

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

Case No. 15-cv-324-C

SOUTHEASTERN OKLAHOMA STATE
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM
OF OKLAHOMA,

Defendants.

DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Defendants, Southeastern Oklahoma State University ("SEOSU") and The Regional University System of Oklahoma ("RUSO"), submit the attached Jury Instructions. Defendants reserve the right to amend or withdraw the proposed instructions or submit additional proposed instructions based upon further rulings of the Court and the evidence presented at trial.

Respectfully submitted,

/s/ Dixie L. Coffey

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State University and The Regional University

System of Oklahoma

DEFENDANTS' INSTRUCTION NO. 1

OPENING

In 2004 Dr. Robert Tudor was hired at SEOSU in the English, Humanities, and Languages Department (“EHL”) as a tenure-track professor. In 2007 Dr. Tudor began using the name “Rachel,” and transitioned from presenting himself as a man to presenting herself as a woman. In 2008 Dr. Tudor (“Intervenor” or “Tudor”) made an abortive attempt to apply for tenure. At a most preliminary level the EHL committee voted 0-5 against recommending her for tenure. Then after a conversation with her department chair, Intervenor withdrew her application before it could be sent to the Dean and higher administration for consideration. In 2009 Intervenor again submitted her application for tenure, this time receiving enough committee votes (4-1) for her application portfolio to be sent up for administrative consideration. Intervenor’s portfolio was then reviewed independently first by the Dean, and then by the Vice-President for Academic Affairs, both of whom had concerns about Intervenor’s application and recommended against the granting of tenure. In an attempt to assist Intervenor, the administration decided to offer her an opportunity to withdraw her portfolio prior to denial, and then to have an extra time period in which to improve her portfolio. At the time, she was warned that if the portfolio were allowed to continue being considered, tenure would be denied. Intervenor ignored the academic and professional advice she received from administrators (the decision makers) at SEOSU, and pushed forward with a deficient tenure application, with full knowledge she would not succeed. The result of Tudor’s selfish and cavalier approach to the tenure process was that Intervenor’s application for tenure was denied. Rather than accept personal responsibility for her own inadequacies in a very detail-oriented process, Tudor began first by submitting

internal procedure grievances at the university, and then by filing external charges of discrimination against the State with the United States of America's ("Plaintiff" or "USA") "Department of Education" ("DOE"), even claiming racial discrimination. After nearly five (5) years Plaintiff finally filed its lawsuit. Intervenor then joined the lawsuit..

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS’ INSTRUCTION NO. 2

UNLAWFUL DISCRIMINATION

It is unlawful for an employer to discriminate against an employee because of the employee’s sex/gender¹. An employer may, however make promotion decisions for other reasons, good or bad, fair or unfair. Intervenor, Rachel Tudor, has brought a claim of employment discrimination against Defendants, Southeastern Oklahoma State University (“SEOSU”) and The Regional University System of Oklahoma (“RUSO”). Intervenor claims that she was not granted tenure due to her transgender status and failing to conform to traditional gender types. SEOSU and RUSO deny that Intervenor’s transgender status was a motivating factor for the decision to not grant tenure. SEOSU and RUSO also deny Intervenor’s failure to conform to traditional sex stereotypes was a motivating factor in their decision to deny tenure. SEOSU and RUSO claim the decision was based on lawful reasons, i.e. Intervenor was not qualified for tenure.

Authority

9th Cir. Pattern Instruction 10.1A. (2016); 5th Cir. Pattern Instruction 11.1 (2014); *Green v. JP Morgan Chase Bank Nat. Ass’n*, 501 F.App’x 727, 733 (10th Cir. 2012)(choosing among relative parity is within the employer’s discretion so long as the decision is not based on unlawful criteria); *Johnson v. Weld County, Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010)(employee must show more than the employer got it wrong).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

¹ Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status. *United States Attorney General Memorandum dated Oct. 4, 2017, Revised Treatment of Transgender Employment Discrimination Claim under Title VII of the Civil Rights Act of 1964.*

DEFENDANTS' INSTRUCTION NO. 3

TITLE VII

Intervenor's claim of discrimination based on sex is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII.

