied Tudor might not be permitted to reapply next cycle if she did not accept the "offer." Tudor asked for Scoufos to put the "offer" in writing, but Scoufos refused. Tudor advised Scoufos that she (Tudor) felt that without the "offer" in writing she could not withdraw her application and that she (Tudor) feared retaliation—specifically that the administration would block her attempts to reapply in the next cycle. Later that same day, Tudor wrote a letter to Scoufos advising that she would not withdraw her application and that she feared retaliation.

After the meeting with Scoufos, President Larry Minks denied Tudor's 2009-10 application and advised Tudor that his (Minks') rationales would be shared with her by McMillan sometime later. In a memorandum to Tudor dispatched in June 2010, McMillan claimed that Minks denied Tudor's application because she was deficient in scholarship and service (he admitted she was qualified as to teaching). As to scholarship, McMillan claimed Tudor had two publications and a bevy of other "activities" but he found that (by a metric he himself devised and not otherwise articulated in Defendants' policies), because McMillan deemed only three of five of Tudor's scholarship activities to be "excellent and noteworthy," her scholarship was deficient. As to service, McMillan claimed, that Tudor's service on several departmental

committees and the Faculty Senate was deficient (for inexplicable reasons McMillan did not count or remark on other service activities such as a presentation she made at Southeastern). The evidence at trial will show that Minks/McMillan's rationales were not believable to Minks/McMillan at the time and are otherwise unworthy of credence.

More formal grievances and complaints. Finding the circumstances of the administration's denial of her 2009-10 application to be suspicious and having concerns about McMillan's bias against her, Tudor filed discrimination and due process complaints (one of which was filed with Faculty Appellate Committee ["FAC2"]; one of which was filed with Southeastern's Affirmative Action Officer, Claire Stubblefield) at Southeastern in late August 2010 challenging the 2009-10 cycle decisions. Tudor simultaneously filed a discrimination charge with the U.S. Department of Education (later referred to the U.S. Equal Employment Opportunity Commission).

Tudor's attempted 2010-11 application. In early Fall 2010, Tudor restarted the application process for the 2010-11 cycle. By this time, Tudor had completed more service to Southeastern and had substantially improved her scholarship—now having eight peer review articles published or accepted for publication (six more than she had in the 2009-10 cycle).

Evidence submitted at trial will show that Tudor was more than qualified for promotion and tenure at this juncture.

Retaliation and interference of process. Shortly after Tudor engaged in protected activities (e.g., filing her complaints and grievances internally at Southeastern and externally with federal agencies, as well as actively meeting with and participating in investigations), Defendants interfered with the FAC2 process. Among other things, Stubblefield (who was purportedly investigating Tudor's discrimination complaint in a separate process) and RUSO general counsel Charles Babb attended the FAC2 meeting and directed FAC2 on what they could and could not do with Tudor's FAC2 appeal, ultimately advising them that Tudor's appeal could not be heard by FAC2 because it was not due process complaint. FAC2 was further advised that to the extent Tudor's appeal pointed to discrimination, FAC2 also could not hear it (setting up Tudor's discrimination issues to only be assessed by Stubblefield). Shortly thereafter, FAC2 dismissed Tudor's appeal.

Also close in time to Tudor's protected activities, Minks delegated presidential authority to McMillan to send Tudor a memorandum. In an October 5, 2010 memorandum to Tudor, McMillan claimed that though there were no rules against reapplication—Tudor would not be permitted to reapply in the 2010-11 cycle because, he claimed, her application would not be successful (despite the fact he had not reviewed it yet) and her

reapplication would otherwise "inflame the relationship between the faculty and administration." The evidence at trial will show that Minks/McMillan's rationales for barring Tudor's reapplication were not believable by him at the time and are otherwise unworthy of credence.

Sham investigations at Southeastern other failures to redress Tudor's complaints. Shortly after Minks/McMillan barred Tudor's 2010-11 application, Tudor amended her internal complaints, filed a new appeal with the Faculty Appellate Committee ("FAC3") seeking to redress the bar on reapplication, and otherwise complained.

