

CASE NO. 15-cv-324-C

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff/Intervenor

v.

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 IN LIMINE AND BRIEF IN SUPPORT

DIXIE L. COFFEY, OBA#11876
KINDANNE C. JONES, OBA#11374
JEB E. JOSEPH, OBA#19137
TIMOTHY M. BUNSON, OBA#19137
Assistant Attorneys General
Oklahoma Attorney General's Office
Litigation Division
313 NE 21st Street
Oklahoma City, Oklahoma 73105
Telephone: (405) 521-3921 Facsimile: (405) 521-4518
dixie.coffey@oag.ok.gov
kindanne.jones@oag.ok.gov
jeb.joseph@oag.ok.gov
tim.bun@oag.ok.gov
Attorney for Defendants

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FOR THE WESTERN DISTRICT OF OKLAHOMA**

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

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SOUTHEASTERN OKLAHOMA STATE
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THE REGIONAL UNIVERSITY SYSTEM
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Defendants.

**DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
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MOTION IN LIMINE AND BRIEF IN SUPPORT**

Defendants, Southeastern Oklahoma State University, (“SEOSU” or “University”), and The Regional University System of Oklahoma (“RUSO”), (collectively “University Defendants” or “the State”), pursuant to this Court’s Order of June 13, 2017 herein [Doc. 142] and the Federal Rules of Evidence, move this Court to enter an order precluding Intervenor, Intervenor’s counsel, and any witness from mentioning, referring to, arguing about, or introducing any evidence of, the following matters.

The Court has broad discretion to balance probity versus prejudice. *Blim v. Western Electric Company, Inc.*, 731 F.2d 1473, 1477 (10th Cir. 1984). In a case such as this one, based heavily on innuendo, emotion, and speculation, as opposed to one based on concrete facts, rational analysis, and particular observation, the likelihood for unfair prejudice is

significant. As the “first and best judge ... of trustworthiness and reliability,” (*Franklin v. Skelly Oil Co.*, 141 F.2d 568, 572 (10th Cir. 1944), the Court is empowered to help insure as fair and impartial a trial as possible. Defendants ask the Court to exercise that power to exclude the subjects outlined below.

ARGUMENT AND AUTHORITY

“A motion in limine is a request for the court’s guidance concerning an evidentiary question.” *Cox Liquidating Trust ex rel., CDX Liquidating Trustee v. Venrock*, 411 B.R. 571, 578 (N.D. Ill. 2009). Though “not explicitly authorized by the Federal Rules of Evidence,” motions in limine may be ruled upon by trial judges “pursuant to their authority to manage trials.” *Id.* The burden is on the moving party to establish that the evidence is not admissible. *Id.* A motion in limine is also supposed “to exclude the introduction of either irrelevant evidence, *cf.* Fed. R. Evid. 401, or evidence, though relevant, [that] is either more prejudicial than probative, confusing or is a waste of time. *Cf.* Fed. R. Evid. 403.” *In the Matter of Rambus Inc., a corp.*, 2003 WL 21223850, at *1 (F.T.C. Apr. 21, 2003). As set forth more fully below, the purported evidence listed as numbered herein, are either inadmissible hearsay and/or more prejudicial than probative. All of these topics or areas should be excluded from use at the trial in this matter.

Evidence which is not relevant is not admissible. Fed. R. Evid 402. Even relevant evidence may be excluded where its “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Fed. R. Evid. 403. Relevant evidence is defined under the Rules as “evidence

having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Fed. R. Evid. 401.

MATTERS I – VII:

I. HEARSAY REMARKS REGARDING, OR ATTRIBUTED TO, DR. DOUGLAS McMILLAN

Intevernor points in her Complaint to instances of hearsay, which, through Discovery, have been consistently debunked by every witness, except perhaps by Intervenor herself. In the absence of any corroborating witness or document, such self-serving allegations by a plaintiff have very low probative value. *See AIOI Nissay Dowa Ins. Co. v. Prosgnit Specialty Mgmt. Co.*, 563 F.App’x 68, 69, fn 1. (2d Cir. 2014) (“ . . . probative value of . . . evidence is suspect, insofar as the supposedly corroborating interpretations may amount to self-serving readings. . . .”); and *Green Gas Delaware Statutory Trust v. Comm’r of Internal Revenue*, No. 13698-10, 2016 WL 3909765, at *37 (T.C. July 14, 2016) (evidence “corroborated only by the self-serving testimony . . . ha[s] little to no probative value. . . .”).

By contrast, the danger of unfair prejudice to the University and RUSO is extremely high. The Tenth Circuit cited approvingly to the following commentary from 4 Weinstein & Berger, Weinstein’s Evidence, at ¶ 805[01]: Certainly, the trial judge has discretion under Rule 403 to exclude a statement of multiple hearsay, even if each included portion meets the requirements of an exception, when [s]he finds the statement so unreliable that its probative value is substantially outweighed by the danger of prejudice and confusion. *Boren v. Sable*, 887 F.2d 1032, 1036 (10th Cir. 1989).

However, the probative value of these hearsay remarks is very low, given that the only witness who claims to know anything about them is Intervenor. Every witness whom Intervenor claims passed on these alleged comments denies having ever heard the comments, and denies telling Intervenor of the comments. The Court should exclude argument and testimony about the following Items, labeled 1-4:

1. That an SEOSU employee “warned [Intervenor] that [SEOSU] Vice-President for Academic Affairs” Douglas McMillan “had inquired whether Dr. Tudor could be fired because her ‘transgender lifestyle’ offended his religious beliefs,” as alleged in Paragraph 15 of Plaintiff’s Complaint [Doc. 1], and Paragraph 40 of Intervenor’s Complaint [Doc. 24].

2. That Intervenor was told by a SEOSU “human resources employee” that the SEOSU human resources employee told Vice-President Douglas McMillan “that Southeastern could not fire [Intervenor] because she was transgender,” as alleged in Paragraph 15 of Plaintiff’s Complaint [Doc. 1], and Paragraph 40 of Intervenor’s Complaint [Doc. 24].

3. That Intervenor was told by Jane McMillan that SEOSU Vice-President for Academic Affairs Douglas McMillan told his sister, (Jane McMillan), that “transgender people [are] a ‘grave offense to his [religious] sensibilities,” as alleged in Paragraph 17 of Plaintiff’s Complaint [Doc. 1], and Paragraph 42 of Intervenor’s Complaint [Doc. 24].

4. That Intervenor was told that Vice-President for Academic Affairs Douglas McMillan “made statements that were repeated to [Dr. Tudor] that her gender expression and gender identity were offensive to [McMillan],” as alleged in Paragraph 136 of Plaintiff/Intervenor’s Complaint [Doc 24].

a. Hearsay Nature of Alleged Remarks

Hearsay is a statement that “(1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” Fed. R. Evid. 801(c). In the absence of an exception, hearsay evidence is not admissible. Fed. R. Evid. 802; *see also U.S. v. Cooper*, 286 F.Supp.2d 1283 (D.Kan.2003) (granting motion in limine to exclude hearsay evidence); *Hillman v. U.S. Postal Service*, 171 F.Supp.2d 1174 (D.Kan.2001) (same). Moreover, hearsay within hearsay is also inadmissible unless “each part of the combined statements conforms with an exception to the rule [against hearsay].” Fed. R. Evid. 805.

Each of the four Items listed above is hearsay. Also, each includes instances of “double hearsay,” or “hearsay within hearsay,” under the Federal Rules of Evidence. Further, none of the hearsay exceptions properly apply to Items 1-4 or their subparts. Therefore, these four Items are not admissible, and the Court should preclude their introduction and any reference to them. Even if all parts of the hearsay information in Items 1 - 4 were somehow each found to meet appropriate exceptions to the prohibition against hearsay evidence, these Items should still be excluded as set forth below.

Intervenor’s sworn testimony is far from definitive on this subject. When asked by Defendants’ counsel whether or not Intervenor has accused Dr. Douglas McMillan of making discriminatory comments about Intervenor, the response was “I wouldn’t characterize it in [pre]cisely those terms.” (*Deposition of Intervenor*, at p. 225, ln. 13-17, attached as Exhibit 1. Intervenor does not ever testify to having any firsthand knowledge of Douglas McMillan making any comment about firing someone due to a transgender

status. Instead, Intervenor testified that an SEOSU employee, Cathy Conway, relayed to Intervenor the question supposedly made by Dr. McMillan to Conway. When asked about who told Intervenor about Dr. McMillan's comment or question, Intervenor testified "that – I believe it was Cathy Conway." *Id.* at p. 226, ln. 1-4. Intervenor then testified further that, "I believe she [Cathy Conway] was the person who conveyed that information to me." *Id.* at p. 226, ln. 7-8. Other than this purported and uncorroborated exchange, there is no evidence of any kind that Dr. Douglas McMillan ever asked that question of Cathy Conway. Cathy Conway expressly denied that (a) Dr. McMillan ever made comments like that to her, and she also denied that (b) she ever told Intervenor anything like that. (*See Transcript of EEOC Interview of Cathy Conway*, attached as Exhibit 2 and *Transcript of EEOC Interview of Jane McMillan*, attached as Exhibit 3). Aside from the fact that this remark appears to have been wholly fabricated by Intervenor, its inherent unreliability, coupled with its double-hearsay nature, means it is not worthy of further consideration, and it should be excluded. As discussed in Section IV below, each individual (besides Tudor) who supposedly took part in the hearsay statements denies that any of the alleged exchanges ever took place. For example, Cathy Conway told Plaintiff's counsel and the EEOC investigator on February 8, 2012 that she never had these conversations:

EEOC: Did Dr. McMillan call you and ask you if she could be terminated?

Cathy Conway: No.

EEOC: Did he make the statement that this offended his beliefs?

Cathy Conway: No.

EEOC: He didn't make that statement to you?

Cathy Conway: He did not.

Ex. 2, p. 2, lns. 15-20.

Jane McMillan (sister of Douglas McMillan) was interviewed on February 9, 2012 by Plaintiff's counsel and the EEOC investigator. The following exchange took place:

EEOC: Okay that you told her that it was good that she was not going to be judged by Dr. McMillan, that true?

Jane McMillan: No.

EEOC: Did you tell Dr. Tudor that Dr. Doug McMillan had a problem with her lifestyle that it offended his religious beliefs?

Jane McMillan: No.

Ex. 3, p. 1, lns. 23-28.

Similarly, during his February 8, 2012 interview by Plaintiff's counsel and the EEOC investigator, Dr. McMillan himself denied making these statements. He was questioned by Plaintiff's counsel and investigator at that time, with the following results:

EEOC: Do you have any religious beliefs . . .

Doug McMillan: Yea I have personally.

EEOC: . . . about gay and lesbian, bisexual, transgender, people being immoral?

Doug McMillan: That I apply to other people? No.

EEOC: Do they make you uncomfortable?

Doug McMillan: No.

EEOC: Do you have any objections to their lifestyle?

Doug McMillan: Objection, no.

. . .

EEOC: Did you inquire of human resources or anybody else if the charge party [Intervenor] could be terminated because of her lifestyle?

Doug McMillan: No never. That's a complete fabrication.

Transcript of EEOC Interview of Doug McMillan, at p. 14, lns. 1-8; 23-24, attached as Exhibit 4.

b. Remoteness and Vagueness of Alleged Remarks

Although Intervenor's Complaint is less than specific about the circumstances of Items 1-4, it appears that the statements in question (set out in Paragraphs 40 and 42 of Intervenor's Complaint) are alleged to have occurred in the summer of 2007. This temporal location is based on the reading of Paragraphs 40 and 42 together. As noted, there is no corroboration for either the substance of these purported exchanges, or that the exchanges ever occurred at all. As discussed above, the alleged declarants deny such statements were made. Further, these alleged statements are extremely remote from the issues at hand in this case.

Paragraphs 78 and 84 of Intervenor's Complaint allege it was in the summer of 2009 that Dr. Tudor made preparations to apply for tenure and promotion, and Intervenor submitted her application in October 2009. Paragraph 88 of Intervenor's Complaint alleges in February 2010 Dr. McMillan sent a letter to Intervenor opposing the application for tenure and promotion. Thus, it was at least two and a half (2 1/2) years after the alleged remarks (either by or about Dr. McMillan) in Items 1-4 that Dr. McMillan had any involvement in Dr. Tudor's tenure process. The comments outlined in Items 1-4 are far too remote in time to be truly probative or admissible here. *See Thompson v. State of Oklahoma*, 202 F.3d 283 (10th Cir. 2000) (properly excluding "material [that] is attenuated in time from the years in question" included in an affidavit executed some four or five years after the fact); *Utah State Farm Bureau Fed'n v. Nat'l Farmers Union Serv. Corp.*, 198 F.2d 20, 24 (10th Cir. 1952) (noting that the trial court was properly within its province to exclude some testimony tending to connect Farmers Union representatives with the

Communist Party as too remote in time and based on hearsay); *Joffe v. Vaughn*, 873 P.2d 299, 304 (Okla.Ct.App.1993) (upholding trial court's discretion to exclude evidence “too remote in time and relevance”); and *Stouffer v. State*, 738 P.2d 1349, 1355 (Okla.Crim.App.1987) (ex-wife's knowledge of victim's drinking habits “was too distant [after living apart for fifteen months] to establish a then current pattern of ... conduct or to be relevant, or to qualify as impeachment evidence”).

In *McGrath v. Clinton*, the court there found that an employee's separation from work two years after the filing of his EEOC charge, and sixteen (16) months after the conclusion of the EEOC's investigation were “adverse action outside the timeframe from which a jury could infer a causal relationship. 674 F.Supp..2d 131, 148 (D.C. 2009), aff'd, 666 F.3d 1377 (D.C. Cir. 2012) (citing *Clark County Sch. Dist. v. Breeden*, 532 U.S. at 273–74, 121 S.Ct. 1508 (2001) (citing cases with three to four month intervals between protected conduct and adverse employment action as too remote to infer a causal relationship); *Mayers v. Laborers' Health and Safety Fund of North America*, 478 F.3d 364, 369 (D.C. Cir. 2007) (“[T]he eight- or nine-month gap between the final protected activity ... and the [adverse employment action] is far too long”). Similarly, the United States District Court for the Northern District of Mississippi found statements made at a time too remote from the alleged adverse action could not “demonstrate any animus.” *Brewer v. All. Healthcare Servs.*, No. 4:11CV130-SA-JMV, 2013 WL 1896132, at *5 (N.D. Miss. May 6, 2013) (citing *Guthrie v. Tifco Indus.*, 941 F.2d 374, 379 (5th Cir.1991), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1267 (1992) (statements made one year before adverse **employment** action held too vague and **remote** in time to establish discrimination); *Tillman v. S. Wood Preserving of*

Hattiesburg, Inc., 377 F.App'x 346, 2010 U.S. App. LEXIS 9181, at *6, 2010 WL 1778831 (5th Cir.2010) (affirming district court's dismissal of all claims based on **events** occurring more than 180 days prior to filing of EEOC charge).

Intervenor's first EEOC charge is alleged to have been filed on September 9, 2010, (Paragraph 8 of Intervenor's Complaint), which is more than three (3) years after the supposed hearsay statements outlined in Items 1-4. It is also important to note that Intervenor's EEOC charge does not include anything about these supposed statements, strongly indicating that these statements were never made. Plaintiff's lawsuit was filed on March 30, 2015, nearly eight (8) years after the uncorroborated hearsay statements in Items 1-4. Given the authority cited above, the two and a half (2 1/2) year gap between the alleged hearsay statements and Intervenor's tenure denial, the three (3) year gap between Items 1-4 and Intervenor's first EEOC charge, and the more than eight (8) year span between the alleged statements and Plaintiff's lawsuit, these double-hearsay statements are too remote in time to be of sufficient probative value in this litigation and to a trier of fact. Therefore, Items 1-4 of hearsay regarding Douglas McMillan should be excluded, as they are unreliable, unfairly prejudicial, and double-hearsay.