Title VII makes it an unlawful employment practice for an employer:

1. To discriminate against any individual with respect to the terms, conditions or privileges of employment because of such individual's sex, or
2. To limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect her status as an employee because of such individual's sex.
3. Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status.

Authority

42 U.S.C. § 2000 e-2.

United States Attorney General Memorandum dated Oct. 4, 2017, Revised Treatment of Transgender Employment Discrimination Claim under Title VII of the Civil Rights Act of 1964.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 4

ESSENTIAL ELEMENTS

Intervenor accuses SEOSU of gender discrimination in violation of federal law. To succeed on this claim, Intervenor must prove by a preponderance of the evidence that SEOSU took adverse employment action against her because of gender.

Intervenor need not show that gender discrimination was the only or predominant factor that motivated SEOSU. In fact, you may decide that other factors were involved as well in SEOSU's decision making process. In that event, in order for you to find for Intervenor, you must find that she has proven that, although there were other factors, she would have been granted tenure, but for the gender discrimination.

It is not your role to second guess SEOSU's business judgment. Standing alone, honest errors in business judgment do not establish discrimination. Even if you were to decide that the failure to grant tenure was neither fair, nor wise, nor professionally handled, that would not be enough. In order to succeed on the discrimination claim, Intervenor must persuade you by a preponderance of the evidence that were it not for gender discrimination, she would have been granted tenure.

Comments

Source of Instruction: *Proposed Civil Pattern Jury Instructions – Employment Discrimination (Pretext)*, Judge Hornby, United States District Court, District of Maine, §1.1 (2005).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 5

GENDER

Intervenor has alleged that she has been discriminated against on the basis of her gender. Gender refers to the quality of being male or female.

Authority:

42 U.S.C.A. § 2000e-2(a)

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 6

FAILURE TO CONFORM TO SEX STEREOTYPE

The ultimate question in this case is whether SEOSU denied tenure to Dr. Tudor or discriminated against Tudor because of her failure to conform to sex stereotypes. It is not sufficient for a jury to merely disbelieve the reason offered by the Defendants.

To find discrimination based upon failure to conform to sex stereotype, the jury must first find Dr. Tudor was a female at the time of the alleged non-conformity; second, that she did not conform to general notions of femininity, and third, that she was discriminated against based upon her nonconformity. The jury must believe that the Intervenor was the victim of intentional discrimination.

Authority

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S.Ct. 2742 (1993).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 7

STRAY REMARKS ARE NOT DIRECT EVIDENCE OF DISCRIMINATION

Stray remarks in the workplace based on sex stereotypes do not constitute direct evidence of discrimination. Dr. Tudor must show that the employer actually relied on gender in making its decision.

Authority

Ramsey v. City & Cnty. of Denver, 907 F.2d 1004, 1007–08 (10th Cir.1990); *Heim v. State of Utah*, 8 F.3d 1541 (10th Cir.1993)

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 8

DISPARATE TREATMENT

As to Intervenor's claim that her sex was a motivating factor in the denial of tenure, Intervenor has the burden of proving all of the following elements by a preponderance of the evidence:

1. *She was qualified for tenure;*
2. *She was overwhelmingly better qualified for tenure than others granted tenure;*
3. She was denied tenure; and
4. Her gender was a motivating factor in the decision.

Authority

9th Cir. Pattern Instructions 10.1C; 5th Cir. Pattern Instruction 11.1; *Ash v. Tyson Foods, Inc.*, 126 S.Ct. 1195, 1197-1198 (2006)(suggesting standards in which pretext may be inferred from disparity in qualifications); *Conroy v. Vilsack*, 707 F.3d 1163, 1172 (10th Cir. 2013) post *Ash*, (disparity in qualifications must be overwhelming).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 9

QUALIFIED FOR POSITION

To be considered “qualified” for a position, Intervenor must show that her work was sufficient to meet her employer’s legitimate expectations.