Over the course of the next several months, the Faculty stood strongly behind Tudor. The FAC3 ordered the administration to allow Tudor to reapply in the 2010-11 cycle. The Faculty Senate passed a resolution ordering the administration to allow Tudor's reapplication (also ignored by the administration). (Close in time, the Faculty Senate also bestowed an honor on Tudor, recognizing her excellence in Scholarship based on the merit of her scholarly work up to that point.) And third parties, including professors, a professional association of professors, more than 4000 signatories of an online petition, an Oklahoma state senator, and others voraciously complained about Tudor's treatment publicly and/or directly to Defendants.

Despite Tudor's complaints and grievances and the obvious consternation of Southeastern's faculty and the intervention of third parties,

Defendants refused to meaningfully consider Tudor's plight let alone fairly investigate and/or adjudicate the matters she grieved.

Rather than fairly investigating Tudor's grievances and complaints, Defendants assigned investigatory duties to McMillan's close friend at Southeastern, Claire Stubblefield, whom, at various points, sought out legal opinions stating that transgender people were not protected by law or policy, fed sensitive information about her investigation to the respondents of Tudor's grievances, and shared working drafts of and asked McMillan to review and edit her investigatory report and make any corrections he saw fit. Unsurprisingly, Stubblefield's final report found Tudor did not face discrimination or retaliation at Southeastern. When Tudor appealed these findings to President Minks—who sat over the appeal as final appellate reviewer despite the fact that he was a respondent—he sided with Stubblefield. Defendant RUSO did not "investigate" Tudor's plight at all prior to her separation from Southeastern.

As to FAC3, after FAC3 ordered the Southeastern administration to allow Tudor to reapply in the 2010-11 cycle (finding no rules or justification for not allowing her reapplication), the administration short-circuited the order. Among other things, the administration adopted new rules mid-stream, creating an appeal level over FAC3 where the President could disapprove of FAC3's order. Several things are patently unseemly here—the

new rules adopted for Tudor's appeal were never approved by the Faculty Senate as was required at the time, those new rules have *never* been used in any other appeal (before or since), and the new rules allowed the President to sit over FAC3 as final appellate reviewer, despite the fact that *his own actions* (authorizing McMillan's October 2010 memo barring Tudor's reapplication) were the subject of the appeal.

Tudor separated from Southeastern at the end of May 2011, pushed out by the Southeastern administration because she finished her seventh year without winning tenure.

Relief sought. Dr. Tudor is seeking reinstatement at Southeastern as an associate professor with tenure, lost wages and benefits, other compensatory damages, reasonable attorneys' fees, costs, pre-judgment and post-judgment interest, injunctive relief, and any other relief this Court deems necessary.

Legal Basis of Dr. Tudor's Claims

Tudor's claims arise under Title VII of the Civil Rights Act, as amended and codified at 42 U.S.C. § 2000e-2(a) ("Title VII"). Title VII prohibits discrimination "because of . . . sex," which reaches discrimination against persons whom fail to conform with sex stereotypes, such as transgender persons. *See* Order, ECF No. 34 at 5–6 (holding that Tudor is protected by Title VII). Title VII also prohibits hostile work environments and retaliation.

Environmental claim. Tudor intends to prove her environmental claim by presenting evidence that she endured hostilities because of her presented female gender after her gender transition. Defendants have no defense to Tudor's claim because their harassment and discrimination policies in place at the time did not reach the kinds of hostilities Tudor endured. (See also *infra* 14–16.)

Discrimination and retaliation claims. Tudor intends to prove her claims by presenting evidence of pretext. In *Reeves v. Sanderson Plumbing, Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court held,

> In appropriate circumstances, the trier of fact can reasonably infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose. Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonesty about a material fact as 'affirmative evidence of guilt'. Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation.

Id. at 147.