II. SETTLEMENT NEGOTIATIONS WITH USA/TUDOR, AND AGREEMENT WITH USA

Defendants move this Court to exclude any argument and evidence regarding settlement offers, statements made during settlement discussions or conciliation proceedings, and the Settlement Agreement reached between Defendants and Plaintiff, United States of America ("USA"). A number of federal and local rules proscribe use of such

offers or statements. Settlement offers and statements made during settlement and mediation discussions are inadmissible under Fed. R. Evid. 408.

Intervenor has already affirmed her intent to place the Settlement Agreement between Defendants and USA before the Court and the jury, in her Response to Defendants' Motion for Protective Order [Doc. 174]. Intervenor has declared that she intends to use the terms of the agreement during voir dire and argument. It is Defendants' suspicion that Intervenor intends to use the settlement in such a way as to imply wrongdoing on the part of the Defendants, which is wholly improper under Fed. R. Evid. 408. Defendants have not, and do not confess any liability. Furthermore, Intervenor was not a party to the Settlement Agreement, does not know the reasons certain provisions were included or excluded, and any use of the Agreement would clearly be unfairly prejudicial to Defendants, while providing little to no probative value.

Because parties would be reluctant to enter into settlement talks if their negotiation positions could later be used to influence the finder of fact, Federal Rule of Evidence 408 makes inadmissible offers, conduct, and statements made in connection with settlement negotiations. *Fiberglass Insulators, Inc. v. Dupuy*, 856 F.2d 652, 654 (4th Cir. 1988) ("The public policy favoring and encouraging settlement makes necessary the inadmissibility of settlement negotiations in order to foster frank discussions"; affirming exclusions under Rule 408).

In furtherance of this Motion in Limine, Defendants' note that Intervenor has a documented history of failing, (or choosing not), to protect the sanctity and confidentiality of settlement discussions as evidenced by her reference to mediation and conciliation

discussions in her response to Defendants' Motion to Dismiss. [Doc. 31, p. 24, fn 17]. This clearly demonstrates Intervenor's lack of understanding regarding the purpose and need for confidentiality when negotiations occur between the parties.

Based upon the foregoing, Defendants respectfully request this Court exclude any evidence of, or argument about, statements or other communications made during settlement discussions or mediation proceedings, and the settlement agreement reached between Defendants and Plaintiff, United States of America ("USA").

III. HEALTH INSURANCE OPTIONS AND EXCLUSIONS

Defendants request an Order from this Court prohibiting any reference to, or exhibits regarding, the health insurance plans, options, and exclusions in place at SEOSU or RUSO at any time. Intervenor's Complaint [Doc. 24] makes a number of references to health insurance plans, options, and exclusions. (*See* [Doc. 24, at ¶¶s 36, 67, 68, 69, 71, 146, and 148].) However, Intervenor never raised the issue of health insurance plans, coverage, or options in her complaint to the Oklahoma Human Rights Commission, dated July 6, 2011, or her complaint to the Equal Employment Opportunity Commission, dated July 21, 2011, (both charges of discrimination are identified as No. 564-2011-00849). Nor did Intervenor raise this issue in her complaint to the United States Department of Education's Office for Civil Rights, (OCR Docket #07102099), received by that office on September 7, 2010. By her own testimony, Intervenor never even submitted any medical claims regarding her transgender transition-related counseling to her insurance company while working at SEOSU. (Ex. 1 at p. 312, ln. 25 - p. 313, ln. 4). These repeated omissions confirm not only was this never actually an issue for Intervenor, but the omissions signify

Intervenor's failure to exhaust administrative remedies regarding health insurance, thus precluding her recovery under Title VII on these grounds.

Finally, Discovery in this case has uncovered zero (0) instances of Intervenor (or anyone else) complaining to the University or RUSO about any exclusions, coverage (or lack thereof), or options in the employers' health insurance plans, prior to denial of Intervenor's promotion and tenure application. References to health insurance plans, coverage, or exclusions, by Intervenor, her counsel, or witnesses will be irrelevant, confusing of the issues, unduly prejudicial, and should be excluded. *New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310 (1929); and Fed. R. Evid. 401-403.

IV. STATE EMPLOYEES' WORK STATUS IN LIGHT OF INTERVENOR'S TENURE APPLICATION

No employees of Defendants were terminated, demoted, or otherwise disciplined due to the handling of Intervenor's promotion and tenure application or the subsequent process. Although a significant percentage of employees who were involved in Intervenor's tenure process have either changed positions within, or retired from, the Defendants' employ since the time of the events described in Intervenor's lawsuit, there is no evidence that any of those employees did so as a result of Intervenor's promotion and tenure application, the process of that application, or Intervenor's ensuing grievances and lawsuit. Defendants anticipate that Intervenor may try to cast aspersions on former employees' credibility or reliability based on the fact that those individuals might no longer hold the positions they held at the time Intervenor sought promotion and tenure or grieved the denial thereof.

Attempts to insinuate (or directly attribute) changes in employees' work status to their contact with Intervenor's application for tenure and promotion is unsupported by the evidence and should be prohibited. Suggestions or statements that employees' handling of Intervenor's application and/or grievance process resulted in employees' retirements, job changes, or other separations from employment will be irrelevant, unduly prejudicial, confusing of the issues, and should be excluded. *New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310 (1929); and Fed. R. Evid. 401-403.

V. "FOR THE COMMUNITY" ARGUMENTS

Intervenor may attempt to request that the jury grant an exceptional or noteworthy verdict to make the transgender community "proud" of this case; make the Defendants "know the price of justice" or the "importance of civil rights" in the higher education community; or "send the Defendants' leadership a message." Any such inflammatory and prejudicial language which is calculated to have the jury render a determination or to assess any damages on some basis other than proper review of the facts presented or compensation as provided by the Court's directions should be excluded. Furthermore, references to a community conscience or collective sense of decency are improper because they suggest to the jury that it should rule on matters not relevant to the case at bar, and that some award of damages is expected. *See Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985). *See also*, Fed. R. Evid. 401-403.

VI. PURPORTED DRESS CODES

Defendants request an Order from this Court prohibiting any reference to, or exhibits regarding, supposed dress code restrictions in place at SEOSU or RUSO at any

time. Intervenor's Complaint [Doc. 24] makes a single reference to "dress restrictions." (*See* [Doc. 24, ¶ 148].) However, Intervenor never raised the issue of dress restrictions in her complaint to the Oklahoma Human Rights Commission, dated July 6, 2011, or her complaint to the Equal Employment Opportunity Commission, dated July 21, 2011, (both charges of discrimination are identified as No. 564-2011-00849). Nor did Intervenor raise this issue in her complaint to the United States Department of Education's Office for Civil Rights, (OCR Docket # 07102099), received by that office on September 7, 2010. Finally, Intervenor never reported to SEOSU that any alleged dress restriction had been placed on her, and discovery in this case has uncovered zero (0) evidence of instances of Intervenor (or anyone else) actually complaining to the University or RUSO about any dress restrictions imposed by her employers.

Not only do these omissions reveal this was never actually an issue for Intervenor, but at a minimum the omissions signify Intervenor's failure to exhaust administrative remedies in this regard, thus precluding her recovery under Title VII on these grounds. In addition, the same argument and authorities set forth in Section I(b), *Remoteness and Vagueness of Alleged Remarks, supra*, is applicable here. Intervenor contends that during a single discussion with Cathy Conway in June 2007 regarding Intervenor's transition, Ms. Conway told Intervenor that Dr. Doug McMillan said that Intervenor "should not wear short skirts . . . or makeup which may be considered excessive." (Ex. 1, at p. 305, ln. 10 – p. 306, ln. 4). There are no allegations of any subsequent comments or alleged dress restrictions. Notably, both Ms. Conway, and Dr. McMillan denied, under oath, that they ever discussed placing dress code restrictions on Intervenor. (*Deposition of Cathy Conway*,

at p. 52, ln. 16-22, attached as Exhibit 5 and *Deposition of Doug McMillan* at p. 71, ln. 21-24, attached as Exhibit 6). For the same reasons outlined in Section I, *supra*, relating to other hearsay matters attributed to Dr. McMillan, all testimony, argument, or references to this supposed dress or makeup restriction should be prohibited.

Plaintiff's lawsuit was filed on March 30, 2015, nearly eight (8) years after this uncorroborated statement. Given the authority cited above, the two and a half (2 1/2) year gap between the alleged statement and Intervenor's tenure denial, the three (3) year gap between the alleged statement and Intervenor's first EEOC charge, and the more than eight (8) year span between the alleged statement and Plaintiff's lawsuit, this statement is too remote in time to be of sufficient probative value in this litigation to a trier of fact.

References to supposed dress restrictions upon Intervenor will be irrelevant, unreliable, confuse the issues, will be unduly prejudicial, and should be excluded. *New York Cent. R.R. Co. v. Johnson*, 279 U.S. 310 (1929); and Fed. R. Evid. 401-403.

MATTERS VII - IX

According to this Court's Scheduling Order, [Doc. 57], the deadline by which parties were to have designated expert witnesses and to have produced expert reports was June 6, 2016. The "United States served the Defendants and Plaintiff-Intervenor with [such] expert reports and designations on June 6, 2016." (*See* [Doc. 101]). The USA followed that (with leave from Court) by filing an expert witness list on August 16, 2016. [Doc. 107]. Intervenor did not serve any party with such designations of her own, nor designate any experts or submit any expert reports by June 6, 2016, nor has Intervenor done so to this day. By her own court filings [Doc. 181], Intervenor freely states that her counsel did not

even retain an expert until September 2017, some *fifteen (15) months after the deadline* for designation of experts and submission of experts' reports. Although Intervenor suggests, (in her Response in Opposition to the United States' and Defendants' Joint Motion to Dismiss [Doc. 181]), that the Court should condition dismissal of USA by granting Intervenor the ability to use USA's experts and their reports, that suggestion is misplaced under the Local Rules, for example LCvR. 7.1(c), and under the Court's scheduling order. The fact that Intervenor had no experts by September 22, 2017 is the reason Defendants filed no *Daubert* motion as to Dr. Brown¹. But, to the extent Intervenor ever actually files a motion asking the Court for leave to adopt USA's experts, their reports, and the Court were to actually grant such speculative relief (over Defendants' anticipated objections), Defendants offer matters VII, VIII, and IX, below, as matters subject to limitation if Dr. Parker, Dr. Brown, and/or their expert reports are actually allowed to be used by Intervenor at trial.

VII. OPINIONS BEYOND THOSE IN DR. ROBERT PARKER'S WRITTEN EXPERT REPORT

Intervenor should be precluded from having any experts testify as to opinions or bases for their opinions that are not specified in their respective expert reports. Expert testimony is properly limited to what is contained in an expert's report. *See, e.g., Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 289 F.Supp.2d 493, 500, n. 33 (D. Del. 2003).

¹ In the event Intervenor ever convinces the Court to allow her use of Plaintiff USA's experts, Defendants respectfully request the ability to address that (or those) experts with *Daubert* motion(s) after (and if) the Court grants Intervenor that relief.

In the Expert Report of Robert Dale Parker, Ph.D. ([Doc. 98-1]), Dr. Parker limited his review to the full 2010 proposed portfolio, and “portions” of the 2009, promotion portfolio of Intervenor. According to his authored report dated June 6, 2016, Dr. Parker did not indicate he reviewed either Intervenor’s abortive 2008 promotion portfolio, or the *complete* 2009 promotion portfolio. Dr. Tudor has already testified under oath that she did not keep, and does not have, a copy of the actual 2009 portfolio she submitted for review and consideration, so it is impossible for Dr. Parker to have an informed opinion on something to which he did not actually have access. Dr. Parker should not be permitted to reference or opine on the complete and submitted 2008 or 2009 promotion portfolios, as those portfolios were not contained in his expert report, submitted in purported support of his expert opinion. In fact, Dr. Parker opines on the portions of the “partial” 2009 portfolio as though it were reviewed in its entirety, (even though it was not), as it would have been by the committee and administration at the time of the portfolio review. But allowing Parker’s opinion on the 2009 portfolio would be improper as his opinions on the 2009 portfolio are compared to the complete portfolios of Intervenor’s colleagues. Promotion portfolios should be viewed in their totality rather than only as portions and the select parts that Plaintiff, USA, determined were appropriate to provide to its expert.

In his report, Dr. Parker’s opinions were based on the review of only one “complete” promotion packet from 2010. But that packet was never actually submitted to a committee or the chain of review that would follow. All 2010 tenure and promotion packets are irrelevant because Intervenor was not allowed to participate in the 2010 tenure process. The prohibition was based on Intervenor’s refusal to withdraw the 2009 application,

thereby allowing it to be denied at the final step. Therefore, no 2010 review was performed, and thus, any discussion by Dr. Parker of any applicant's 2010 tenure packet is irrelevant and would only serve to confuse the jury as to the specific process that occurred.

Finally, Dr. Parker is not a part of SEOSU, the RUSO university system, or even any higher education system in Oklahoma. Accordingly, Dr. Parker should not be allowed to testify about how any of those systems are supposed to function. Therefore, pursuant to Fed. R. Evid. 401-403, 702(d), and 703, Defendants request a limitation on Dr. Parker's opinions to only those expressed in his report as they relate to the universally general concept of tenure, and tenure review processes in general across higher education as a whole.

VIII. DR. BROWN'S REFERENCES TO INTERVENOR EITHER INDIVIDUALLY OR SPECIFICALLY

Intervenor should be precluded from having her experts testify to opinions or bases for their opinions that are not specified in their respective expert reports. Expert testimony is properly limited to what is contained in an expert's report. *See, e.g., Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 289 F. Supp. 2d 493, 500, n. 33 (D. Del. 2003).

Dr. George R. Brown's testimony as an expert witness is limited in scope to only those opinions expressed in his May 27, 2016 expert report. Dr. Brown's report contained only general opinions and had exactly zero (0) references to any personal knowledge of the Intervenor. At no time in his report did Dr. Brown indicate that he evaluated or diagnosed Intervenor, nor had he evaluated Intervenor's status as a transgender individual based on the criteria provided in his report. For instance, while Dr. Brown opines that a person's sex is a broad and complex concept that consists of at least seven (7) different factors that one

might consider to determine one's sex, he applies none of them to Intervenor. In fact, Intervenor's name is not present on even one single page of Dr. Brown's report. Therefore, Dr. Brown is unqualified as an expert in this case to opine whether Intervenor suffers from "gender dysphoria" (previously called gender identity disorder). *See Dr. Brown's Expert Report*, attached as Exhibit 7.

Further, Dr. Brown expresses his opinion as to what it means to be transgender, (surely something that may mean different things to different individuals), and yet Intervenor's status as transgender is not something that has ever been disputed in this case. Plaintiff and Intervenor's Complaints clearly and expressly assert Intervenor's transgender status; Defendants' Answers admit the same. [Docs. 1, 24, 28 and 29]. To the extent Intervenor's transgender status matters in this case, it is not in dispute. Any testimony Dr. Brown might offer in this regard is irrelevant, unnecessary, and only likely to either (a) confuse the issues actually in dispute, and/or (b) improperly appeal to jurors' senses of sympathy or pity in spite of the relevant facts at hand.