Comments

Source of Instruction: *Bramble v. American Postal Workers Union*, 135 F.3d 21, 25 (1st Cir. 1998) (citing *Mesnick v. General Elec. Co.*, 950 F.2d 816, 823 (1st Cir. 1991), *cert. denied*, 504 U.S. 985 (1992)) (applied to ADEA case).

Federal Circuits

Tenth: When two candidates are equally qualified in that they both possess the objective qualifications for a position and neither is clearly better qualified, it is within the employer’s discretion under Title VII to choose among them so long as the decision is not based on unlawful criteria. An employee’s own opinions about his or her qualifications do not give rise to a material factual dispute as to whether the employer’s proffered reason for an adverse employment action is pretextual. Thus, in the instant case, although the Intervenor firefighter scored higher on the initial round of interviews and had more fire training than the successful candidate, the difference in scores was small and the firefighter had substantially less supervisory experience than the successful candidate; thus, no inference of discrimination was raised. *Simms v. Oklahoma*, 165 F.3d 1321, 1329-30 (10th Cir. 1999).

The Tenth Circuit found that a *prima facie* showing can be made through credible evidence that a Intervenor was qualified, even if that evidence was disputed by the employer, and that this burden may be met through the Intervenor’s own testimony as well as that of coworkers who were in a position to know the Intervenor’s qualifications. *Thomas v. Denny’s, Inc.*, 111 F.3d 1506, 1510 (10th Cir.), *cert. denied*, 118 S. Ct. 626 (1997) (citing *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1005 (10th Cir.), *cert. denied*, 116 S. Ct. 2500 (1996)).

In addition, the Tenth Circuit concluded that the fact that a Intervenor has no college credit whatsoever will not disqualify him or her for a position if the requirement of college training was not a genuine prerequisite for the position; thus, evidence that the defendant employer retained others in the same position without college credit, or that the employer accepted other experience as a substitution for the college credit, raised a genuine issue of fact as to whether the employer’s claim that the Intervenor was not qualified was pretextual. *Randle v. City of Aurora*, 69 F.3d 441, 453 (10th Cir. 1995).

References: Hiring—subsequent hiring of white applicant, testimony. 3 Am. Jur. 2d Proof of Facts 221 §32.

Hiring—admissibility of discriminatory reputation. 3 Am. Jur. 2d Proof of Facts 221 §26.

Hiring—the denial of employment, testimony. 3 Am. Jur. 2d Proof of Facts §25, 34, 36.

Hiring—supervisory position, *prima facie* case of race discrimination. 3 Am. Jur. 2d Proof of Facts 221 §21.

Hiring—adverse impact on minority employment. 3 Am. Jur. 2d Proof of Facts 221 §13, 21, 32, 33.

Hiring—testing, adverse impact on minority employment. 3 Am. Jur. 2d Proof of Facts 221 §8, 33.

Hiring—segregated work force. 3 Am. Jur. 2d Proof of Facts 221 §3.

Lack of duty to adopt procedure for maximization of minority hiring. 3 Am. Jur. 2d Proof of Facts 221 §2

GIVEN: _____

MODIFIED: _____

REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 10

EMPLOYER'S REASONS FOR ITS EMPLOYMENT DECISIONS

SEOSU and RUSO assert that they had a legitimate, non-discriminatory reason for not granting tenure to Intervenor. SEOSU asserts that the tenure process was handled according to SEOSU and RUSO's policies, and they determined that her portfolio did not demonstrate she was not qualified for tenure.

You are instructed that SEOSU and RUSO do not bear the burden of proof with respect to reasons for their actions. Thus, Intervenor can prevail on her claim of gender discrimination only if she proves, by the greater weight of the evidence, that her gender was a motivating factor in their decision not to grant tenure to Intervenor, in addition to, or instead of, any legitimate, non-discriminatory reason or reasons.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 11

GENDER DISCRIMINATION: PRETEXT

Intervenor has introduced evidence that SEOSU and RUSO's articulated reason for their action is a pretext for discrimination. When you consider Intervenor's evidence of pretext, remember that the relevant question is whether SEOSU and RUSO's reason that Intervenor was not qualified was not the real reason for their decision.