The circumstances of this case make it appropriate for the jury to infer that Defendants are dissembling to cover up discriminatory and retaliatory purposes behind their decision to deny Tudor's 2009-10 application and their decision to refuse to allow Tudor to reapply in the 2010-11 cycle and her eventual non-renewal and termination in Spring 2011. Tudor contends that

the evidence proves Defendants lied about the reasons for denying Tudor's 2009-10 application, which is a material fact in this case. Tudor also contends that decision-makers Scoufos and McMillan (the latter of whose opinions were adopted by President Minks at multiple stages) are prejudiced against Tudor because of her gender and otherwise retaliated against her for her protected activities.

Evidence of Subsequent Remedial Measures is Relevant and Admissible

Since Tudor's separation from Southeastern, Defendants have dramatically changed policies that touch on issues pertinent to her environmental claim. For example, they have adopted new anti-harassment and nondiscrimination policies which expressly protect transgender people and expressly put their employees on notice of this fact, changed their health plan to remove the transgender categorical exclusion, and adopted a policy expressly setting forth that transgender persons may use restrooms which match their presented gender. Evidence of changed policies at Southeastern should be admitted into evidence.

Federal Rule of Evidence 407 generally prohibits introduction of evidence of subsequent remedial measures where they are introduced to prove negligence or culpable conduct. However, courts may admit such evidence for "another purpose." Fed. R. Evid. 407. There are two situations in

which Tudor is entitled to introduce the Defendants' changed policies into evidence, both of which are permissible for an "alternative purpose" pursuant to Rule 407.

Feasibility of alternative measures. Tudor desires to introduce Defendants' changed polices as evidence in affirmative support of her hostile work environment claim.[1] Tudor argues that Defendants' changed policies show that it was feasible for Southeastern to have different policies (such as those now in place) during Tudor's employ. This limited purpose falls within the exception for admissibility of subsequent remedial measures carved out in Rule 407.[2]

In the event that Defendants argue that *Stahl v. Bd. of Cty. Comm'rs of the United Gov't of Wynandotte Cty./Kan. City, Kan.* (10th Cir. 2004) bars

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[1] Taking her environmental claim under a disparate impact theory, Tudor need only point to the existence of policies giving rise to a hostile environment that had a disparate impact on persons with her protected characteristic. Defendants' only viable rebuttal to Tudor is to argue that less burdensome, alternative policies were infeasible. *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009). In this case, Defendants' changed policies evidence the feasibility of adopting alternative policies at Southeastern.

[2] *See, e.g.*, *Adams v. City of Chicago*, 469 F.3d 609, 612 (7th Cir. 2006) (recognizing exception in Rule 407 allowing introduction of evidence of subsequent remedial measures where introduced in support of disparate impact theory of claim because such evidence is offered for the purpose of proving the feasibility of precautionary measures); *Estate of Hamilton v. City of New York*, 627 F.3d 50, 54 n.3 (2d Cir. 2010) (in context of Title VII disparate impact theory claims, Rule 407 should not foreclose introduction of evidence of subsequent remedial measures where they are introduced to prove feasibility of precautionary practices or alternative practices).

admission of Defendants new policies, Tudor responds that the case at bar is plainly distinguishable. In *Stahl*, the Tenth Circuit excluded evidence in an employment discrimination case where there was no disparate impact theory at play and the employee failed to point to the evidence's relevance to a particular claim. *Stahl*, 101 Fed.Appx. 316, 321–22 (10th Cir. 2004). Here, Tudor has shown that she seeks to admit Defendants' new policies in support of a particular claim asserted (her hostile work environment claim), she has explained to the Court how and under what theories Defendants' new policies are relevant to her claim (thereby satisfying the relevancy requirement), and Tudor does not otherwise seek to prove culpable conduct through admission of Defendants' new policies. *See also Adams*, 469 F.3d at 612 ("A subsequently enacted method bears on the availability of the alternative method at an earlier time. Because we must [in the context of a disparate impact claim] discuss the availability of an alternative method, this situation falls within the ambit of the exception contained in Rule 407 . . . .").