Pursuant to Fed. R. Evid. 401-403, 702(d), 703, Defendants respectfully request this Court exclude the testimony of Dr. Brown entirely. In the alternative, Defendants ask this Court to limit Dr. Brown's testimony to only those general opinions contained in his report, and to preclude Dr. Brown from applying any of the general opinions in his report to Intervenor individually, or from referencing Intervenor individually.

IX. EXPERTS OPINING ON MATTERS OF LAW

Plaintiffs' experts should not be permitted to opine on matters of law, as the law is not their area of expertise and the law is the province of the Court. *See Aguilar v. Int'l*

Longshoremen's Union Local No. 10, 966 F.2d 443, 447 (9th Cir. 1992) (finding that matters of law for court's determination were inappropriate subjects for expert testimony); *Local 159, 342, 343 & 444 v. Nor-Cal Plumbing, Inc.*, 189 F.3d 473, at *6 (9th Cir. 1999) (citing *United States v. Scop*, 846 F.2d 135, 139 (2d Cir. 1988) (holding that "Rule 704 was not intended to allow experts to offer opinions embodying legal conclusions.")). Under Fed. R. Evid. 702, such expert opinions should be excluded because the experts are unqualified to offer such testimony and yet, as the jury may be impressed by the stature of an expert, the jury may place undue weight on such unqualified testimony.

Dr. Parker and Dr. Brown provided written reports which contain no legal analysis of the law, nor do the experts provide qualifications for such opinions. As such, Defendants request this Court bar Plaintiffs' experts from opining on matters of law, as the law is not their area of expertise and the law is the province of the Court.

CONCLUSION

For the foregoing reasons, and in the interest of a fair and impartial jury's determination of the issues involved in this case, Defendants respectfully ask this Court to exclude or otherwise limit the above subjects from reference by Intervenor, her counsel, and any witnesses.

Respectfully submitted,

/s/ Dixie L. Coffey

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 1st day of June 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:

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

Marie E. Galindo
1500 Broadway, Ste. 1120
Lubbock, TX 79401
Attorney for Intervenor Plaintiff

/s/Dixie L. Coffey

Dixie L. Coffey

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

UNITED STATES OF AMERICA, and)

DR. RACHEL TUDOR,

Plaintiffs,

vs.

NO. 5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA
STATE UNIVERSITY, and

THE REGIONAL UNIVERSITY
SYSTEM OF OKLAHOMA,

Defendants.

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME I
TAKEN ON BEHALF OF THE DEFENDANTS
IN OKLAHOMA CITY, OKLAHOMA
ON MARCH 7, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

1 Q -- that led you to believe he discriminated
2 against you because you're Native American?

3 A Yes.

4 Q What?

5 A In the letter that he composed outlining
6 the reasons for the denial of tenure and promotion,
7 as well as his memo prohibiting me from applying in
8 the last year at Southeastern. In both of those
9 documents, he demonstrates an un- -- a disrespectful
10 attitude toward Native American scholarship, Native
11 American service, Native American culture, in
12 general, and me in particular.

13 Q Okay. You -- you have accused Dr. McMillan
14 of making several discriminatory comments about
15 you; is that right?

16 A I wouldn't characterize it in cisely
17 (phonetic) those terms.

18 Q Okay. Well, you are claiming that
19 Dr. McMillan asked somebody at Southeastern if they
20 could fire you because you're transgender; is that
21 right? Is that correct?

22 A Yes. We're -- we're moving on to a -- I
23 was confused about whether we were continuing with
24 the Native American questions. And this is in
25 reference to being transgender. Yes, he -- he did --

1 I was informed --

2 Q By who?

3 A -- that -- I believe it was Cathy Conway.

4 Q So you believe that Cathy Conway told you

5 that Dr. McMillan asked if you could be fired because
6 you're transgender?

7 A I believe she was the person who conveyed
8 that information to me.

9 Q Okay. Well, you sound uncertain. Are you
10 certain that Cathy Conway told you Dr. McMillan asked
11 her if you could be fired because you're transgender?

12 A Okay. That question's a little bit
13 confusing. Could you rephrase it?

14 Q Are you certain that Cathy Conway told you
15 that Dr. McMillan asked if you could be fired because
16 you're transgender?

17 A To the best of my knowledge, Cathy
18 Conway -- in a conversation with Cathy Conway, the
19 information was conveyed to me that Dr. McMillan
20 asked if I could be terminated because I'm
21 transgender.

22 Q Did she share that with you on more than
23 one occasion?

24 A No.

25 Q When did she tell you that?

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

UNITED STATES OF AMERICA, and)

DR. RACHEL TUDOR,

Plaintiffs,

vs.

) NO. 5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA
STATE UNIVERSITY, and

THE REGIONAL UNIVERSITY
SYSTEM OF OKLAHOMA,

Defendants.)

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME II
TAKEN ON BEHALF OF THE DEFENDANTS
IN OKLAHOMA CITY, OKLAHOMA
ON MARCH 8, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

Rachel Tudor

March 8, 2016

Page 312

1 A There's a certain stigma that goes along
2 with being denied tenure and promotion.

3 Q And is that the sole basis for why you
4 claim that Southeastern's respons- -- is partially
5 responsible for you to not be able to get a job at
6 one of those universities?

7 A Excuse me, could you restate the question?

8 Q Well, let me ask this this way. Any other
9 reason why you're claiming that Southeastern is
10 responsible for you not being able to get another
11 job?

12 A In addition to the ones that I gave you?

13 Q Yeah, loss of professional relationship,
14 you said loss of tenure and promotion and loss of
15 employment.

16 A And the consequences of those things.

17 Q Have you ever received mental health or
18 psychological counseling concerning your trans- --
19 being a transgender?

20 A Yes.

21 Q Were any of those sessions covered by your
22 health benefits offered -- or the health benefits
23 that you had while at Southeastern?

24 A No.

25 Q Did you submit medical claims for that

1 counseling -- medical -- while at Southeastern, did
2 you submit medical claims to your insurance company
3 to cover that counseling?

4 A No.

5 Q Okay. So it's not your claim that the
6 health benefits at Southeastern were denying you
7 coverage for counseling; is that correct? That's not
8 part of your claim?

9 A Excuse me, could you restate the question?

10 Q Well, are you claiming that one of the
11 exclusions of your health benefits at Southeastern
12 was counseling for your transgender status?

13 A My understanding is that any trans-related
14 healthcare was excluded.

15 Q Okay. Did you ever seek coverage for any
16 counseling while you were at Southeastern?

17 A No.

18 Q Okay. So you had no idea whether or not it
19 would have been covered; is that right?

20 MS. WEISS: Objection.

21 THE WITNESS: It was my understanding that
22 it was not covered.

23 Q (By Ms. Coffey) Then how did you come to
24 have that understanding?

25 A I read the exclusion of the policy.

1 your tenure denial in 2009?

2 A I don't recollect at present.

3 Q Okay. So your conversation with Cathy
4 Conway, fall of 2007, what did she tell you about
5 Doug McMillan?

6 A That he had inquired whether or not I could
7 be summarily terminated because I'm transgender, that
8 he had placed some odious conditions on my continued
9 employment at Southeastern.

10 Q Cathy Conway told you that Doug McMillan
11 placed odious conditions on your continued employment
12 at Southeastern?

13 A No. She defined -- she gave me the
14 conditions and I will characterize them as odious.

15 Q Cathy Conway told you that Doug McMillan
16 placed certain conditions on your continued
17 employment?

18 A Yes.

19 Q Okay. What conditions were those?

20 A That I may only use the single-stall
21 handicap restroom on the second floor of the building
22 where I work; that I was prohibited from using any
23 other multi-stall restrooms -- women's restrooms on
24 campus.

25 Q Anything else?

1

A Yes.

2

Q What?

3

A That I should not wear short skirts that

4

might -- or makeup which may be considered excessive.

5

Q Anything else?

6

A That's what I can recollect at this time.

7

Q How many written grievances did you file

8

regarding those -- with Southeastern regarding those

9

conditions that you claim Doug McMillan placed on

10

your continued employment?

11

A Okay. Restate the question, please.

12

Q Let me ask it this way. Did you ever

13

submit a written complaint or a written grievance

14

concerning the conditions that Doug McMillan

15

supposedly placed on your continued employment at

16

Southeastern?

17

A I'd have to refresh my memory by looking at

18

the details of the complaint that I filed with Claire

19

Stubblefield to accurately answer your question.

20

Q But as you sit here today, do you recall

21

ever submitting any kind of a written grievance while

22

you were employed at Southeastern complaining of

23

these conditions that you claim Doug McMillan placed

24

on your continued employment?

25

A Your inquiry is of a written grievance.

Interview of Cathy A. Conway

February 8, 2012

(Also present Charlie Babb, General Counsel, RUSO (CKB) and
Allan K. Townsend, Senior Trial Attorney, U.S.D.O.J. (AKT))

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Kathy Nusz, EEOC: I just wanted to run through, I'm here on an investigation. I'm with the EEOC a charge of discrimination filed by Rachel Tudor against the university. And I'll be asking you questions today, I would just ask that, I'm not going to swear you in but like a court of law that you tell the truth. I am going to turn this on and I'll have you state your name for the record.

EEOC Okay will you state your name for the record?

CC Cathy A. Conway.

EEOC And your job title?

CC Human Resources Director.

EEOC What was your date of hire?

CC January 15, 1999.

EEOC And were you hired as the HR Director?

CC Yes.

EEOC When did you find out that Dr. Tudor was transitioning?

CC It was probably a day or two before June 1st, late May, 2007.

EEOC And how did you find out?

CC Dr. Tudor came to Human Resources to present a legal document letting us know she was changing her name.

EEOC Had you known about this prior to her coming to HR?

CC No.

EEOC This was just new news?

CC Yes.

EEOC Okay. When was it decided and who decided that she was to use another restroom?

CC There was no decision that she was to use another restroom. It was suggested to her that there was another restroom, and it was not mandatory, but she might consider using it.

EEOC You made the suggestion?

1 CC Yes.

2 EEOC Did someone make that suggestion to you?

3 CC Uh Charlie Babb and I spoke about bathroom facilities. This was the first time we'd ever
4 experienced this.

5 EEOC There's no other transgender?

6 CC Not to my knowledge.

7 EEOC Did she use another restroom, did she follow that direction?

8 CC I have no idea.

9 EEOC Okay I guess you contacted Mr. Babb to get direction?

10 CC Yes and talk about.

11 EEOC Were there, of course I guess at this time, most everyone else in her department was made
12 aware and....

13 CC The semester had ended and most of the faculty were gone. It was like May so it was between
14 spring and summer semester. I don't know if any of them knew at that point.

15 EEOC Did Dr. McMillan call you and ask you if she could be terminated?

16 CC No.

17 EEOC Did he make the statement that this offended his beliefs?

18 CC No.

19 EEOC He didn't make that statement to you?

20 CC He did not.

21 EEOC Did he make any statements about her transition?

22 CC He just listened when I told him that she was transitioning.

23 EEOC And you told him why?

24 CC I told him two of our policies.

25 EEOC What are those?

- 1 CC Policy on non-discrimination, equality opportunity and affirmation action, 1.8 I believe in the
2 faculty handbook and our sexual harassment policy which includes the definition and how to
3 report if you're being sexual harassed.
- 4 EEOC Okay but none of these, your policy does not include someone who is transitioning?
- 5 CC That's true. It does not.
- 6 EEOC They changed policy though like in January of 2011, wasn't there something added to the
7 policy?
- 8 CC We added, it just escaped me genetics and the ADA but we have not included sexual
9 orientation or....
- 10 EEOC Okay, I'll have to look this up, just a minute. The faculty senate didn't pass a resolution?
- 11 CC They may have passed a resolution, but that has not changed the university policy.
- 12 EEOC Okay. So Dr. McMillan just listened, he made nothing....
- 13 CC I had suggested that the dean, the department chair, and Dr. McMillan be made aware of this
14 and offered that I would be there if he would like me to be there and he said okay.
- 15 EEOC And why did you think they needed to discuss it?
- 16 CC Because someone needed to tell them that they now have a faculty member who is female
17 instead of male and has a new name and that her new name is now in the directory and her new
18 name would be on her door.
- 19 EEOC And so that was you wanted Dr. McMillan and Dean Scoufos and who else you wanted involved
20 in this?
- 21 CC Well at the time it was Dr. Mangrum, C.W. Mangrum he's retired, he was dean of the school and
22 Dr. Mischo who was the department chair and is still the department chair of English Humanities
23 and Languages where Dr. Tudor is part of that department.
- 24 EEOC Okay, where you at that meeting?
- 25 CC Yes.
- 26 *(Interruption, Claire Stubblefield brought documents into the room that had been requested by*
27 *EEOC during Dr. Stubblefield's interview.)*
- 28 EEOC Okay so you had a meeting to discuss how you were going to handle things, or disseminate the
29 information or what was the meeting about?

- 1 CC I had the meeting with them to tell them what I had discussed with Dr. Tudor so that they would
2 be aware that she was going by a different name and would probably be presenting herself as
3 female.
- 4 EEOC The next semester when she came?
- 5 CC Immediately, yes.
- 6 EEOC When school started, fall semester?
- 7 CC Yes and if she was teaching that summer, I don't recall if she was teaching that summer.
- 8 EEOC And what were the comments?
- 9 CC I don't recall specific comments it was several years ago other than "yes", "okay", "thank you". I
10 recall they were very professional, nothing negative. They just took in the information.
- 11 EEOC Okay, we're going to go backwards a little bit. You called a meeting with only Dr. McMillan to
12 discuss policy?
- 13 CC I had let Dr. McMillan know that we had a name change and that I suggested that the dean and
14 department chair that he meet with them to let them know and I said I would be available if
15 they would like for me to be there.
- 16 EEOC Okay, who did you review the anti-discrimination and the harassment policy with?
- 17 CC Dr. Tudor.
- 18 EEOC Oh you did?
- 19 CC I definitely, yes.
- 20 EEOC And why was that?
- 21 CC Because I felt that those policies were relevant.
- 22 EEOC Why?
- 23 CC For her. Well non-discrimination equality opportunity and affirmation action, just so she knows
24 that policy is there to protect her and everyone else. And the sexual harassment policy was just
25 to remind her of that she already had training on that, but to let her know, remind her there is a
26 policy, where to find it, and how to report in the event that she ever felt like she was being
27 sexual harassed.
- 28 EEOC And did you review it with everyone at the meeting?
- 29 CC Yes.

1 EEOC So you did review it again with everyone at the meeting?

2 CC Yes.

3 EEOC And you felt they needed an update, why did you...?

4 CC No I wanted them to know what I had discussed with Dr. Tudor and I felt like they needed to
5 know about that. The sexual harassment policy for example.....

6 EEOC And it covers men too doesn't it?

7 CC Oh absolutely.

8 EEOC Not just for women.

9 CC Yes. But you know the part of the policy is the grievance and due process and how to report and
10 they're next level supervisors and so if they receive a report, I just want to let them know. It
11 doesn't hurt to remind people of the policies that we have.

12 EEOC No it doesn't. Okay, well I've already asked about these people. Did anyone express a
13 discomfort about working with Ms. Tudor after the transition?

14 CC No.

15 EEOC So no comments?

16 CC No comments. No complaints.

17 EEOC Don't you find that unusual?

18 CC Of this group of administrators?

19 EEOC For the whole university. You'd think somebody would make a comment.

20 CC Well I think if they made a comment to me, it would have been a complaint possibly or a
21 concern. Typically faculty or staff come to human resources for complaints. No faculty or staff
22 came to human resources. I feel like the university embraced the change, certainly human
23 resources did.

24 EEOC Do you have any knowledge how her students.....?

25 CC No I don't.

26 EEOC Okay. I don't have anything else at this time. You may be recalled, I just caution you this is an
27 ongoing investigation please don't discuss it with anybody but your legal counsel. Okay?