You are not to consider whether SEOSU and RUSO's reason showed poor or erroneous judgment. You are not to consider SEOSU and RUSO's wisdom. However, you may consider whether their reason is merely a cover-up for discrimination.

You may consider whether SEOSU and RUSO's reasons are consistent with their own policies and rules and whether they have applied these policies and rules uniformly. You should also carefully evaluate any subjective reasons they have asserted for their actions.

Intervenor has the burden to persuade you by a preponderance of the evidence that SEOSU and RUSO took action against Intervenor because of her sex/gender. If you do not believe Defendants' explanations, you may, but are not required to, infer that Intervenor has satisfied her burden of proof that Defendants intentionally discriminated against her because of her sex/gender.

NOTES

In General

The **instruction** limiting the scope of inquiry into the defendant's articulated reason is adapted from *Clay v. Hyatt Regency Hotel*, 724 F.2d 721, 724 (8th Cir.1984).

When articulating a legitimate, nondiscriminatory reason for its action, the defendant is only required to introduce competent evidence that creates a question of fact as to whether the proffered reason was the motivating factor. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 510, 113 S.Ct. 2742, 2748 (1993); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 1824 (1973).

If the defendant meets this burden, the plaintiff must persuade the trier of fact of the defendant's discriminatory intentions by showing that the defendant's proffered reason was merely a **pretext** for **discrimination** or by proving it more likely true than not true that sex motivated the defendant. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089 (1981).

The plaintiff retains the final burden of persuading the **jury** of intentional discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 187, 109 S.Ct. 2363, 2378 (1989). *See Cabrera v. Jakobovitz*, 24 F.3d 372, 381-82 (2d Cir.), cert. denied, 513 U.S. 876, 115 S.Ct. 205 (1994) (if facts of prima facie care are disputed and

defendant has produced no rebuttal evidence, **jury** needs to be told that if it finds the following facts, plaintiffs are entitled to prevail; there is no need to label such facts for **jury** as constituting “prima facie case”).

In *Dybczak v. Tuskegee Institute*, 737 F.2d 1524 (11th Cir.1984), the Eleventh Circuit stated:

Elsewhere in its charge to the jury, the district court, referring to the pretext analysis, stated, “If you find from a preponderance of the evidence that the defendant would have retained or would have reappointed the plaintiff in the absence of [discrimination], then you may return a verdict in favor of the plaintiff and against the defendant.” To the extent that it focuses on the question whether the defendant's motive was actually discriminatory, not the hypothetical question whether the defendant would have taken the same action even if there had been no discriminatory purpose, we think that formulation of the burden in terms of the pretextual nature of the articulated reason is preferable. Given the portion of the charge quoted in the text, however, the district court's use of the other formulation, in itself, scarcely amounts to reversible error.

737 F.2d at 1530 n.5.

In *Hargett v. National Westminster Bank, USA*, 78 F.3d 836 (2d Cir.), cert. denied, 519 U.S. 824, 117 S.Ct. 84 (1996), the court upheld the following **pretext** charge:

It is for you to decide if the other individuals were similarly situated to the plaintiff. You may consider the positions held and the conduct in question in determining if the individuals were similarly situated. If you believe by a preponderance of the evidence that plaintiff has proven that other similarly situated employees did commit similar acts and were not terminated, then you may find defendants' reason pretextual.

78 F.3d at 838. Because evidence was lacking that the employment determination was the product of a mixture of legitimate and illegitimate motives, the trial court did not abuse its discretion in declining to give a mixed motives charge. 78 F.3d at 840–41.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 12

GOOD FAITH BUSINESS JUDGMENT

Federal law only requires that an employer reach an employment decision without regard to any employee's gender. The law does not require that an employer reach a decision which the Intervenor or anyone else would necessarily agree was reasonable and correct. As jurors, you are not permitted to second-guess an employer's good faith business decision. The question is not whether the employer made a wise or prudent business decision, but whether the Intervenor has proven by the greater weight of the evidence that SEOSU and/or RUSO intentionally discriminated against Intervenor because of her gender status and failing to conform to traditional gender types.