Rebutting Defendants'* Faragher/Ellerth *defense.[3] At trial, Defendants are likely to point to their discrimination, harassment, and other policies in place during Tudor's tenure at Southeastern as a basis to satisfy

[3] The *Faragher/Ellerth* defense is an affirmative defense against hostile work environment claims. It takes its name from two seminal U.S. Supreme Court cases—*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).

the first element of the *Faragher/Ellerth* defense.[4] If Defendants raise this defense, Tudor desires to point to the Defendants' new policies to show that the policies in place during her tenure at Southeastern were deficient and thus Defendants cannot satisfy the first prong of the *Faragher/Ellerth* defense.[5]

Use of Defendants' new policies to rebut Defendants' invocation of the *Faragher/Ellerth* defense is appropriate under Rule 407.[6] If Defendants invoke *Faragher/Ellerth*, they will necessarily point to the existence of

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[4] Under *Faragher/Ellerth*, an employer may avoid liability for hostilities it failed to redress where it establishes two elements: (1) the employer exercised reasonable care to prevent and promptly correct any statutorily prohibited harassment, and (2) the employee unreasonably failed to take advantage of preventive or corrective opportunities provided by the employer. *Stapp v. Curry Cty. Bd. Comm'rs*, 672 Fed.Appx. 841 (10th Cir. 2016). *See also Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013) ("These two elements are designed to encourage forethought by employers and saving action by objecting employees.").

Traditionally, the first element of the *Faragher/Ellerth* defense is met where the employer points to its corrective policies in place at the time hostilities were sown. *See, e.g.*, *Debord*, 737 F.3d at 653 ("an employer may defeat liability by showing it took reasonable steps to avoid a hostile workplace by adopting policies available to employees to report harassment").

[5] An employee can rebut the employer's showing by pointing to evidence that the employer's policies were deficient because they failed to expressly identify the kind of harassment complained of and/or otherwise fail to alert employees to the employer's interest in correcting the kind of harassment suffered by the employee. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72–73 (1986).

[6] Rule 407 does not expressly state that evidence of remedial measures may be introduced to rebut a defense. However, the "list of permissible uses in Rule 407 is illustrative, not exclusive. 23 Fed. Prac. & Proc. Evid. § 5290 (1st ed.).

Southeastern's discrimination and harassment policies at the time of Tudor's employment. At that juncture, Rule 407 allows Tudor to point to Defendants' new policies to rebut Defendants' evidence. This is so, because Defendants' new polices would be used for the narrow purpose of apprising the jury of the relevant prior condition of Southeastern's policies and Defendants' new policies would also disabuse the jury of any misleading impressions concerning the effectiveness of prior policies generally or their coverage of sex stereotype discrimination hostilities specifically[7]. Construing Rule 407 in this manner is sensible. *See Rimkus v. Northwest Colorado Ski Corp.*, 706 F.2d 1060 (10th Cir. 1983) (upholding admission of evidence of subsequent remedial measures for the limited purpose of plaintiff rebutting defendant's proffer of evidence which, left unredressed, would put plaintiff in position of "contending with unrefuted" evidence defeating his claim).

Defendants' Promotion of Other Candidates Does Not Defeat Tudor's Discrimination Claim

[7] Under binding Tenth Circuit precedent, Tudor is required to do more than merely claim that the policies in place during her tenure were deficient—she must directly point to evidence of their deficiencies. *See, e.g.*, *Debord v. Mercy Health Sys. of Kan., Inc.*, 737 F.3d 642, 653 (10th Cir. 2013) (holding employee must do more than merely allege she endured harassment despite existence of employer's policies; going on to imply that pointing to deficiencies in policies is a necessary showing where employer claims its policies satisfy the first element of *Faragher/Ellerth*).

