

**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' REPLY TO INTERVENOR'S OBJECTION
TO JOINT MOTION TO DISMISS**

Defendants, Southeastern Oklahoma State University ("SEOSU") and Regional University System ("RUSO") submit this reply to Intervenor's objection ([Doc. 181]) to Plaintiff, the United States of America's ("USA") and Defendants' Joint Motion to Dismiss. [Doc. 164]. In support of this reply, Defendants state as follows:

REPLY TO INTRODUCTION AND BACKGROUND

After years of investigation and litigation, Defendants entered into a Settlement Agreement with the USA. A copy of the Settlement Agreement has been attached to documents, filed ex parte and under seal with this Court. [Doc. 173–1]. As with any settlement, this settlement essentially concludes litigation between Defendants and the USA. And, as with any settlement, the reasons behind

Defendants' decision to settle with the USA were largely to resolve this hotly contested dispute in a mutually acceptable manner and to curb the significant cost of state resources being expended on this matter.

Intervenor requests this Court to essentially nullify the Settlement Agreement and compel the USA and State of Oklahoma to continue to expend federal and state tax dollars on a dispute they have mutually elected to resolve. According to Intervenor's logic, Dr. Tudor is somehow entitled to the USA's continued support in this matter. This is simply not the case. A dismissal pursuant to Fed. R. Civ. P. 41(a)(2) is appropriate in this case. Intervenor's objection to the joint motion to dismiss should be overruled and the USA's claims against Defendants should be dismissed with prejudice.

REPLY TO ARGUMENTS

Intervenor apparently believes that because she reaped the benefits of participating in litigation in conjunction with the USA for the past several years, this Court must compel that continued support even against USA's wishes. Regardless of the fact that Intervenor may lose some of those benefits as a result of the settlement, her capacity to develop her case with the benefit of the "Common Interest Agreement" with USA has left her in a much better position than a typical plaintiff involved in a Title VII discrimination lawsuit. She has benefited from a multi-year, extensive EEOC investigation, which was overseen by the USA's Department of Justice ("DOJ"). She has the benefits of multiple depositions, most of which were taken (and presumably financed) by the USA. She has enjoyed the

benefits of DOJ's capacity to engage in extensive hardcopy and electronic discovery.¹ USA fought countless battles on her behalf. The only prejudice Intervenor may suffer as a result of this settlement is that she is now like any other plaintiff in an employment lawsuit. She must now face the decisions any other plaintiff must face: Can I prove my case? Is it worth taking a chance at trial? Can I overcome the motion for summary judgment? Should I engage in reasonable settlement negotiations? Where is my evidence?

Defendants are not aware of the details of the Common Interest Agreement entered into between USA and Intervenor. Defendants were not privy to any such information when they were negotiating the Settlement Agreement with the USA. Defendants are not privy to any "secrets" USA and Intervenor may have shared while their Common Interest Agreement was in effect, and cannot comment on the dangers Intervenor fears. If there is information relevant to this case that USA and Intervenor conspired to conceal from Defendants, a Common Interest Agreement is no shield and the evidence should be disclosed. To the extent confidential privileged information was shared that is properly protected from discovery, Defendants have no interest in the information. Further, discovery has concluded.

While Intervenor points to a line of cases in which a court delays the decision to dismiss a claim because it would preclude another party's claim (*i.e.*, law of the case or plaintiff is an essential party to the action), there is no such issue here. The

¹ Defendants acknowledge that dismissing USA's claim will moot the USA's motion to compel [Doc. 146] which seeks to compel Defendants to produce documents they claim are privileged [Doc. 146-4].

settlement between Defendants and USA does not determine the merits of Intervenor's claim.²

Once this Court grants the joint motion to dismiss, this case will proceed as any other employment discrimination case proceeds brought by a former employee against an employer, including those filed against the state. Defendants do not contend the Settlement Agreement determines the factual merits of Intervenor's claims. In the unlikely event Intervenor survives summary judgment and prevails at trial, this Court will be called upon to determine appropriate prospective equitable relief, if any. At that point Defendants will ask the Court to consider the terms of the Agreement. There is nothing in the law cited by Intervenor that prohibits this course of conduct.