You may not infer or find that Intervenor was intentionally discriminated against on the basis of her gender simply because you may happen to disagree with SEOSU and/or RUSO's business decision. You are not permitted to base your decision on a view, if any, that you would have granted Intervenor tenure or that SEOSU and/or RUSO's business judgment does not appeal to your sensibilities.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 13

DIRECT AND CIRCUMSTANTIAL EVIDENCE

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eye witness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule the law makes no distinction between direct and circumstantial evidence but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 14

INDIRECT EVIDENCE – DEFENDANTS ARTICULATE A NON-DISCRIMINATORY REASON

SEOSU and RUSO have stated legitimate, non-discriminatory reasons for not granting Intervenor tenure. By doing so, SEOSU and RUSO have met their burden of producing some explanation of their actions other than gender discrimination. It is not necessary that the reason be a good one, or one that you agree with or believe it to be true. All SEOSU and RUSO need do is state a reason other than gender discrimination for their actions. It is then Intervenor's burden to prove that it was not the reason for the SEOSU and RUSO's actions; SEOSU and RUSO do not have the burden of convincing you.

By meeting this intermediary burden, SEOSU and RUSO have shifted the burden of proof back to Intervenor

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 15

INFERENCE OF DISCRIMINATION — SIMILARLY SITUATED

To be deemed similarly situated, individuals with whom Plaintiff seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 16

INTERVENOR'S TITLE VII RETALIATION CLAIM – ESSENTIAL ELEMENTS

In this case, Intervenor claims that SEOSU retaliated against her. SEOSU and RUSO deny all liability. SEOSU and RUSO specifically deny all allegations of retaliation in violation of Title VII.

For Intervenor to prevail on her Title VII Retaliation claim, she must first establish a *prima facie* case of retaliation by showing:

1. She engaged in a protected opposition to Title VII discrimination;
2. She suffered an adverse employment action; and
3. There is a causal connection between the protected activity and the adverse employment action.

Authority

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1227 (10th Cir. 2008); *Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1229 (10th Cir. 2004)

GIVEN: _____

MODIFIED: _____

REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 17

HOSTILE OR ABUSIVE WORK ENVIRONMENT

To establish a hostile or abuse work environment, Intervenor must prove by a preponderance of the evidence that the workplace was permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of Intervenor's employment and create an abusive work environment. In determining whether a work environment is "hostile" or "abusive," you must look at all the circumstances including:

1. The total physical environment of Intervenor's work place;
2. The degree and type of obscenity that filled the environment before and after Intervenor arrived;
3. The reasonable expectations of Intervenor upon entering the environment;
4. The frequency of the offensive conduct;
5. The nature of unwelcome sexual acts or words;
6. The severity of the conduct;
7. Whether the conduct was physically threatening or humiliating;
8. Whether it was merely an offensive utterance; and
9. Whether it unreasonably interfered with Intervenor's work performance.

In determining whether conduct was hostile, you should consider the following:

1. Whether the conduct was verbal, physical, or both;
2. Whether the conduct occurred one time or repeatedly,
3. Whether the conduct was plainly offensive;
4. Whether the alleged harasser was a co-worker or supervisor;
5. Whether others joined in the harassment;
6. Whether the harassment was directed at one more person; and

7. Whether Intervenor voiced any complaints about the hostile conduct.

Authority

29 C.F.R. §1604.11; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986); *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998); *Harrison v. Eddy Potash, Inc.*, 248 F.3d 1014, 1022 (10th Cir. 2001).

Comments

See Faragher v. City of Boca Raton, 524 U.S. 775, 786–87, 118 S.Ct. 2275, 2282–83 (1998), *citing Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21–23, 114 S.Ct. 367, 370–71 (1993)

Test for hostile work environment under Title VII has objective and subjective elements: the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive. *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002). Isolated acts, unless very serious, do not meet threshold of severity or pervasiveness required to establish hostile work environment under Title VII. *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002).