28 CC Certainly.

Interview of Jane McMillan

February 9, 2012

(Also present Charlie Babb, General Counsel, RUSO (CKB) and
Allan K. Townsend, Senior Trial Attorney, U.S.D.O.J. (AKT))

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EEOC You know why we're here. I'm investigating a complaint that was filed by Rachel Tudor against the university. I'm not going to swear you in today, I would just ask that you be truthful.

JM Okay.

EEOC What is your title?

JM I'm the director of the counseling center.

EEOC You counsel students?

JM Yes.

EEOC And your date of hire?

JM June 1st of '92

EEOC And when you were hired, what were you hired in as?

JM Director of counseling center.

EEOC And that's what you've done all the time. Okay we've had some statements made that you had a discussion with Dr. Tudor prior to her going up for tenure and one of the statements that you made was that "It's good that she's not going to go up your brother, Doug McMillan is your brother correct?"

JM He's my younger brother yes.

EEOC Okay that you told her that it was good that she was not going to be judged by Dr. McMillan, that true?

JM No.

EEOC Did you tell Dr. Tudor that Dr. Doug McMillan had a problem with her lifestyle that it offended his religious beliefs?

JM No.

EEOC Do you know what your brother's religious beliefs are on gay and lesbian?

1 JM I really don't, we've never had conversation about it.

2 EEOC As you know we're not recording, we're writing.

3 CKB Okay that's fine.

4 EEOC Have you ever heard your brother talk about Dr. Tudor?

5 JM You know I don't remember him talking about her except once the complaint I guess
6 had been filed, he had asked me had we ever had a conversation about his views
7 because he didn't recall us ever having one and I said no we....

8 EEOC He asked you if the two of you ever had a conversation?

9 JM Yea. He said do you recall us ever having a conversation about my position or view I
10 don't remember the exact wording on gay, lesbian, bisexual, transgender, questioning,
11 etc. and I said no we've never had conversation.

12 EEOC Does your brother go to church on a regular basis?

13 JM To be real honest I don't know. We don't live in the same town

14 EEOC OK.

15 JM and even though we work here at the same university, our paths don't cross very much.

16 EEOC Did you consider yourself a good friend with Dr. Tudor?

17 JM I would describe our relationship as a friendly, acquaintance, as colleagues serving on
18 the Native American Symposium Committee. And when Rachel made it known to me
19 that she was going through a transgendering process, I certainly offered my support and
20 provided it at one point, maybe several points but one really stands out in my mind.

21 EEOC Okay.

22 JM Would you like to hear about that?

23 EEOC Yes.

24 JM Okay. Summer of 2007 is when Rachel came to my office and shared the letter that she
25 was in therapy and going through the transgendering process and I made it clear that
26 she and I did not have a therapist client relationship, she understand that but I did tell
27 her I was willing to support her in any way I could. Tell me if I'm talking too fast.

28 EEOC I'll slow you down if I need to. I'm keeping up so far.

1 JM Ok. And we talked about that we are in a Bible belt conservative region and in other
2 conversations we had similar discussions it's a fundamentally Baptist area, but in that,
3 the particular one I'm telling you about is we talked about that she indicated that she
4 didn't have a lot of support at that time that she had disclosed I believe to her
5 department chair and maybe a few others and that I was among the first that she had
6 shared the information with so in talking about this being such a conservative Bible belt
7 area. I inquired did she feel safe? And had she been mindful of safety precautions?
8 Also we talked a little bit about her....

9 EEOC Did she feel safe?

10 JM She said she did, yea. And that's a conversation I typically would have with any say even
11 a student that may be was disclosing to me because it's just normal for me to make sure
12 they feel safe. We talked about her upcoming plans because school was going to be
13 starting the fall semester and I offered to accompany her to the university that first day
14 of class because she indicated that would be the first time she would be presenting
15 herself as female to not only her colleagues but her students. And in fact she took me
16 up on the offer and I did accompany her.

17 EEOC And what did you take her to department?

18 JM She asked for me to pick her up at her house and I did that and I took her to her office in
19 her department. She was extremely anxious and I offered to go with her to her classes;
20 also offered to go with her into the female restroom, she said that she had already
21 planned to use a unisex restroom and was comfortable doing that so she didn't need for
22 me to accompany her there. And ultimately she didn't go to her classes she just became
23 very anxious and she requested that the departmental secretary pass out her syllabi to
24 her students.

25 EEOC Who did she request do that?

26 JM The departmental secretary.

27 EEOC And who was that?

28 JM I can either look that up for you or maybe HR can tell you.

29 EEOC Was it Teresa Anderson?

30 JM I believe that's who it may have been.

31 EEOC Okay did she leave? Or, continue your story.

- 1 JM She didn't leave her office at that time, I stayed with her for a while and then eventually
2 returned to my own office since I had demands that I needed to take care of.
- 3 EEOC Okay so you left her there?
- 4 JM In her office.
- 5 EEOC Okay so how was she getting home?
- 6 JM We didn't really talk that that, if we did I don't remember. She seemed comfortable
7 when I offered to stay longer but she was comfortable and some of her departmental
8 colleagues had stopped by, said hello and so....
- 9 EEOC Okay so any other conversations that you had?
- 10 JM Not at that time but we've had multiple conversations over the years.
- 11 EEOC Have you spoken with her since she left school?
- 12 JM Yes I have.
- 13 EEOC I need one more piece of paper over here. You got anything?
- 14 AKT What did you and Dr. Tudor talk about since she's left the school?
- 15 JM She sent me an email this past May I don't know the exact day I say around May 22nd or
16 so of 2011 and then she followed that up with a phone call within a day or two after
17 that. The phone call she initially asked if I was angry at her and I indicated no and she
18 asked if I had received her email; and I said yes and she wondered why I hadn't
19 responded, it didn't request a response, I didn't, I just didn't and so in the course of that
20 conversation...
- 21 EEOC What was the email about?
- 22 JM It was a pretty lengthy email in which she was talking about having, it's gonna take me a
23 second, let me try and collect my thoughts.
- 24 EEOC That's fine. I'll get a drink of water.
- 25 JM I guess the main points that I can remember at this time included that she felt that my
26 brother, Dr. McMillan, had been or had held acrimonious beliefs about transgendering
27 individuals and that she had gotten that impression from a prior lunch we had had. I
28 told her at that time that I never had any conversation with Doug about that...
- 29 EEOC A prior lunch that you had with Dr. Tudor?

1 JM Uh huh yea, a couple of years before this phone conversation. She said that perhaps
2 our conversation had been more general in nature. We again talked a little bit about
3 being in an area that was a fundamentally Baptist Bible belt area....

4 EEOC Did you bring that up?

5 JM Uh she did.

6 EEOC Okay.

7 JM She also in the email had indicated that something about how she felt her, I don't think
8 she used the word "treatment" but the course of her tenure process and outcome sent
9 a non-supportive message to gay, lesbian, bi, transgendering students, seems like there
10 was some more regarding that.

11 EEOC Did she say students or students and faculty or.....?

12 JM I would have to look at the email to tell you for sure, I want to say it was students...

13 EEOC Okay.

14 JM But I'm not positive on that Kathy.

15 EEOC Okay.

16 JM She also had said in the email that she knew that I couldn't say anything because of
17 being a family member, she knew I wouldn't be able to say anything because she knew
18 the administration here would retaliate against me; none of those statements are true.

19 EEOC Did you tell her that?

20 JM I did. I did. Every time I tried to either clarify or gain more information from her about
21 where she was getting this, she didn't become anymore clear, in fact she got angry at
22 one point and I really didn't try to continue the conversation much after that. I told her
23 that I wished her well and that I'd like to stay in contact with her. And I know there
24 were other parts of the email and the conversation but like I said, I'd have to look at it to
25 try to remember anything else. It's the best that I can recall right now.

26 EEOC Well that was a while ago so, I can understand that?

27 AKT When was the last time you looked at that email that she sent you?

- 1 JM You know I did look at it within the last month or so I want to say, because I knew you
2 guys were coming, I'd been informed of that and encouraged to kind of fresh my
3 memory probably should have looked at it again before I came to day but I didn't.
- 4 AKT Is there anything else you remember about any conversations you had with Dr. Tudor
5 after she left?
- 6 JM No not after she left.
- 7 EEOC I don't have anything else for you.
- 8 JM Alright.
- 9 EEOC I just want to caution you not to discuss this with anybody it's an ongoing investigation.
- 10 JM I understand.

Interview of Doug McMillan

February 8, 2012

(Also present Charlie Babb, General Counsel, RUSO (CKB) and
Allan K. Townsend, Senior Trial Attorney, U.S.D.O.J. (AKT))

1
2
3
4
5 Kathy Nusz, EEOC: I think I've met you before.
6 DM Really?
7 EEOC I don't know. Did you work at another college?
8 DM No. I've always been here.
9 EEOC Huh. Oh well. Oh well.
10 EEOC Of course you know why I'm here. I'm Kathy Nusz; I'm from the EEOC investigating a charge
11 filed by Rachel Tudor against the university. I'm not going to swear you in today but I would ask that
12 you be truthful and answer like you were in a court of law.
13 DM OK
14 EEOC I am going to turn the recorder on and I'll have you state your name and we'll begin the
15 questions.
16 DM OK
17 EEOC Will you please state your name?
18 DM Douglas McMillan
19 EEOC Okay and your title?
20 DM Interim Vice President for Academic Affairs.
21 EEOC And your date of hire?
22 DM Was January 8, 1990, no that was my hire at the university. Are you asking for my current
23 position....?
24 EEOC You very first hire date. And your job title at hire?
25 DM Assistant professor, Psychology.
26 EEOC And your promotions?
27 DM Let's see, of course I'm a full professor now still retain faculty rank, but 4 or 5 years after hire, I
28 was promoted to associate professor as a part of that or a little bit later than that, I was also
29 named as department chair. Then around 1999 I think, it's pretty close, I was joined the central
30 administration as Assistant Vice President of Academic Affairs, shortly after that I was promoted

1 to full professor, that was my rank. I'm assuming you know the difference between position and
2 rank? But so and I retained my faculty rank at that time. Then I was promoted within a couple
3 of years after that, to Associate Vice President for Academic Affairs. Then for a short period of
4 time, when we were going through a transition and president, I served as interim vice president
5 for academic affairs the first time, and I probably should know the date for you, but I don't recall
6 the dates. It was about a year maybe two that I served that time.

7 EEOC That was interim....?

8 DM Vice President of Academic Affairs, yes.

9 EEOC And then you did something else and now you're back?

10 DM Yea. And then I went back to Associate Vice President after that, then I was promoted to Vice
11 President for Educational Outreach. And then back now to Interim Vice President for Academic
12 Affairs.

13 EEOC Okay. Alright. Can you identify other instances where deans or VP's of Academic Affairs or the
14 president has rejected the recommendation of a faculty tenure promotion committee and
15 denied professor tenure?

16 DM I'm trying to think if there are any other examples for that. During this period of time, while I'm
17 serving at this time, I think Dr. Tudor's was the only one that went all the way through the
18 process. There have been other cases where individuals withdrew their application prior to a
19 final determination.

20 EEOC And they're given that opportunity to withdraw before they're denied?

21 DM It depends; well I would say in almost in every case if they have time left and it looks like they
22 can do some things to strengthen their portfolio, then we give them that opportunity and say to
23 them, "you're not quite there yet and in our opinion you need to work on these things, you can
24 allow it to go through the process or you can withdraw and try again" if they have time left in
25 the 7 year period.

26 EEOC So there have been some occasions?

27 DM Yes.

28 EEOC Several, many or...?

29 DM A couple at least maybe more than that, maybe three.

30 EEOC Withdraw verses denial, I mean what....?

31 DM It doesn't go all the way through the process to completion to the president's decision or a
32 board's decision at that point. It basically stops at my level. I'll stop and say "you're going to be
33 weak in this area. Looks like you can have a chance of fixing the weak area" and then give them

1 the option to continue or not continue. Dr. Tudor's situation was the only one where we made
2 an offer for additional time to complete or strengthen the portfolio.

3 EEOC Is there a policy on applying for tenure after being denied?

4 DM There's a precedent. There is a statement in the policy that says you are allowed to apply, I
5 don't have a good verbatim memory, but you're allowed to apply during your 4th, 5th, or 6th year.

6 EEOC But nothing stating how long after you've been denied that you can reapply?

7 DM We've never had a reapplication at that point. The precedent, not while I've been the interim
8 VP.

9 EEOC Why was Dr. Tudor given, why two years?

10 DM At looking at her portfolio, and evaluating it, it seemed as through about 2009, maybe a little bit
11 more, she started engaging in some activities that look like she might be on track to
12 strengthening her portfolio, so I felt like she was in her, for example, she was in her 6th year at
13 that point, so if she went all the way through and had a denial based on her portfolio, she
14 wouldn't have any ability to correct it that at that point. She had one more year left in the 7
15 year period and I.....

16 EEOC She was aware of that?

17 DM She was aware of that yea. So the offer that I authorized, well I visited with President Minks
18 first, he approved it and was willing to bring it to the board if she was willing to accept or
19 wanted to accept the offer. It would have given her 2010-11 and she could have reapplied in
20 2011-12 of this year. So getting back to your question, what I think your question was, was that
21 why did we make the offer two years, she was coming right up to a point of running out of time.
22 And I thought she needed some additional time to strengthen her portfolio. I didn't think there
23 was going to be enough time, if we allowed resubmission or she resubmitted in the 7th year.

24 EEOC What was she lacking?

25 DM The portfolio itself was lacking letters of support from fellow faculty members. I felt like she
26 was weak on scholarship, she hadn't reached the noteworthy and exceptional standard on
27 scholarship and her university service had been very episodic up to about 2009.

28 EEOC I'm sorry her what?

29 DM Her university service requirement had been very episodic.

30 EEOC And what would that have been? I don't know what that is.

31 DM Okay. Actually there are four areas that faculty members are evaluated in. The fourth area
32 doesn't apply to her. That's administrative assignments. But the three areas are scholarship,
33 teaching and service.

1 EEOC And what is service?

2 DM Service has to do with serving on....it can be a couple of different things, two or three different
3 things. I'll give you some examples of it: university wide committees, professional association....

4 EEOC Okay, I'm sorry what's a university wide committee?

5 DM Okay, faculty senate, there are committees, do you want names of the university wide or...?

6 EEOC Just give me a couple.

7 DM Okay. The institutional assessment committee is one, there....

8 EEOC Was she offered any, or do you have to be offered to be on those committees or do you apply to
9 be on them?

10 DM Yea, you just indicate an interest to the faculty senate and they make assignments based on
11 that.

12 EEOC And she did not have an interest in any?

13 DM I don't know.

14 EEOC Was she aware?

15 DM Yes, she was aware and in 2009 I believe she joined the faculty senate or was elected to it.

16 EEOC Okay, so joining and being elected are two different things.

17 DM She was elected.

18 EEOC Okay. She was elected to the faculty senate?

19 DM Uh huh. And that was an example of the kind of service that most, actually all faculty members
20 have when they go up for tenure and promotion. It affects the whole institution, the work of
21 that particular committee not just the departmental committee like a search committee that
22 operates for a few months and then nothing happens with that again and the obligation is over.

23 EEOC Okay. Let me ask you about letters of support from her peers. The tenure promotion
24 committee was her peers right?