In its yet fully briefed summary judgment motion, Defendants argue for the first time that Dr. Tudor cannot succeed on her discrimination claim because both females and males were promoted around the time of the 2009-10 application cycle (ECF No. 177 at 20). However, Tudor need only prove that she was discriminated against because of *her* gender; she need not prove that Defendants did not discriminate against others because of their genders.

In *Perry v. Woodward*, 199 F.3d 1126 (10th Cir. 1999), plaintiff, a Hispanic woman, was terminated and replaced by another Hispanic woman. *Id.* at 1131 (noting that the individual who replaced the plaintiff was Hispanic); *see also id.* at 1135 (noting the plaintiff was also Hispanic). The district court granted the defendants' motion for summary judgment because, among other reasons, the court found the plaintiff's replacement was a minority. *Id.* at 1130. On appeal, the defendants argued that the plaintiff "must show that the individual who was hired to replace her was not Hispanic." *Id.* at 1135. The Tenth Circuit rejected this argument and reversed the district court's order granting summary judgment.

The *Perry* Court provided an in-depth analysis of this issue. The Court explained that, "the inflexible rule advocated by Defendants is untenable because it could result in the dismissal of meritorious claims." *Id.* at 1137. For example:

> Defendants' rule would preclude suits against employers who replace a terminated employee with an individual who shares her protected attribute only in an attempt to avert a lawsuit. It would preclude suits by employers who hire and fire minority employees in an attempt to prevent them from vesting in employment benefits or developing a track record to qualify for promotion. It would also preclude a suit against an employer who terminates a woman it negatively perceives as a 'feminist' and replaces her with a woman who is willing to be subordinate to her male co-workers or replaces an African–American with an African–American who is perceived to 'know his place.' Although each of these situations involves wrongfully-motived terminations, under the rule advocated by the Defendants, the terminated employee would be unable to meet the prima facie burden. **Such a result is unacceptable.**

Id. (emphasis added).

Tudor's Mitigation Efforts Are Relevant to Damages, But Irrelevant to Her Merits Claims

Tudor has filed a motion *in limine* relating to Defendants' attempts to construe Tudor's job search and mitigation evidence as probative of her merit (or, in their view, meritlessness) during the 2009-10 and 2010-11 application cycle at Southeastern. As Tudor argues in her motion, this evidence is immaterial and irrelevant to Tudor's merit claims and should be excluded save for the limited purpose of resolving damages.

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, 362–63 (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 claim that evidence of Tudor's mitigation efforts are probative of the merit of her 2009-10 and 2010-11 tenure and promotion applications at Southeastern (Defs. SJ Mot., ECF No. 177 at 7–8 ¶¶ 26–33 ; *id.* at 22). In effect, they argue Tudor's mitigation efforts should be converted

to after-acquired evidence, which they claim 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. Her applications for tenure-track jobs (and other jobs) and her post-Southeastern job experiences are not equivalent to the application process for tenure and promotion at Southeastern. Given the foregoing,

Defendants fail under the first step of *McKennon*. *See Perkins*, 557 F.3d at 1145.

The only thing Tudor's mitigation efforts might shed light on is a failure to hire claim where there is some question regarding whether an application was ever made at Southeastern. *See Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1281 (10th Cir. 1999). But here, the fact that Tudor actually applied in 2009-10 and that she attempted to apply in the 2010-11 cycle are not disputed. *See Anaeme*, at 1281 (application evidence only relevant where it touches directly on proffered nondiscriminatory rationales). Additionally, the case at bar is distinguishable from *Anaeme*, as the applications admitted into evidence there were applications the prospective employee claimed he submitted to the employer he accused of EEO violations, where-as the applications and personnel materials Defendants seek to introduce here are from prospective employers and Tudor's immediate former employer after Southeastern, Collin College.

Third, even if Tudor's mitigation efforts were to be deemed a form of after-acquired evidence, at most, such evidence cuts off or limits relief to the employee—it does not and cannot defeat a merits claim. At most, after-acquired evidence imposes a limit on damages. *See McKennon*, 513 U.S. at 358 ("It would not accord with this scheme if after-acquired evidence of

wrongdoing that would have resulting in termination operates, in every instance, to bar all relief for an earlier violation of the Act.").