A Title VII hostile work environment claim requires a showing that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. *Fairbrother v. Morrison*, 412 F.3d 39, 48 (2d Cir. 2005).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 18

HOSTILE WORK ENVIRONMENT STANDARD

The prohibition on harassment based on sex forbids only behavior so objectively offensive as to alter the conditions of the victim's employment.

Authority

Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998 (1998).

DEFENDANTS' INSTRUCTION NO. 19

EMPLOYERS ENTITLED TO AFFIRMATIVE DEFENSE

Employers are entitled to an affirmative defense to a hostile work environment claim where no tangible employment action has occurred and:

1. the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
2. the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Authority

Faragher v. City of Boca Raton, 524 U.S. 775, 786–87, 118 S.Ct. 2275, 2282–83 (1998), at 2293; *see also Phillips v. Taco Bell Corp.*, 156 F.3d 884, 888 (8th Cir. 1998); *Duran v. Flagstar Corp.*, 17 F.Supp.2d 1195, 1203 (D. Colo. 1998)

DEFENDANTS' INSTRUCTION NO. 20

INTERVENOR'S SUBJECTIVE BELIEF OF DISCRIMINATION OR RETALIATION

You are instructed that Intervenor's subjective belief, however genuine, that she has been discriminated or retaliated against is not sufficient to establish her claims. In fact, mere speculation can never serve as a basis for discrimination or retaliation claims. Just as Intervenor's own opinion is not sufficient to support her claims, neither is the opinion of Intervenor's co-workers. You cannot base a finding of discrimination or retaliation solely on a co-worker's opinion that Intervenor should have been granted tenure.

Authority

Carter v. City of Miami, 870 F.2d 578, 585 (11th Cir. 1989)(plaintiff's subjective opinion that defendant's action was discriminatory, without support of evidence, is not sufficient to establish pretext); *Young v. Gen Foods*, 840 F.2d 825, 830 (11th Cir. 1988); *Fusaro v. Hialeah Housing Authority*, 33 F.Supp.2d 1354, 1360 (S.D. Fla. 1999)("Conclusory allegations of discrimination are not sufficient to raise an inference of pretext of intentional discrimination where a defendant has offered extensive evidence of legitimate nondiscriminatory reasons for its actions."); *Woodbury v. Sears, Roebuck & Co.*, 901 F.Supp. 1560, 1565 (M.D. Fla. 1995)(citing *Carter v. City of Miami*, 870 F.2d 578, 585 (11th Cir. 1985)("a plaintiff's subjective opinion that the defendant's action was discriminatory, without supportive evidence, is not sufficient to establish pretext...")); *Hamalanian v. Mister Grocer Corp.*, 735 F.Supp. 1025, 1029 (S.D. Fla. 1990).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 21

DETERMINING CREDIBILITY [BELIEVABILITY] OF WITNESS

You are the sole judges of the believability of each witness and the value to be given the testimony of each. You should take into consideration the witness's means of knowledge, strength of memory and opportunities for observation. Also consider the reasonableness and consistency or inconsistency of the testimony.

You should also consider the bias, prejudice, or interest, if any, the witness may have in the outcome of the trial, the conduct of the witness upon the witness stand, and all other facts and circumstances that affect the believability of the witness.

Authority

See Frierson v. Hines, 426 P.2d 362, 365 (Okla. 1967); *In re Brown*, 412 F. Supp. 1066, 1070 (W.D. Okla. 1975); *Lincoln v. Wells*, 350 P.2d 589 (Okla. 1960) (Syllabus 1); *Borden v. Day*, 197 Okla. 110, 113, 168 P.2d 646, 649 (1946).

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 22

IMPEACHMENT

You are instructed that a witness may be discredited or impeached by contradictory evidence or by evidence that at other times the witness has made statements that are inconsistent with the witness' present testimony.

If you believe that any witness has been impeached and thus discredited, it is your exclusive providence to give the testimony of that witness only such credibility, if any, as you may think it deserves.