25 DM Right.

26 EEOC I'm very surprise why would there be no letters of support from them?

27 DM I don't know.

28 EEOC When they were....really thought she was ready for tenure?

- 1 DM Yea, I don't know. They were not in her portfolio.
- 2 EEOC And why do you suppose they all were so supportive.....
- 3 DM What I could share with you about that would be hearsay. I mean I don't have any direct
4 knowledge of what's happened there.
- 5 EEOC It just you know from my standpoint, it's hard to believe, all these folks over here that...and
6 then....
- 7 DM I can offer you a guess but it's purely speculation and I don't know if you want that from me.
- 8 EEOC No that's fine.
- 9 DM I don't know if that's worth very much.
- 10 EEOC I'll get back on some train of thought here.
- 11 DM She did, my recollection, she did have some letters of maybe one or two letters of support from
12 clerical staff in her department and I don't remember who it was.
- 13 EEOC And what would that serve to gain her....?
- 14 DM It's not what the dean...the dean meets with each candidate before they make application.
- 15 EEOC This would have been Dean Scoufos?
- 16 DM Yes. And she goes over what should be in the portfolio.
- 17 EEOC So she would have let her know that she needed to collect some letters?
- 18 EM Yes.
- 19 EEOC And you reviewed her portfolio?
- 20 DM I did.
- 21 EEOC Did you meet with her and give her advice on what she needed to do?
- 22 DM No, I've never done that. The dean does that.
- 23 EEOC You've never met with anyone and provided them with.....?
- 24 DM No not mid process, when the portfolio comes to me, they are in the middle of the process and
25 I've never met with anybody to give them any sort of advice at that point. Not that I recall.
- 26 EEOC Did you ever meet with Dr. Mark Spencer during his application?

- 1 DM No I've racked my brain trying to remember if that ever happened. I can tell you what I
2 remember about that whole situation. We were in a transition in president and Dr. Snowden
3 came to me and asked, he said that Dr. Spencer had just submitted some articles, it was mid
4 process, and asked me to be willing to accept those articles if he got documentation that they
5 had been accepted into his portfolio and I agreed to do that. And I don't know honestly, I don't
6 recall whether I had any conversation with Dr. Spencer about that. I do remember a
7 conversation with Dr. Snowden about that. And by the way, we did this same thing with Dr.
8 Tudor which was to allow her to add articles after the portfolio was submitted.
- 9 EEOC Okay did you meet with Dr. Spencer?
- 10 DM I don't recall meeting with him. I'm just being completely honest with you, I don't recall
11 meeting with him.
- 12 EEOC But at Dr. Snowden's request, you did what?
- 13 DM Accepted some verification for his portfolio that he got an article accepted after he submitted
14 his portfolio and Dr. Snowden asked if I would accept that as a part or allow him to place that in
15 the portfolio. Which I also did for Dr. Tudor, she had one accepted mid-stream the request
16 came over would I allow that to be placed in the portfolio and I said yes.
- 17 EEOC Do you know of any other professors at any other institutions with RUSO that have received
18 tenure promotion after they've been previously denied?
- 19 DM No I don't know of any. Each institution kind of functions independently of each other so I
20 don't, I wouldn't have ever had a discussion with anybody at the other institutions about that.
- 21 EEOC This is a memo it's to Dr. Tudor from you and its reference denial of application for tenure
22 promotion.
- 23 DM Okay.
- 24 EEOC Have any other professors received tenure with 3 or fewer activities in their research
25 scholarship portion of their portfolio, and meet the excellent noteworthy standard or university
26 service that was limited to department assignments and services on the faculty senate?
- 27 DM I don't believe there have been any while I've been Interim VP. You also have to keep in mind
28 the period of time. At that point, I believe she was in her 6th year. But I don't recall any that
29 meet the requirements that you've said. And the reason I bring that up for the 6th year is that
30 you would expect continual involvement in scholarly activity, so I think that's the letter in which
31 I detailed, we evaluate both quantity and quality and that's by policy that we do that and certain
32 things just do not qualify as an appropriate example of scholarship. And so while she I believe
33 she had 8 activities that were some in my judgment did not qualify.
- 34 EEOC Okay. This was dated April 30th, she did not receive this until June 9th do you know...?

- 1 DM I don't know why. It may be that we were reviewing drafts of it, but I don't know why.
- 2 EEOC Okay so this went out with the original date on it maybe?
- 3 DM Yes probably.
- 4 EEOC So you're saying reviewing drafts is going to be....?
- 5 DM Maybe.
- 6 EEOC Maybe. Okay.
- 7 DM Yea, maybe.
- 8 EEOC Okay. What was the reason or reasons why you wouldn't give your rationale for your decision
9 to deny tenure?
- 10 DM Policy requires notification. It doesn't require rationale and it's also mid-stream in the process
11 so the final decision hasn't been made yet until the president and the board....
- 12 EEOC Have you ever provided anybody else with a rationale?
- 13 DM No, not mid-stream like that. What I've done is the letter you have in hand, occurs after the
14 process is complete, the president has delegated the responsibility to me, which by policy that
15 requirement is the president's requirement to give a written statement as to why they didn't
16 receive tenure or promotion and then by policies delegate that to me.
- 17 EEOC So you do send out...?
- 18 DM At the end of the process yes. Absolutely. What you're looking at is the end of the process,
19 April 30th.
- 20 EEOC Oh this one right here?
- 21 DM The one you put back in the volume I'm sorry.
- 22 EEOC Okay that's in the mid...?
- 23 DM No that's after the process is complete. We send an explanation for why they didn't get what
24 they got. That didn't make any sense did it? Sorry about that. I'm trying to be as clear as I can.
25 That occurs after the entire process has been complete and that's again written by policy.
26 There's a policy statement I apologize I can't give you a number on it, I could show you if you
27 like for me to show it to you, but that says that particularly in those cases where the president
28 disagrees with the faculty committee, he states the reasons for that.
- 29 EEOC Okay but had she already been told she was going to be denied?
- 30 DM Right.

1 EEOC So how is that in the mid-process?

2 DM No my decision is mid-process which only requires notification and actually I'm making a
3 recommendation at that point to the president. So that's the little short sentence or two that
4 says I've reviewed your portfolio and here's my recommendation. And then it goes on to the
5 president and tenure decision goes on if the president concurs, goes on to the board.

6 EEOC So this would have been an end process for someone?

7 DM Yes

8 EEOC You would have already made your decision and set it up the line to the president and he would
9 have...

10 DM Yes right and this is just promotion also but that's an example of the communication at the end
11 of the process that's required by...

12 EEOC And so promotion would have been like from assistant to associate?

13 DM Right or associate to full.

14 EEOC Okay. This is a memorandum dated May 27th 2011 to Dr. William Fridley from Douglas
15 McMillan.

16 DM Yes, there is no requirement for me to give reasons and...

17 EEOC But you know, I would want to know why I was being denied, why would you not give somebody
18 a reason?

19 DM I don't make the denials. I make a recommendation to the president. That is at the end of the
20 process and then we give reasons at the end of the process.

21 EEOC But if they know you're going to give a recommendation for denial.....?

22 DM Right I notify them.

23 EEOC You don't give them any reason?

24 DM No. Notification is all that's required by policy. There's a practical reason for doing that way if
25 you like to know it?

26 EEOC Sure.

27 DM The first time I give somebody information that I don't give somebody else. I've potentially
28 discriminated against them.

29 EEOC Okay. October 19th memo this is to Charla Hall, chair of the faculty appellate committee from
30 you, Douglas McMillan. You said that Ms. Tudor's portfolio was the poorest portfolio you had

- 1 every reviewed in 20 years at Southeastern. How many portfolios have you reviewed during the
2 20 year period and in what capacities have you reviewed them? As a member of the faculty
3 tenure committee as dean as a.....?
- 4 DM I could only hazard a guess, sixty, seventy. And I've reviewed on them as a faculty member of a
5 tenure promotional committee, as a department chair, as an interim dean, I left that out. I did
6 serve concurrently during one of my....assistant vice president is also an interim dean as a same
7 time, sorry for reviewed him as interim dean. I've reviewed them one of the vice presidents
8 asked me to review them, help him to review them as an assistant vice president, and I've
9 reviewed them as Interim Vice President.
- 10 EEOC Okay given that the members of the faculty tenure promotion committee recommended the
11 charging party and I just ask a while ago despite allegedly extremely poor portfolio, did anyone
12 in the administration subsequently seek to train the members of this committee on what they
13 should be looking for when they review a portfolio?
- 14 DM That would be a question for the dean. I'm not sure that anything has been done with that.
15 Generally departments make decisions that is easier to agree with than this one.
- 16 EEOC And who would be the person that would do that. I mean who would be the person that
17 recommend that?
- 18 DM That a committee be trained?
- 19 EEOC That there recommendation was poor, they made a poor recommendation and they needed
20 to....?
- 21 DM Typically a dean would do that.
- 22 EEOC Dean Scoufos?
- 23 DM Typically that's where it would occur.
- 24 EEOC Dean Scoufos would have been the person.
- 25 DM And I don't know whether she's done it or not. It's a great suggestion though.
- 26 EEOC Okay and you've kind of answered this before, but we'll go over it one more time.
- 27 DM Okay.
- 28 EEOC Do you believe the members of the committee were bias in any way?
- 29 DM I don't have any direct knowledge of any bias of the committee. Again, I mean I've heard things
30 but I couldn't verify those for you.
- 31 EEOC Just rumors?

1 DM Uh this was reported to me, and I'm trying to remember who told me this, maybe Dean Scoufos,
2 that Dr. Tudor had submitted her portfolio either once or twice previously to this time and each
3 time that committee told her that the portfolio was not up to standard and she withdrew at that
4 point. And the year previous decision and I believe Dr. Scoufos told me this, that it was nearly
5 either unanimous or almost unanimous decision to deny her portfolio. And then based on that,
6 she withdrew her portfolio at the departmental review level. Now that's just what's been told
7 to me. You would have to ask some of the department faculty to verify that.

8 EEOC The department chair?

9 DM The department chair would know but you would also.....

10 EEOC Who was the department chair?

11 DM At that point it was John Mischo.

12 EEOC But he recommended her didn't he?

13 DM Yes. In 2009/10. This was the years prior to that. So it would have been 2008/2009.

14 EEOC And that was the first time she....

15 DM It was either the first or second time and you'll have to ask them.

16 EEOC She hasn't been there long enough I don't think.

17 DM Yes she has.

18 EEOC She has?

19 DM Yes. At least for one before, now Charlie is going to fuss at me because I'm talking about stuff I
20 don't actually know. You can kick me under the table if you want to. It's just what I heard. I
21 want to be clear about that. It's hearsay. I don't have any direct knowledge of it. Those faculty
22 members when you interview them, Dr. Mischo or Dr. Prus could verify that or negate it either
23 way.

24 EEOC Okay I'm sure they've recommended many other people for tenure. And don't they, I mean,
25 one would think they would look and say, she's not ready yet.

26 DM Yes. And that's my understanding of what happened. Previous to 09/10 what was happening in
27 09/10, she was running out of time to apply. She was in her 6th year and not much time left. So
28 I'm sure that's why she went ahead and applied then.

29 EEOC Okay Dr. Tudor submitted some symposium that she was editing.

30 DM Right.

31 EEOC And I guess you didn't.....

1 DM I didn't judge the quality to be where it needed to be.

2 EEOC Is that what it was?

3 DM Yes, would you....?

4 EEOC You do know that she did it?

5 DM Well since then, I don't know if you have this statement from Dr. Scoufos. Dr. Mark Spencer was
6 the head of that Native American Symposium and Dr. Scoufos, now this has all been since that
7 time. Do you want me to go ahead and talk about that?

8 EEOC I do.

9 DM Okay and I can give you copies of all that because that really came up after all of this was
10 submitted. Dr. Spencer was the recognized editor of that Native American Symposium
11 proceedings. And he made some statements to Dr. Scoufos in a conversation where he
12 described himself as a one-man show, as the primary editor and as an afterthought, he said oh
13 yea there was that one year that Dr. Tudor did a little bit of this. And so a couple of things about
14 that, one when I went to the link, she identified in her portfolio to verify that she in fact was an
15 editor, her name was not listed as an editor, so that was a problem. And had that been the only
16 thing, I mean, I don't know what I would have done with that. But anyway ...

17 EEOC Was there any way to verify that at the time? Did you try and verify it?

18 DM I thought that was what I was doing?

19 EEOC Okay.

20 DM Going to the link she supplied me. So and there is an expectation that faculty are going to have
21 their portfolio complete and have those links checked and so that when we look at them up the
22 line, we don't have to come back and say well you said this, but I don't see any of this. That's on
23 the faculty to do that. Okay back to, I'm sure I'm confusing you now.

24 EEOC No you're not.

25 DM I'm glad of that. There are also and this was astonishing to me to be honest with you, in the
26 conversation Dr. Scoufos had with Dr. Spencer about the Native American Symposium, he said
27 those articles that are accepted for the symposium proceedings are not refereed and in fact he
28 contacts all applicants and tells them.....

29 EEOC Okay, I'm lost now. Not refereed tell me what that means?

30 DM That means nobody looks at them to judge them as being acceptable or not acceptable.

31 EEOC So if an article is submitted is not....

- 1 DM A refereed process means there's a judge somewhere for the journal or the proceedings that
2 judges the quality of this submission and decides whether to accept it or deny it. And in judging
3 the quality of scholarly activities for portfolios, that's an important piece. Because that means
4 somebody external to the institution or the department, looked at the work and deemed it to be
5 either of sufficient standard quality standard to be accepted or denied this submission. That's a
6 really good way of establishing quality.
- 7 EEOC Okay for this particular symposium, that was not the case?
- 8 DM They were not refereed. Now the other piece of it is, Dr. Spencer indicated that he sends out to
9 all perspective authors, the statement that says, these submission likely will not meet the
10 requirements for tenure and promotion at your institution because they are not refereed. And
11 I'd be glad to give you that statement if you would like to have it.
- 12 EEOC Yes.
- 13 DM So I think you can follow my reasoning on this. The chief editor, the proceeding of the
14 symposium are indicating these are not refereed nobody judged them to be acceptable or not
15 acceptable. And your institution will most likely not view these as meeting the quality standard
16 for tenure promotion. So that's the reason why There's another reason is that, when a
17 portfolio is heavy, in terms of local, here's another gage of quality. Local, state, regional,
18 national. What we hope to see in a portfolio, what I always look for when I talk to faculty and
19 schools generally about the process, is that we hope to see a good mix of those things. And with
20 that mix more weighted toward regional, national. Because obviously the quality standards are
21 higher.
- 22 EEOC So published work on all levels.
- 23 DM Yes. With less emphasis on local submissions, because a local submission could be, went to the
24 third grade, I talked about neuropsychology that was my presentation. That's not the same as a
25 national journal with an acceptance rate of 10% ...
- 26 EEOC Like in the medical journal.
- 27 DM ... It's not the same, in terms of judging quantity and quality; we want to see some of those
28 quality submissions and we want the portfolio to be heavier on that end than it is on local
29 submission.
- 30 EEOC Okay did she have any other published work beside....?
- 31 DM She did, yes and it's documented in the letter that I think you were looking at a minute ago. She
32 did have two or three, I probably stretched one of them to say it was a good example, but she
33 had two or three that were examples of that kind of work, but that was out of 8 activities she
34 was claiming, the two or three were the ones that were at that level. Again you got to keep in

1 my we're talking about a 6 year body of work. Two or three over that period of time doesn't
2 clearly make the case.

3 EEOC Over a 6 year period how many would you, what would you consider?

4 DM We don't have a hard and fast rule but I would say, I want to see examples of continuous
5 involvement in that kind of quality work. So just as a rule of thumb, I'd like to see 6 or more
6 examples of that kind of quality work. That's just an illustration.