Intervenor claims settlement at this late date is harmful to her, yet she had the opportunity to avoid many of the problems she claims have befallen her. Intervenor was provided the details of the settlement on August 31, 2017. Yet, even before becoming aware of the specific details, Intervenor was aware that the USA and Defendants were engaged in settlement discussions that did not include Intervenor. All parties, including Intervenor, attended a judicial settlement conference on May 5, 2017 in Oklahoma City, Oklahoma. On June 1, 2017, USA

²Intervenor appears to want to have her cake and eat it too. In the dispute regarding the publication of the Settlement Agreement, Intervenor erroneously contends she should be allowed to use the Agreement as evidence at trial. Yet in this instance, she argues against the enforcement of the Agreement. Without divulging the details of the Agreement, a simple review of the document is sufficient evidence that there is no reason for Intervenor to oppose the substantive terms on the Settlement Agreement.

and Defendants filed a notice to this Court that they believed USA and Defendants might be able to reach an agreement and had requested an additional settlement conference with Judge Goodwin. [Doc. 140]. Intervenor was aware of that. Aside from objecting to the USA and Defendants' Joint Motion to Dismiss a full twenty-one (21) days after it was filed, Intervenor has taken no formal steps to address any of the issues she complains about in the objection. This appears to be delay for the sake of delay.

For example, Intervenor wants to adopt USA's experts and maintain deposition dates scheduled for expert depositions that had been set when USA was still an active litigant in this case. But, she filed nothing with this Court seeking leave to adopt those experts and now the time for discovery and *Daubert* motions has passed. The trial docket is less than one month away. No active party is interested in an extension. Defendants should not bear the burden of Intervenor's procrastination or decision not to take action.

Intervenor fails to take into account that obviating the need for those costly depositions was one of the reasons Defendants elected to settle with USA. Intervenor filed her own witness list and did not timely adopt USA's expert witness list and/or reports. She did not include any experts. She did not respond to Defendants' motion in limine filed against one of USA's experts. Defendants should not be denied the benefits of their bargain simply because Intervenor failed to act.

Moreover, Intervenor's argument that Dr. Brown's testimony is relevant and critical to her case is without merit. Dr. Brown's "expert" testimony is focused on

explaining to the jury what it means to be transgendered. As this Court has reminded Defendants in two separate orders, the question of whether Rachel Tudor is transgendered is not a disputed issue in this case. [Docs. 92 and 121]. Defendants admitted that Rachel Tudor is a male to female transgender in their answers. The term “sex” as used in Title VII refers to one’s biological gender not his or her gender identity. (See *United States Attorney General Memorandum dated October 4, 2017*, attached as Exhibit 1). Hence, Intervenor’s pontification of the critical nature of the testimony of this expert, who apparently had never even met Rachel Tudor, (at least not for the purposes of his report), is simply that, pontification without merit.

Although the Court denied Defendant’s motion in limine (*Daubert* Motion [Doc. 163]) on the USA’s other expert, Dr. Parker, his testimony is also of little merit in this matter. Dr. Parker did not and could not review the tenure packet Intervenor submitted the year she was actually considered for, and denied, tenure.³ Without this critical piece of information, regardless of Dr. Parker’s educated opinions, he cannot have an informed opinion of the validity of the decision regarding Intervenor’s actual tenure and promotion application’s merit at the time it was submitted.

Defendants’ primary purpose for settling this matter with the USA was to cease the litigation with the USA. It was costly and time consuming. Their flamboyant use of experts was going to be one of the most costly pieces of this

³ The evidence developed through litigation establishes that at the time Intervenor was denied tenure, Defendants did not retain copies of tenure packets. Rachel Tudor did not retain a copy of her tenure packet for the relevant year, even though it is clear she was determined to pursue litigation.

litigation. While the settlement did not completely resolve the case, Intervenor's request to shackle USA to the case going forward by denying the motion to dismiss (and/or delay the motion to dismiss) is, in effect, a nullification of the Settlement Agreement and denies Defendants the benefit of the bargain they struck.