If any witness is shown to have knowingly testified falsely concerning any material matter, you have the right to distrust such witness' testimony in other particulars, and you may reject all of the testimony of that witness, or give it only such credibility as you may think it deserves.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 23

NO SPECULATION

Although you are allowed to draw inference based on circumstantial evidence, an inference is not a suspicion or a guess. An inference is a reasoned, logical conclusion that a disputed fact exists on the basis of another fact that has been shown to exist. While you may draw such inferences, your decision must be based upon probabilities, not possibilities. It may not be based upon pure speculation or guesswork.

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 24

DAMAGES

If you find that Intervenor has not proven her discrimination claims by a preponderance of the evidence, your verdict should be for the Defendants.

If, however, you find that Intervenor has proven her claims by a preponderance of the evidence that the Defendant purposefully or intentionally discriminated against her, you must then consider the issue of damages.

You may award compensatory damages only for injuries that Intervenor has proven to you were directly caused by wrongful conduct by the Defendant. To obtain compensatory damages, Intervenor must prove she suffered actual injury at the hands of the Defendant. You may award Intervenor a sum of money you believe will justly and fairly compensate her for any injury you believe she suffered as a direct result of Defendant's conduct. The abstract value of a civil suit is not part of the damages awarded in this action.

Each element of damages must be proven by Intervenor; damages are not presumed.

Damages must be reasonable. If you should find that the Intervenor is entitled to a verdict, you may award her only such damages as will reasonably and fairly compensate her for such injury and damages as you find from a preponderance of the evidence. Intervenor may not recover damages for any of her losses which could have been avoided through the exercise of reasonable care and prudence.

You may award compensatory damages, based on the evidence introduced at trial, for emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life.

The fact that I instruct you on damages should not be taken by you as indicating one way or another whether the claimant is entitled to recover anything. This is entirely for you to decide.

You may award compensatory damages only for damages that Intervenor proves were proximately caused by the alleged wrongful conduct. Proximate cause means a cause that, in a natural and continuous sequence, produces injury or damage without which the injury or damages would not have happened. The damages that you award must be fair compensation for all damages, no more and no less. Compensatory damages are not allowed as a punishment and cannot be imposed or increased to penalize.

GIVEN: _____

MODIFIED: _____

REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 25

INTERVENOR'S DUTY TO MITIGATE DAMAGES

You are instructed that any person who claims damages as a result of an alleged wrongful act on the party of another has a duty under the law to mitigate those damages – that is, to take advantage of any reasonable opportunity that may have existed under the circumstances to reduce or minimize her damages.

So if you find by a preponderance of the evidence that Intervenor failed to seek out or take advantage of a business or employment opportunity that was reasonably available under all the circumstances shown by the evidence, then you must take that into consideration in determining what damages, if any, Intervenor is entitled to recover.

Authority

Federal Claims Instruction 1.2.1 and Supplemental Damages Instruction. 1.1

GIVEN: _____
MODIFIED: _____
REJECTED: _____

DEFENDANTS' INSTRUCTION NO. 26

SPECIAL INTERROGATORY

Question No. 1:

Has Intervenor proved by a preponderance of the evidence that her gender was a motivating factor for SEOSU's decision to not grant her tenure?

Yes_____ No_____

If the answer to Question 1 is "no" do not answer any further questions. If the answer to Question 1 is "yes" proceed to Question No. 2.

Question No. 2:

Has SEOSU proven by a preponderance of the evidence that it's reason for not granting tenure to Intervenor was motivated by a lawful reason?

Yes_____ No_____

If your answer to Question 2 is "yes" do not answer any further questions. If your answer to Question No. 2 is "no" proceed to Question No. 3.

Question No. 3:

Has SEOSU proven, by a preponderance of the evidence, that it would have made the same decision to deny tenure even if the Intervenor's gender had played no role in its decision?

Yes_____ No_____

DEFENDANTS' INSTRUCTION NO. 27

VERDICT FORM

We, the Jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find the issues in favor of Defendants, SEOSU and RUSO.

Foreperson

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____