7 EEOC Okay. Do you know other gay, lesbian, bisexual, transgender people other than the charging
8 party, Ms. Tudor?

9 DM Yes I do.

10 EEOC Roughly how many?

11 DM We have three department chairs on campus that are gay men.

12 EEOC Three department chairs?

13 DM And there may be more faculty.

14 EEOC These are just the ones you know of?

15 DM Yes the ones I know. And I might say I've been involved in every one of their tenure promotion
16 process with positive recommendations. I don't know if that's important to know but it is.

17 EEOC So all three were approved their first time around?

18 DM I believe so. And some of them I've been involved in separating the rank from the position.
19 Some of them might been involved in approving them as department chairs.

20 EEOC So you have good relationship with the males, any women that you know of?

21 DM I don't know that I know any that are, really

22 EEOC Well what about outside of the university?

23 DM I had a colleague she went on to a different university that was an openly, I don't know the most
24 correct term is, but she described herself as a lesbian, she was a great member of the
25 department and I'm not even sure I'd have to go check this, it might have been on her tenure
26 and promotion committee, if she was here long enough, she may not even been here long
27 enough.

28 EEOC Do you have any beliefs about these people being immoral?

29 DM Immoral? About them being immoral, you mean any more immoral than anybody else?

1 EEOC Do you have any religious beliefs....

2 DM Yea I have personally.

3 EEOC about gay and lesbian, bisexual, transgender, people being immoral?

4 DM That I apply to other people? No.

5 EEOC Do they make you uncomfortable?

6 DM No.

7 EEOC Do you have any objections to their lifestyle?

8 DM Objection, no. You mean do I ...? I don't understand that question. I assume that's their
9 lifestyle, not my lifestyle.

10 EEOC What's your religious tent.... is it...what religion are you?

11 DM I'm Baptist Christian.

12 EEOC Okay. Does your religious tent have an objection to gay, lesbian, bisexual, transgender?

13 DM Okay, what do you mean by religious tent I'm not sure?

14 EEOC The Baptist belief.

15 DM I would say generally the Baptist belief teaches that that's a not a biblical lifestyle.

16 EEOC Okay.

17 DM Let me say this about that question. I don't believe my personal faith is something that I get to
18 beat people over the head with and make decisions about as vice president. I think we would
19 be in a pretty sorry situation if whoever was in charge got to dictate how everybody else lived
20 and the faith they have. The only way my personal beliefs comes into play, is I believe I'm
21 required to, and I'm being honest to you, required to the best of my abilities to have fairness in
22 the workplace as I do my work And that's what I've attempted to do.

23 EEOC Did you inquire of human resources or anybody else if the charging party could be terminated
24 because of her lifestyle?

25 DM No never. That's a complete fabrication.

26 EEOC Have you heard that statement before?

27 DM I've heard it, and I've seen it and read it on blogs.

28 EEOC Me to.

- 1 DM Which I can't respond to.
- 2 EEOC Can we take just a short break?
- 3 EEOC Okay. There's an email chain between you and Lucretia Scoufos and Clair Stubblefield where
4 Ms. Stubblefield is sharing a legal elements of a prima facie case of discrimination.
- 5 DM Right.
- 6 EEOC Why would she send you this email?
- 7 DM I don't know. She did send it to me.
- 8 EEOC Did you ask for it?
- 9 DM No, I didn't ask for it. I don't recall asking for it. I do remember just a little.....
- 10 EEOC Did you have more than one discussion?
- 11 DM I think there was like maybe a discussion where she was trying to educate me about the
12 elements of a discrimination complaint. I think we might have had something like that and the
13 follow-up was she sent me those elements. I'm not sure I even understand them at this point,
14 yet but she sent them to me.
- 15 EEOC So she did this after she advised you that a charge had been filed with the EEOC?
- 16 DM I think so, no, now I don't know about whether it was before or after the filing with the EEOC.
17 You probably would just go by the date, I don't know.
- 18 EEOC Okay, do you feel it's not in the school's best interest to allow professors to reapply for tenure
19 after they've been denied?
- 20 DM Basically yes.
- 21 EEOC Is that a rule?
- 22 DM Well it's the precedent that I'm aware of. I know while I've been VP it's never been allowed and
23 I don't know of any other cases where it was allowed. There may be one 30, 40 years ago but
24 I'm not aware of it.
- 25 EEOC Has anybody else been approved for tenure without letters of support from faculty?
- 26 DM Everybody includes them. I don't remember a single time when they weren't included. Now let
27 me be clear about that, if that was the only thing missing, and everything else was just "A okay"
28 and met standard in my mind, in my professional judgment, then that might have been that
29 would have been a different consideration. It was the whole package, the whole portfolio.
- 30 EEOC Since your, you work in the Department of Psychology?

1 DM Uh huh.

2 EEOC How do you access literary work? I mean do you have background in that?

3 DM Sure, no I do have a bachelor's degree with a 1st or 2nd teaching field, it's like a double major in
4 psychology in English but the process for English is pretty similar, there is some variation among
5 discipline for example music, you don't get a lot of journal articles but you get national and
6 international performances and compositions so scholarly activity in the different disciplines
7 varies a little bit but the majority of departments, what I was talking to you about in terms of
8 the quality, local, state, regional, national, that holds up on most of the disciplines. Does that
9 make sense?

10 EEOC Yes. And while we're on that same vein about the symposium, who would judge, I mean,
11 Spencer as editor would he not be the person to judge?

12 DM If they had a referee process? They don't. They don't claim to have a referee process.

13 EEOC That would be like several people?

14 DM It could be that's a great question. Usually it's more than one. They'll have an editorial board,
15 they have a group of people that accept the article for submission or not.

16 EEOC Okay Spencer was not a quote judge?

17 DM No he said he wasn't that it's not a referee process and that again in that document that we're
18 going to provide you, he indicated that in all the years he's been doing it, and I don't know how
19 many years that is, they've only not accepted two articles and I don't know what the reason was
20 for them not accepting those.

21 EEOC He's only declined.....2?

22 DM Two. And that's another way of saying what I've been saying is that, the quality is not well, the
23 submission is not judged to meet a certain standard or quality.

24 EEOC I'm just trying to confirm this, the comments that Dr. Scoufos made about Spencer saying that
25 "oh by the way she was an editor at some point in time" did that come up after she had been
26 denied?

27 DM Yes.

28 EEOC Okay.

29 DM That document we'll give you was something we found out afterwards and it may have a date
30 on it to help you.

1 EEOC Okay. In an October 10th memo, I'll let you see that, you stated that you thought that allowing
2 Ms. Tudor apply for a second time would potentially inflame relations between faculty and the
3 administration, why?

4 DM There's been an ongoing misunderstanding between a few of the faculty and administration
5 over how the tenure and promotion process goes. And they have, it's just been a handful of
6 faculty some of them have been pretty vocal in the faculty senate, where they take one policy
7 and interpret that without the context of the rest of the policy, so they ignore other policies that
8 pertain to promotion and tenure and they focus on one sentence or two sentences and one
9 policy and ignore the other statements about the tenure and promotion process and they've
10 gotten pretty vocal about that. And the nature of that policy basically is, it says something like
11 that departmental faculty are primarily responsible for tenure and promotion decisions. And
12 they've said, in fact I've....

13 EEOC They don't want you to have anything to do with it, is that right?

14 DM Right. Yea, and I've actually written, you probably have a letter or memo of clarification to the
15 president on that point that shows that policy can't be interpreted in isolation, it's never been
16 our practice, it's never been the interpretation that we've had on this campus since I've been
17 here showing that only the faculty get to decide that. And ignoring the description of the
18 process that includes independent review at the chair level, the dean level, the VP level, the
19 president level, that was the part that they were saying, I guess their interpretation is that we're
20 just going to rubber stamp whatever the faculty says.

21 EEOC Does any school just rely totally on....?

22 DM I'm not aware of any on our system that do that? And in fact, my perspective of it, is we pay
23 probably more attention to that than most of our sister institutions. For examples, over the last
24 three years, well two previous years while I've served as interim VP, we've agreed with the
25 faculty 93% of the time and I think this year I'm going through them right now, I think we're
26 going to end up over a total of three period of 95% agreement. So we do honor that.

27 EEOC So that agreement with their....?

28 DM Agreement with their departmental tenure departmental promotion committee. We do honor
29 that and we pay attention to it but it's not the only steps in the process and they're not the sole
30 decision maker. Does that make sense?

31 EEOC Uh huh.

32 DM And I think that clearly spells out a policy for example, the dean supposed to take the portfolio
33 and do their due diligence and review it and I'm supposed to look at it carefully and review it
34 and I can just tell you that's what we try to do. As long as I've been interim, that's what I've
35 tried to do. I can understand that somebody that I didn't recommend would think I didn't do a
36 very good job of that but I really diligently try to do that the way I'm supposed to.

- 1 EEOC Okay is there any, this goes back to assessment. Is there any published guide to determine if
2 scholarship is excellent and noteworthy?
- 3 DM Yes, are you asking is there a hard and fast rule that doesn't involve professional judgment? No.
4 Now there are statements in the policy that I can point you to where you can get a flavor for
5 what I've been talking about. But is there a statement that says, this for example, is a number 1
6 this a number 2, this a number 3, no. The process relies on professional judgment and
7 experience. I think that's true of every college in our system. I've tried to be very consistent in
8 the way that I do it. There have been times when I'll get invited to speak to a school, like a, we
9 have schools I don't know if you're aware of that, but the School of Education, Behavior Sciences
10 is a school...
- 11 EEOC I did go to college.
- 12 DM I'm sorry. If that was condescending, I really apologize.
- 13 EEOC That's okay.
- 14 DM I wasn't trying to do that I know you're coming from the outside there probably times it didn't
15 make a lot of sense.
- 16 EEOC Well there is a lot to digest.
- 17 DM But occasionally in the fall, actually in the fall semester ever since I've been interim VP this time,
18 the president has asked me to go around to each school and talk about issues that are pertinent
19 to them. And I have gone to several of the schools and talked about this issue with them. Now
20 whether I did all of them, I couldn't tell you, it was just a discussion we had.
- 21 EEOC Okay do you do that periodically or just that you do it once or.....?
- 22 DM I've done it each fall since I've been interim VP this time. Now I want to be clear, we didn't
23 discuss tenure and promotion every time. I have some things that I think they might want to
24 know.
- 25 EEOC Tell me, kind of give me an outline of what you discuss?
- 26 DM It would be very similar to what I talked to you about. Which was, we judge both quantity and
27 quality, like to see active involvement in scholarship across your period of employment here,
28 like to see service that goes beyond, sort of routine departmental service, and is of greater
29 service either to your profession or to the university and sustained over a long period of time.
30 Those are the kinds of things I routinely talk about.
- 31 EEOC Who accesses the teaching skills?

1 DM The departments are heavily involved in that but we also have a university wide assessment
2 process. But in light of, are you asking me in light of tenure and promotion who would assess
3 that?

4 EEOC Uh huh.

5 DM Okay. It's typically what faculty, the best way I can answer that is to tell you what faculty
6 normally include in their portfolio to demonstrate that. They'll include course evaluations from
7 students and that can include both are, we have an instrument that we use specially and then
8 ever so often we also use a national normed course evaluation instrument. Faculty members
9 will include occasionally a peer evaluation of their teaching. Sometimes they will....I'm trying to
10 think how else they demonstrate that. Occasionally they'll include letters of support from
11 students where they talk about their abilities, what they learned from them, how they found
12 them as a teacher.....

13 EEOC Did Ms. Tudor include in any of those?

14 DM Uh teaching was not the thing that set off the alarm for me with her, and so I think and I can't
15 remember specifically what was in her portfolio on the teaching side, but I don't think I found
16 anything that raised a huge red flag for me there.

17 EEOC Okay.

18 DM That's a good question because for, that's something that's absolutely...you got to demonstrate
19 effectively. That can sink a portfolio on it's own.

20 EEOC Complaints and....?

21 DM Yea, complaints. Complaints from students they didn't learn what they were supposed, they
22 couldn't find the professor, didn't ever understand what they were teaching, didn't feel like they
23 learned anything, they rolled in a lot of different variations.

24 EEOC Well I had a couple of those.

25 DM Well I think learning to get along with some of those kinds of faculty is part of your college
26 education. But hopefully that's not the whole faculty.

27 AKT Uh let me just ask a follow-up question on one thing that Kathy asked because I was unclear on
28 something.

29 DM Okay.

30 AKT This issue about the inflaming relations with the faculty.....

31 DM Yea.

1 AKT Am I correct at what you were getting at is that, if you had allowed her to reapply after just one
2 year, it was likely that you were going to deny her and that denial would have inflamed the
3 relations with faculty more, is that what you're getting at?

4 DM Yea. What had happened, they're already sensitive on the tenure and promotion decisions that
5 was the point I was making for that part of it. Now to come back to your question, we would
6 have to create an entirely new precedent to allow her to come back in the 7th year. And then,
7 see the tenure decision; the decision had just been made like in late spring and she would have
8 begun the reapplication process in October that would have given her 5 months to try to fix
9 some of these things. Well the service issue in particular, you couldn't do it in five months, you
10 had to have more time at it. So that's again why I thought, okay she's going to need more time
11 to get where we can say, yes. And I wasn't successful in communicating that apparently
12 because she rejected that offer which I never understood why. But yes what was where I was
13 afraid we were going to end up with.

14 EEOC Okay, I don't have anything else.

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
et al.)

Plaintiff,)

VS.)

Civil Action No.
5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA STATE)
UNIVERSITY, et al.)

Defendant.)

ORAL DEPOSITION OF
CATHY CONWAY
MARCH 10, 2016

ORAL DEPOSITION OF CATHY CONWAY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 10th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

1 Q. Why did you bring their names up during that
2 conversation with Dr. Tudor on June 1st?

3 A. Because that's her reporting administrative
4 chain or channel.

5 Q. Did you discuss what she may need to report
6 to -- up that chain?

7 MS. COFFEY: Object to form.

8 A. Yes.

9 Q. (By Mr. Townsend) What did you discuss?

10 A. That she was changing her name and may be
11 changing her gender presentation.

12 Q. Was there anything else said during that
13 conversation with Dr. Tudor regarding Dr. McMillan or
14 Vice-President McMillan, as we've been calling him?

15 A. No.

16 Q. Was there any discussion during that
17 conversation with Dr. Tudor on June 1st about how
18 Dr. Tudor would dress?

19 A. No.

20 Q. Was there any discussion about makeup during
21 that conversation with Dr. Tudor on June 1st?

22 A. No.

23 Q. Have you told me everything you remember about
24 that conversation with Dr. Tudor on June 1st?

25 MS. COFFEY: Object to form.

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

1			
2			
3	UNITED STATES OF AMERICA,)	
4)	
5	Plaintiff,)	
6)	
7	RACHEL TUDOR,)	
8)	
9	Plaintiff Intervenor,)	
10)	
11	vs.)	No. 5:15-CV-00324-C
12)	
13	SOUTHEASTERN OKLAHOMA STATE)	
14	UNIVERSITY, and)	
15)	
16	THE REGIONAL UNIVERSITY)	
17	SYSTEM OF OKLAHOMA,)	
18)	
19	Defendants.)	
20)	
21)	
22)	
23)	
24)	
25)	

DEPOSITION OF DOUGLAS MCMILLAN

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 10, 2016

REPORTED BY: ROSIE STANDRIDGE, CSR

Douglas McMillan

71

10:08 1 A. Not that I recall.

10:08 2 Q. (By Mr. Townsend) In any meetings -- strike
10:09 3 that.

10:09 4 In any discussions you had about Dr. Tudor,
10:09 5 did the issue of whether or not she had surgery ever
10:09 6 come up?