Finally, Defendants object to Intervenor's effort to seek additional relief in her response to the joint motion to dismiss. LCvR 7.1 (c) clearly prohibits a party from making a cross motion in a response to a pending motion. The rule clearly requires Intervenor to file a separate motion seeking this relief. To the extent the relief impacts Defendants and permits Intervenor to engage in activities beyond the designated deadlines, Defendants move to strike the motion. If the Court is inclined to consider the alternative relief Intervenor seeks, Defendants request the opportunity to fully brief the issues.

CONCLUSION

For the reasons set forth herein, Defendants request this Court grant USA and Defendants' Joint Motion to Dismiss the USA's claims with prejudice and permit this case to proceed with Intervenor as it stands.

Respectfully submitted,

/s/Kindanne C. Jones

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of October, 2017, I electronically transmitted the foregoing document to the Clerk of the Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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Office of the Attorney General
Washington, D. C. 20530

October 4, 2017

MEMORANDUM

TO: UNITED STATES ATTORNEYS
HEADS OF DEPARTMENT COMPONENTS

FROM: THE ATTORNEY GENERAL 

SUBJECT: Revised Treatment of Transgender Employment Discrimination Claims
Under Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate in the employment of an individual “because of such individual’s . . . sex.” 42 U.S.C. § 2000e-2(a) (prohibiting discrimination by private employers and by state and local governments); 42 U.S.C. § 2000e-16(a) (providing that personnel actions by federal agencies “shall be made free from any discrimination based on . . . sex”). Title VII’s prohibition of sex discrimination is a strong and vital principle that underlies the integrity of our workforce.

The question of whether Title VII’s prohibition on sex discrimination encompasses discrimination based on gender identity *per se*, including discrimination against transgender individuals, arises in a variety of contexts. In a December 15, 2014, memorandum, Attorney General Holder concluded that Title VII does encompass such discrimination, based on his view that Title VII prohibits employers from taking into account “sex-based considerations.” Memo. at 2; *see also id.* at 1 n.1 (defining “gender identity” and “transgender individuals”).

Although federal law, including Title VII, provides various protections to transgender individuals, Title VII does not prohibit discrimination based on gender identity *per se*. This is a conclusion of law, not policy. The sole issue addressed in this memorandum is what conduct Title VII prohibits by its terms, not what conduct should be prohibited by statute, regulation, or employer action. As a law enforcement agency, the Department of Justice must interpret Title VII as written by Congress.

Title VII expressly prohibits discrimination “because of . . . sex” and several other protected traits, but it does not refer to gender identity. “Sex” is ordinarily defined to mean biologically male or female. *See, e.g., Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1221-22 (10th Cir. 2007); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (citing dictionaries). Congress has confirmed this ordinary meaning by expressly prohibiting, in several other statutes, “gender identity” discrimination, which Congress lists in addition to, rather than within, prohibitions on

discrimination based on “sex” or “gender.” *See, e.g.*, 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). Furthermore, the Supreme Court has explained that “[t]he critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment [or other employment actions] to which members of the other sex are not exposed.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998). Although Title VII bars “sex stereotypes” insofar as that particular sort of “sex-based consideration[]” causes “disparate treatment of men and women,” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 242, 251 (1989) (plurality op.), Title VII is not properly construed to proscribe employment practices (such as sex-specific bathrooms) that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex, *see, e.g., Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc).

Accordingly, 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. Therefore, as of the date of this memorandum, which hereby withdraws the December 15, 2014, memorandum, the Department of Justice will take that position in all pending and future matters (except where controlling lower-court precedent dictates otherwise, in which event the issue should be preserved for potential further review).

The Justice Department must and will continue to affirm the dignity of all people, including transgender individuals. Nothing in this memorandum should be construed to condone mistreatment on the basis of gender identity, or to express a policy view on whether Congress should amend Title VII to provide different or additional protections. Nor does this memorandum remove or reduce the protections against discrimination on the basis of sex that Congress has provided all individuals, including transgender individuals, under Title VII. In addition, the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act and the Violence Against Women Reauthorization Act prohibit gender identity discrimination along with other types of discrimination in certain contexts. 18 U.S.C. § 249(a)(2); 42 U.S.C. § 13925(b)(13)(A). The Department of Justice has vigorously enforced such laws, and will continue to do so, on behalf of all Americans, including transgender Americans.

If you have questions about this memorandum or its application in a case, please contact your Civil Chief or your Component’s Front Office.