Requested Jury Instruction on Pretext

Tudor has included a proposed jury instruction on pretext in this case. It is Tudor's contention that an instruction on pretext must be given in this case, or it will result in reversible error pursuant to *Townsend v. Lumbermens Mut. Casulty Co.*, 294 F.3d 1232 (10th Cir. 2002).

Generally, "the *McDonnell Douglas* burden-shifting analysis drops away entirely once the case has gone to trial." *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1228 n.8 (10th Cir. 2000). However, the *Townsend* Court held that a pretext instruction is required in certain circumstances "where, as here, a rationale finder of fact could reasonably find the defendant's explanation false and could 'infer from the falsity of the explanation that the employer is dissembling to cover up a discriminatory purpose." *Id.* at 1241 (cleaned up).

In *Townsend*, the trial court denied plaintiff's motion for a new trial, and the Tenth Circuit reverse because the plaintiff was entitled to a pretext instruction. As per the *Townsend* Court, the plaintiff "presented evidence from which the jury could reasonably have found that [the employers'] stated reasons for [the adverse actions] were pretextual." *Id.* at 1242–43. It went on to observe that, "it is difficult to understand what end is served by reversing

the grant of summary judgment for the employer on the ground that the jury is entitled to infer discrimination from pretext . . . if the jurors are never informed that they may do so." *Id.* at 1238 (cleaned up). Based on this authority, a pretext instruction is required if a jury can reasonably conclude that the employer's stated reason for an adverse employment action is pretextual.

Assuming that the Court denies Defendants' motion for summary judgment on Tudor's sex discrimination and retaliation claims (ECF No. 177), a pretext instruction is appropriate. If Tudor survives summary judgment, the Court is likely to find Tudor has produced evidence from which a reasonable inference could be drawn that Defendants' proffered reasons for denying Tudor tenure in the 2009-10 cycle and refusing to let her reapply in the 2010-11 cycle were pretextual. *See, e.g.*, *Edwards v. Okla.*, 2017 WL 401259, at *3–4 (W.D.Okla. 2017) (Cauthron, J.) (denying summary judgment because the Court found evidence of pretext sufficient to send claim on to the jury); Order, ECF No. 163 at 3 (holding Parker's testimony "will be helpful to the jury in evaluating the veracity of Defendants' stated reasons for denying Dr. Tudor tenure.").

Tudor's Counsel is Entitled to Ask Leading Questions of Adverse Witnesses

Typically, leading questions should not be used on the direct examination of a witness, but are ordinarily permitted on cross-examination.

See Fed. R. Evid. 611(c). Tudor's counsel may call some witnesses as adverse or hostile witnesses. When a party calls (a) a hostile witness, (b) an adverse party, or (c) a witness identified with an adverse party, leading questions may be used on direct examination. *Id.*. *Accord* Fed. R. Evid. 611(c) advisory committee notes. *See also United States v. Mora-Higuera*, 269 F.3d 905, 912 (8th Cir. 2011); *Elgabri v. Lekas*, 964 F.2d 1255, 1260 (1st Cir. 1992) (noting that a plaintiff may use leading questions on the direct examination of an adverse witness). The reserve is also true: When the adverse party's counsel is questioning that witness on "cross-examination," leading questions should not be permitted to suggest and lead a party's own witness. *See Stahl v. Sun Microsystems, Inc.*, 775 F.Supp. 1397, 1398–99 (D.Colo. 1991) (noting that leading questions should not ordinarily be used by counsel in examining his or her own client or witness). Therefore, in the event counsel for Tudor calls an adverse witness in Tudor's case in chief, counsel should be allowed to ask leading questions, and counsel for Defendants should not be allowed to use leading questions during that examination.

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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/ Ezra Young
Ezra Young (NY Bar No. 5283114)