10:09 7 MR. JOSEPH: Object to the form.

10:09 8 A. I don't -- I don't remember.

10:09 9 Q. (By Mr. Townsend) Do you remember any
10:09 10 discussions you were ever part of where it was
10:09 11 discussed that Dr. Tudor had had any sort of medical
10:09 12 treatment?

10:09 13 A. No.

10:09 14 MR. JOSEPH: Object to the form.

10:09 15 Q. (By Mr. Townsend) Was there -- were you
10:09 16 ever involved in a discussion where the topic of
10:09 17 whether Dr. Tudor had taken any sort of hormone
10:09 18 supplements had been discussed?

10:09 19 MR. JOSEPH: Object to the form.

10:09 20 A. No.

10:10 21 Q. (By Mr. Townsend) Were you ever involved in
10:10 22 a discussion where the issue of how Dr. Tudor should
10:10 23 dress came up?

10:10 24 A. No.

10:10 25 Q. Were you ever involved in a discussion where

Expert Report of George R. Brown, MD, DFAPA

U.S. et al. v. Southeastern Okla. St. Univ. et al., 5:15-cv-00324-C (W.D. Okla.)

I. Qualifications and Experience

I am a Professor of Psychiatry and Associate Chairman of the Department of Psychiatry at East Tennessee State University in Johnson City, Tennessee. I am board-certified in adult psychiatry. I was named a Fellow of the American Psychiatric Association in 1998 and a Distinguished Fellow in 2003.

I have specialized training and expertise in the diagnosis and treatment of Gender Identity Disorder and Gender Dysphoria (“GID/GD”). I have authored or coauthored 38 papers in peer-reviewed journals and 19 book chapters on topics related to GID/GD, including the chapter on GID/GD in *Treatments of Psychiatric Disorders*, (3rd Ed. 2001), the definitive text on the diagnosis and treatment of psychiatric disorders published by the American Psychiatric Association. I have been a practicing psychiatrist since 1987. Over the last 33 years, I have evaluated, treated, and/or conducted research with between 600 and 1000 individuals with gender disorders in person, and over 5100 patients with gender dysphoria during the course of research-related chart reviews.

Since 1987, I have been extensively involved with the World Professional Association of Transgender Health (“WPATH”), the only international association of medical, surgical, and mental health professionals specializing in the evaluation and treatment of, transsexual, transgender, and gender non-conforming people (WPATH is the same organization which was previously known as the Harry Benjamin International Gender Dysphoria Association until 2006). I served on the Board of Directors of WPATH from 1993-1997 and from 2001 – 2007 and from 2010-2014. I also served on the Executive Committee of this organization as Secretary-Treasurer from 2007-2009. In addition, I was a coauthor in the development and publication of the World Professional Association of Transgender Health Care’s Standards of Care for the Health of Transsexual, Transgender, and Gender-Nonconforming People, Version 7 (published in 2011 and currently in use), and in the previous 2 versions (versions 5 and 6). I served as a member of WPATH’s Standards of Care Revision Committee from 1990-1998 and have been Co-Chairman or a member of that Committee from 2001 to present. These standards for the medical treatment of GID/GD represent the consensus of specialists in the field, and have been recognized as the definitive standards by a number of jurisdictions in the USA and Canada. My current responsibilities involve conducting the largest studies ever developed concerning the health of, and health disparities in, transgender/gender dysphoric people, as well as providing national training programs on transgender health care on a national basis in the Veterans Health Administration

and for the Department of Defense. More detailed information about my background and experience can be found in my curriculum vitae, which is attached as Exhibit 1.¹

II. Opinions

I have been asked to render expert opinions in the following areas:

- (1) The factors that medical professionals consider when determining a person's sex.
- (2) The traits of "gender" and "gender identity," how they relate to a person's sex, and how they relate to "sexual identity."
- (3) The traits of being "transgender" and "transsexual" and how they relate to a person's sex.
- (4) The condition of "gender dysphoria" (previously called gender identity disorder).
- (5) Treatment of gender dysphoria and gender identity disorder.

In forming my opinions, I have relied on my scientific education and training, my research experience, my knowledge of the scientific literature in the pertinent fields (a nonexhaustive list of those references are included at the end of this document), and my 33 years of clinical experience in evaluating, treating, and conducting research with patients with sexual and gender identity issues and gender identity/gender dysphoria disorders. My opinions are set forth below. I may wish to supplement these opinions or the bases for them as a result of new scientific research or publications or in response to statements and issues that may arise in my area of expertise.

A. Summary of Opinions/Conclusions

"Sex" is complex and requires more than a cursory glance at a newborn's genitalia. Sex involves biological constructs that may or may not be readily observed, and includes the important component of gender. "Gender" involves both gender identity and gender role/expression. Gender identity is an internal, subjective sense of oneself as masculine, feminine, or occasionally some other sense of gender that does not fit readily into the "binary" construct of male/masculine and female/feminine that predominates in our Western culture. Gender role, or expression, is the objective presentation that each of us has as we dress, behave, and interact in society in ways that are understood by others as masculine, feminine, or occasionally some other gender role/expression that does not seem to fit into the binary construct of male/masculine or female/feminine. Everyone has a gender identity and role, and in the vast majority of people, there is consonance between the sex of assignment at birth

¹ Please see Exhibit 2 for information about my compensation for preparing reports and testifying in this case.

("birth sex") and both gender identity and role. Rarely, there is significant incongruity between "birth sex" and one's gender identity, which can result in a set of clinically significant symptoms described in psychiatric manuals as "gender dysphoria" (GD).

Treatment of GD is guided by the WPATH standards of care, and many individuals with this diagnosis can be fully cured of all symptoms with appropriate treatment. Treatment typically consists of psychological evaluation and therapy, hormonal therapy, living in the felt gender role, and, for some, irreversible surgeries to bring the body into alignment with the subjective experience of gender identity. Part of this transition necessitates the legal assumption of an identity that is consistent with gender identity, e.g. driver's license, amended/changed birth certificate, passport.

B. Determining a person's sex

A person's "sex" is not exclusively or solely defined by one's anatomy or ability to procreate as was often believed in the past (Ovesey and Person, 1973). "Biological sex" is a broad and complex concept that consists of a number of variables, including gender and gender identity, genital anatomy (internal and externally visible), secondary sexual characteristics, brain anatomy, sexual orientation, hormonal levels in the brain and body, and chromosomal complement. Most commonly, the factors that constitute biological sex align and there is little variation. For example, for the vast majority of men, there is a total matching of chromosomes (XY), sexual organ appearance as male (penis and testicles), male hormone levels (predominantly testosterone), and the overall psychological sense of being a man. The American Psychological Association defines "[s]ex as a person's biological status and is typically categorized as male, female, or intersex (i.e., atypical combinations of features that usually distinguish male from female)." "Birth sex" is another term frequently used in medical professionals' discussions of sex, and refers to the sex of assignment at birth as recorded on a birth certificate. "Birth sex" (the sex of assignment at, or near, the time of birth) can be recorded as only "male" or "female" and as such, is an administrative binary terminology that does not take into account the complexity of human experience.

The variables identified above and their role in determining a person's sex are discussed in more detail below.

1. Gender and gender identity

Gender is a component of sex, and like sex, has both a subjective and an objective component. The subjective sense of oneself as masculine, feminine, both, neither or some other gender is commonly referred to as gender identity, is a critical component in determining a person's sex, and is inextricably linked, although partially distinct, from sexual orientation. Gender role is the objective, social expression of gender identity and is usually aligned with gender identity. Most people give no thought to their gender

identity and whether or not it matches their physical anatomy because no conflict exists. For example, most men get up in the morning, put on clothes that identify them as men in our society, and experience no conflicts or incongruity between their sense of being a man and how they look anatomically and how they present themselves in society as men. However, in rare individuals (recent estimates are 4.6/100,000 births; Arcelus, 2015), gender identity and gender role may not align, and gender identity may not align with the other components of sex. For example, transsexual persons generally experience a lack of alignment between their subjective sense of themselves (gender) and their genital/physical anatomy. Note that “sex” is an integral part of the term “transsexual” (discussed below) which indicates the linkage between gender and sex.

A person’s “gender identity” is a component of one’s biological sex and refers to “one’s sense of oneself as male, female, or transgender” (American Psychological Association, 2006). The American Psychiatric Association defines gender identity as a “category of social identity and refers to an individual’s identification as male, female, or occasionally, some category other than male or female.” (APA, DSM-5, 2013, pg 451). When one’s gender identity and other biological characteristics are not congruent, the individual may experience gender dysphoria (defined below). While “birth sex” (sex of assignment at birth) is usually congruent with a child’s gender identity (as experienced and expressed later in childhood), children are sometimes born with anatomical, hormonal, and/or chromosomal variations that do not align with the “birth sex” (genital anatomy) that was recorded by a physician at or near the time of birth. Such children may then develop gender identities and roles that do not align with their “birth sex.”

All individuals, not just transgender individuals (who are discussed in section II.C below), have a gender identity. Studies have shown that gender role, as an expression of gender identity, is usually established early in life, by the age of 2-3 years old, and that gender role (behaving as a typical boy or girl in our culture) usually displays very little malleability over time for the vast majority of people (Stoller, 1968), especially after the onset of puberty. Children as young as one year old may display gender-specific behaviors readily recognizable as associated with the “other” sex (Zucker and Bradley, 1995, Chapter 1, page 11).

Gender identity is distinguishable from and exists separately from sexual orientation, which refers to whom a person is sexually attracted. Just as with other individuals, transgender people can have sexual identities/orientations as heterosexual, homosexual, bisexual or asexual.

2. Genital anatomy (internal and externally visible)

A critical component in determining a person’s sex is the genital anatomy, which includes both internal (not observable) and external (observable) components. It is the

appearance of the observable external genitalia that determines the classification of “birth sex,” the sex of assignment at birth, and whether “Male” or “Female” is registered on a birth certificate.

3. Primary and Secondary sexual characteristics

Primary sexual characteristics are those features that are not subject to the hormonal changes associated with puberty. These typically include: testes, prostate, seminal vesicles, penis, in “birth sex” males, and ovaries, vagina, uterus, fallopian tubes, clitoris, labia in “birth sex” females. Secondary sexual characteristics are those physical features that develop under the influence of rising levels of sex steroid hormones beginning at puberty. Examples include breasts in women, “Adam’s Apple” (enlargement of the front part of the laryngeal cartilage) in men, facial hair in men, widening of the pelvis in women, deepening of the voice in men, and hip-to-waist measurement ratios that are lower in adult females, on average, compared to adult males. These physical changes are dependent on production of adequate amounts of estrogens in females and testosterone in males.

4. Brain anatomy

Brain anatomy is another determinant of a person’s sex. Many areas of the brain are different between males and females (“sexually dimorphic” areas of the brain), due to genetics and the amounts of sex steroid hormones present in the developing fetal brain (from any source, including from the woman carrying the fetus).

It is well known that the brains of “birth sex” men and women differ in size in many regions of the brain. These include specific parts of the brain that are visible on MRI studies, including the hippocampus, caudate nucleus, and anterior cingulate gyrus, to name a few, that are larger in “birth sex” women and the amygdala and gray matter volumes that are larger in “birth sex” men. Most studies of gender-typical male and female brains also indicate that the right hemisphere is larger in men than in women.

5. Sexual orientation

“Sexual orientation” refers to the sex of those to whom one is sexually and/or romantically attracted. The term “sexual identity” is often used interchangeably with sexual orientation. Categories of sexual orientation typically have included attraction to members of one’s own “birth sex” (gay men or lesbians), attraction to members of the other “birth sex” (heterosexuals), and attraction to members of both sexes (bisexuals). Rarely, some individuals report that they have no attraction to either sex (“asexual”). While these categories continue to be widely used, research has suggested that sexual orientation does not always appear in such definable categories and instead occurs on a continuum. In addition, some research indicates that sexual orientation is fluid for

some people; this may be especially true for women (Nichols, 2004; Peplau and Garnets, 2000).

Although usually aligned, sexual expression/role may or may not be consistent with the subjective sexual identity. For example, a person who has male genitals, a male-differentiated brain, male secondary sexual characteristics (e.g. facial hair, Adam's apple, strong upper body strength), XY chromosomal complement, male levels of brain and body testosterone, and sexual attraction to women (i.e., a heterosexual sexual orientation) as well as a subjective sexual identity as a heterosexual male may nonetheless engage in occasional same-sex sexual behaviors, indicating that sexual identity/orientation and sexual role/behavior may not always align.

6. Hormonal levels in the brain and body

The relative levels of estrogen and testosterone (and their metabolites, or what is left after they are processed by the body) present in the brain and body are also factors that determine a person's sex. Estrogen and testosterone are referred to as "sex steroid hormones" and testosterone and its byproducts are referred to as "androgens." Both the brain and the body have receptors for estrogen and testosterone, which means that the brain and various organs in the body are changed by the presence, or absence, of these two major hormone classes. For example, it is known that both testosterone and estrogen are present in all people, but the relative amount of estrogen compared to testosterone is typically far, far higher in female bodies than in male bodies, whereas the amount of testosterone is typically far greater in male bodies than in female bodies. Variabilities in the amount of these sex hormones, both before and after birth, can have major consequences on the primary and secondary sexual characteristics, the likelihood of homosexual or heterosexual orientation, and the gender role behavior of people with these variances. For example, defects in prenatal sex hormone production can result in ambiguously appearing genitalia at birth, or misclassification of "birth sex" as female when the baby meets the criteria for male sex otherwise (MacGillivray and Mazur 2005). "Birth sex" females with much higher levels of androgens early in life (e.g., congenital adrenal hyperplasia, a genetic absence of an important sex steroid enzyme) may appear to have male genitalia at birth even though they have typically female chromosomes (46XX; see below). Gender identity in these girls is typically female, while gender role behavior may be masculine ("tomboys") and the likelihood of homosexual identity and orientation is much higher (Zurenda and Sandberg, 2003). There are many such conditions, present in both "birth sex" males and females, and collectively these conditions are known as "intersex," disorders of sex development, or "atypical sexual development." (Mazur, et al, 2007).

7. Chromosomal complement

Chromosomes are an important determinant of sex. Typically, most people have 46 total chromosomes, two of which are “sex chromosomes” known as X and Y. The usual situation is for “birth sex” females to have a 46XX pattern, and for “birth sex” males to have a 46XY pattern. If the genes associated with the chromosomes are also typical, there is production of sex steroid hormones in various amounts and at various times during typical physical development such that 46XX is associated with female sex, female genitals, female gender identity and role (see below), and in a similar way, 46XY is associated with male sex, male genitals, male gender identity and role. A single gene on the Y chromosome is responsible for the differentiation of a human embryo into a “birth sex” male fetus with testicular development at approximately 6 to 7 weeks into a pregnancy (Mazur, et al, 2007).

In a fetus with 46XX chromosomes, no testosterone/androgens are secreted, and therefore female genitalia develop.

Uncommonly (but not rarely), there are genetic abnormalities in the fertilized egg that lead to chromosome patterns that are different from either 46XX or 46XY. Examples are numerous and can be found in Mazur, et al, 2007. Classic examples include Turner's Syndrome, estimated at 1:2500 live “birth sex” females (46XO, where one sex chromosome is missing), Klinefelter's Syndrome, where an extra X chromosome is present (for example, 47XXY, 48XXYY). This nonheritable genetic abnormality is present in 1:600 live “birth sex” males (Nielsen and Wohlert, 1991).

Some, but not all, disorders of the sex chromosomes are associated with atypical sexual organ appearance, higher rates of homosexuality, bisexuality, or asexuality (that is, little to no sexual attraction to anyone or interest in having sexual relations). Some, but not all, may have atypical gender identity and/or gender role development as well. The key point is that the presence of a typical 46XX or 46XY chromosome pattern is relevant for determining a person's sex but not sufficient, in and of itself, to determine a person's sex.

C. What it means to be transgender or transsexual

The term “transgender” is a relatively recent term used as an umbrella concept for anyone who experiences any significant degree of “mismatch” between subjective gender identity and objective physical/anatomic sex. The term “transgender” is also used to describe people who have transitioned to living as a gender different from what they were assigned at birth. Many people who self-identify as transgender may have only transient problems which may or may not reach a threshold for a psychiatric diagnosis as defined below. “Transsexual” is frequently used to describe people whose gender identity is substantially inconsistent with the sex they were assigned at birth and

such individuals usually seek social transition and some type of medical, psychological, and/or surgical intervention(s) to align their physical anatomy with their subjective gender identity. Therefore, many researchers in this field of study consider the smaller group of transsexual people to be a subset of the much larger group of transgender persons. In any event, the population of transgender people is not known, as there are no large population-based studies. Since many people who self-identify as transgender do not come to clinical attention and gender identity questions are generally not asked on census forms or medical documents, it is not currently possible to know the size of this population. Estimates for transsexual people, who are more likely to come to clinical attention, vary widely, but are listed as from 0.005% to 0.014% for “birth sex” males and from 0.002% to 0.003% of “birth sex” females (APA, DSM-5, 2013, pg 454).

Although the precise etiology of transsexualism is unknown (Ettner, 2007; Lev, 2004), most experts in the study of transgender phenomena agree that there is likely a biological basis for transsexualism and perhaps other transgender phenomena. Even those who espouse the idea that postnatal factors, such as familial interactions, play an important role in gender identity development suspect that biological factors play a role in “inducing a vulnerability that then allows the psychosocial factors within the family to exert their effect” (Bradley, 1985, p. 175).

Much of the evidence in support of a biological basis for gender identity (typical or atypical) is based on comparison studies of the brains of transsexual persons using imaging techniques with live subjects or measurements taken post-mortem (after death). Such techniques were not possible a short time ago, but nonetheless, the concept of a “critical period effect” during fetal brain development was espoused decades ago as an explanation for why some (few) individuals experience gender nonconformity (Kimura 1992). Although it is not possible to directly study the developing human brain before birth, it was proposed that the hormones present in the bloodstream surrounding the developing brain at certain, undetermined critical periods in brain sexual differentiation was altered to the extent that the “brain sex” did not match the otherwise “normal” anatomic/genital sex at birth. This theory more recently received support in a study of fetal testosterone exposure, which showed that amniotic fluid levels of testosterone for “birth sex” male and female fetuses correlated positively with male-typical play patterns in both “birth sex” male and female children (Auyeung, et al, 2009).

Zhou and others reported in 1995 that areas of the brain known to differ in size between men and women generally could be studied in transsexual persons. At least one of these sexually dimorphic brain regions in male-to-female transsexual subjects was consistent with the size seen in “birth sex” females, and not males.

Additional support for a biological basis for transsexualism was reported by Luders and colleagues, who analyzed MRI data of 24 male-to-female (MtF) transsexuals not yet treated with cross-sex hormones in order to determine whether gray matter volumes in the brains of MtF transsexuals more closely resemble people who share their “birth sex” (30 control men), or people who share their gender identity (30 control women). Results revealed that MtF transsexuals showed a significantly larger volume of regional gray matter in the right putamen compared to the control group of non-transsexual, “birth sex” men. These researchers concluded that their findings provided new evidence that transsexualism is associated with a distinct cerebral pattern, which supports the assumption that brain anatomy plays a role in gender identity.

Savic and Stefan (2011) studied the brains of male-to-female transsexuals compared to “birth sex” controls of the same sexual orientation. The brains of the MtF subjects differed from controls in several regions (e.g., smaller volumes in the putamen and thalamus in MtF). They concluded: “Gender dysphoria is suggested to be a consequence of sex atypical cerebral differentiation.”

Additional studies in support of the hypothesis that gender dysphoria (defined below) is caused by sex atypical differentiation of parts of the brain before birth due to genetic and/or an early organizational effect of testosterone levels during fetal brain development include: Giedd J, Castellanos F, et al, 1997; Green R and Keverne E, 2000; van Goozen S, Slabbekoorn D, et al, 2002; and Swaab D, 2007.

Finally, several other studies have also found distinctive brain patterns in transsexual subjects that differ from what would be expected to be seen in non-transsexual subjects of the same “birth sex” in post-mortem studies: Kruijver F, Zhou J, et al, 2000; Berglund H, Lindstrom P, et al, 2008.

There is a spectrum of severity in the disconnect between subjective gender identity and “birth sex”, with gender dysphoric transsexualism (see D. below) being on the far end of this spectrum. The evidence for transsexualism arising from strictly, or mostly, postnatal influences (such as family interactions, social factors, maternal/paternal rearing styles) is not compelling; nor is the theory that transsexualism is “a lifestyle choice.” Importantly, “birth sex” males who consider themselves to be females (“transwomen” or “male-to-female transsexuals”) and have a female gender identity and female gender role are considered to be women, and not men, whether or not they have had any surgery to alter the appearance or function of their genitalia. Likewise, “birth sex” females who self-identify as male (“transmen”, “female-to-male transsexuals”) and have a male gender identity and gender role are considered to be men and not women irrespective of whether they have had any surgical interventions to change their bodies.

D. The condition of gender dysphoria

Gender dysphoria (GD) is both a symptom complex and a psychiatric diagnosis. As a set of symptoms, gender dysphoria is a mixture of mood symptoms (irritability, depression, anxiety) and mental distress or discomfort based on the experience of a mismatch between the sex of the body (“birth sex”) and the inner, subjective sense of gender. There are degrees of severity of gender dysphoria symptoms, ranging from mild to severe, and such symptoms may be episodic. It is well known that gender dysphoric persons may live in denial of those symptoms and sometimes make life choices that they feel are likely to “purge” cross-gender feelings, e.g. joining the military or pursuing other hypermasculine pursuits in the case of gender dysphoric “birth sex” males (Brown, 1988; 2015; Brown and McDuffie, 2010). It is therefore not uncommon for adults later in life to first “come out” or acknowledge to others their transgender feelings (Lev, 2004).

The Diagnostic and Statistical Manual of Mental Disorders (DSM 5; APA, 2013) is the current, generally recognized authoritative handbook on the diagnosis of mental disorders relied upon by mental health professionals in the United States, Canada, and other countries. Its content reflects a non-ideological, science-based, and peer-reviewed process by experts in the field who have varying perspectives. Prior to the current iteration of the DSM, persons with clinically significant levels of GD symptoms were diagnosed with Gender Identity Disorder (GID).

That diagnosis has since been replaced by the diagnosis of GD in recognition that the essence of the diagnosis is the treatable symptom complex of gender dysphoria, and not a disorder of identity, which remains fixed irrespective of treatment. Most adult patients who would meet the criteria for the past diagnosis of GID would meet the criteria for the current diagnosis of GD. Both GD and GID are diagnostically coded the same (302.85).

Individuals with GID/GD, experience a persistent and recurrent discordance between their anatomical “birth sex” and psychological gender. “Birth sex” males with GID/GD, for example, feel female in their mind and emotions. Individuals with GD are, in essence, psychologically in the “wrong body” and experience significant emotional distress as a result.

The diagnosis of GD in the DSM-5 (pgs 451-459) involves two major diagnostic criteria for adolescents and adults, synopsized below:

- A. A marked incongruence between one’s experienced/expressed gender and assigned gender, of at least 6 months’ duration, as manifested by at least two of the following:

1. A marked incongruence between one's experience/expressed gender and primary and/or secondary sex characteristics
 2. A strong desire to be rid of one's primary and/or secondary sex characteristics because of a marked incongruence with one's experience/expressed gender.
 3. A strong desire for the primary and/or secondary sex characteristics of the other gender.
 4. A strong desire to be of the other gender
 5. A strong desire to be treated as the other gender
 6. A strong conviction that one has the typical feelings and reactions of the other gender
- B. The condition is associated with clinically significant distress or impairment in social, occupational, or other important areas as of functioning.

Diagnoses of gender dysphoria may also be designated by one, or both, of two "specifiers:" gender dysphoria with a disorder of sex development; post-transition gender dysphoria (e.g., an individual who has transitioned, or is in the process of transitioning to the desired /felt gender—with or without legalization of gender change) and has undergone, or is preparing to have, at least one cross-sex medical procedure or treatment regimen (for example, regular cross-sex hormonal treatment or gender reassignment surgeries). Like all psychiatric diagnoses, symptoms must be of significant severity to cause notable distress and/or dysfunction in a person's life. The presence of gender nonconformity alone is insufficient to warrant a psychiatric diagnosis.

There is a general agreement in mainstream psychiatry that GID/GD is a legitimate mental disorder and it is recognized as such in standard medical texts (Saddock and Saddock, 2007; Gabbard, 2007). For example, GD, as defined in various iterations of DSM since 1980, is defined and explained in numerous psychiatric textbooks and resources. The term "transsexualism" is no longer a diagnostic term, having been replaced by GID and GD, but the term is still used in professional circles, scholarly works, and treatment guidelines to refer to persons on the extreme end of a continuum of gender dysphoric symptoms (Coleman, et al, 2012).

The World Health Organization also recognizes the discordance between anatomical sex and gender as a disorder in its publication, The International Classification of Diseases (known as ICD 10). The ICD and DSM codes are generally now compatible with each other. The code for transsexualism in ICD-10 corresponds with the DSM-5

diagnosis of GD. While DSM-5 is the primary diagnostic tool used by mental health professionals in the United States, the ICD is also used in this country, predominantly for research, billing and coding purposes.

In spite of research evidence in support of a biological basis for GID/GD, there are no commercially available or reliable biological or laboratory tests that are used in clinical practice to diagnose GID/GD. This is true for virtually all of the mental disorders in the DSM-5 and its predecessors. In fact, Strategic Objective #1 of the National Institute of Mental Health (NIMH) is to “define the mechanisms of complex behaviors,” including molecules and genomic factors (NIMH, 2015). This statement is in recognition that even in 2016, we don’t know the definitive root cause for mental disorders listed in DSM-5, and we do not have objective tests of body, brain, or fluids that definitively diagnose any mental disorders.

A diagnosis of GID/GD is made by a mental health professional who has training and experience with this disorder and who conducts an in-depth evaluation of the patient, preferably with access to past medical records and collateral history from others who know the individual. The American Psychiatric Association and WPATH (Coleman, et al, Standards of Care, Version 7, 2012) recognize that such diagnoses can be made by a range of trained and experienced mental health professionals.

E. Treatment of Gender Dysphoria (previously Gender Identity Disorder)

Many people initially do not understand their cross-gender feelings and do not have a language for such feelings until well into adulthood. Many “birth sex” males report an extensive history of cross-gender feelings and cross-dressing followed by a variety of attempts to eradicate such feelings, including by marrying and having children or by excessive involvement in stereotypical male behavior (for example joining the military), a phenomenon known as “flight into masculinity” for transgender women (people who transition from male-to-female; Brown, 1988; McDuffie and Brown, 2010; Brown and Jones, 2015). Attempts to repress and suppress gender identity are ultimately unsuccessful and the cross-gender feelings return, often stronger. It may not be until later in life that a person learns that there is a name for their cross-gender feelings. Individuals with severe and prolonged gender conflict frequently have a frantic preoccupation with trying to change their anatomic sex to match their psychological gender. The severe end of the spectrum of GID/GD (which is often referred to as transsexualism) is characterized by significant symptoms of gender dysphoria, whereas many transgender individuals may not experience the symptoms of gender dysphoria, or only to a mild extent or only transiently.

Early attempts at treatment to change transsexuals’ gender identity to that congruent with “birth sex” were demonstrated to be ineffective in most cases, prompting the

American Medical Association as early as 1972 to support medical and surgical interventions as the treatment of choice for transsexualism (AMA, 1972). Others noted that psychotherapy, often with associated cross-sex hormonal treatment, was of benefit for some transsexual people with respect to life adjustment, but not for changing one's gender identity (Lothstein and Levine, 1981; Seikowski, 2007). In fact it has been stated that there are no demonstrable, successful "conversions" of transsexual persons' gender identities through the use of psychotherapy (Monstrey, et al, 2007, pg 89), a form of psychotherapy known today as "reparative therapy" or "conversion therapy." These types of therapy are widely considered to be unethical by professional organizations based on the premise that gender identity and sexual identity/orientation are not "changed" by conversion psychotherapies and that emotional harm has been demonstrated in many who have received such therapies in the past (Daniel, et al, 2015). The federal Substance Abuse and Mental Health Services Administration recently issued a report showing that conversion therapy is not an appropriate therapeutic approach based on the evidence. The report also included similar consensus statements developed by an expert panel held by the American Psychological Association in July 2015. The professional organization that was arguably the most involved with attempting to convert both homosexual and transgender persons' identities decades ago has also strongly come out against the use of psychotherapy to attempt to change either sexual or gender identity:

"Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." (American Psychoanalytic Association, 2012).

WPATH has developed Standards of Care ("SOC") for the evaluation and medical treatment of persons with GID/GD. WPATH has over 1000 members worldwide, approximately 70% of whom are in the United States. These members are physicians, psychiatrists, psychologists, social workers, surgeons, and other health professionals who specialize in the diagnosis and treatment of GID/GD. The "SOC" were first developed in 1979. Currently in the seventh version, the SOC are considered to be authoritative for the evaluation and treatment of gender dysphoria (Coleman, et al, 2012). There are no other comprehensive, widely accepted, medical standards of care for the treatment of GID/GD. As with all medical standards, the SOC are guidelines that can be modified based on the individualized patient circumstances and the health care professional's clinical judgment.

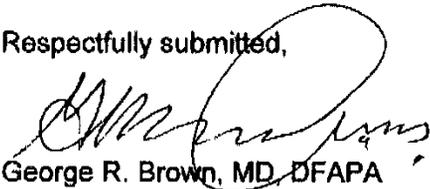
The medical treatment of a person diagnosed with GID/GD is based upon an individualized plan involving one or more of three major components: (1) hormonal

reassignment to the felt/experienced gender identity; (2) 12 continuous months of living in a gender role that is congruent with the patient's identity (previously known as the "real-life experience") and (3) surgery to change the genitalia and, in some cases, secondary sexual characteristics. These elements have been referred to as triadic therapy. Other treatments may also be sought, including electrolysis, voice therapy, breast augmentation, facial reconstruction, etc. (Coleman, et al, 2012). Although it is not an explicit requirement for surgical treatment, it is recommended that patients who seek such procedures have regular contact with a mental health or other medical professional.

Under the SOC, hormone therapy and surgery have established eligibility and readiness criteria that should be met prior to approval for these somatic treatments. Eligibility criteria generally involve timelines of successful experience with one mode of therapy before the next step should be undertaken. Readiness criteria involve the clinician's assessment of whether the client has demonstrated sufficient consolidation of an evolving gender identity to move on to the next step of transition.

The minimum criteria for genital surgery includes the requirement that one have a persistent, well-documented history of gender dysphoria, the capacity to consent to treatment, be of the age of majority and have any significant medical or health care conditions well-controlled. Lastly, a person seeking genital surgery must generally undergo 12 continuous months of living in a gender role that is congruent with the patient's identity, and obtain two letters of referral from experienced clinicians in a qualifying mental health discipline.

Respectfully submitted,



George R. Brown, MD, DFAPA
Professor of Psychiatry
East Tennessee State University

Date: 5/27/16

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