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

UNITED STATES OF AMERICA, Plaintiff, and DR. RACHEL TUDOR, Plaintiff/Intervenor, v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	)	Case No. 5:15-CV-00324-C

PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S OPPOSITION TO DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Plaintiff/Intervenor Dr. Tudor submits the following objections to Defendants' Proposed Instructions (ECF No. 196).

Global Objection No. 1: References to Tudor as Intervenor. Throughout their instructions, Defendants refer to Tudor both by name and as Intervenor. The technical legal term for Tudor is confusing. Dr. Tudor

respectfully requests that all of Defendants instructors refer to her consistently by name rather than as Intervenor.

Global Objection No. 2: References to protections afforded to transgender persons under Title VII. Many of Defendants' instructions obliquely attack whether Tudor, as a transgender woman, may seek protection from discrimination and hostilities. *See, e.g.,* Defs. Instruction 2 n.1 (claiming Title VII does not protect transgender persons *per se* and otherwise engrafting limits on sex discrimination protections); Defs. Instruction 3 (similar); Defs. Instruction 5 (proposing that "Gender refers to the quality of being male or female."); Defs. Instruction 6 (implying that jury must determine Tudor's gender to be female in order for her sex stereotyping theory to be cognizable). While it is appropriate to provide the jury instruction as to how they must apply the law to the facts they are presented with at trial, many of Defendants instructions inappropriately invite the jury to make determinations of law then apply the facts. These portions of Defendants' instructions should be struck.

Defendants' Proposed Jury Instruction No. 1: Objection. This instruction misstates Tudor's legal and factual positions. For example, Defendants refer to Tudor's 2008-09 application which is not at issue in this lawsuit. Defendants also refer to a supposed "4-1" vote of the tenure and promotion committee with respect to Tudor's 2009-10 application; however

testimony in the record revels that the committee had a single "vote" that was to recommend Tudor for tenure and promotion. Defendants also claim that during the 2009-10 cycle, Tudor "pushed forward with a deficient tenure application, with full knowledge she would not succeed." This is not Tudor's position and is otherwise without support in the record.

This instruction also asserts legal and factual positions raised by Defendants that are unsupported by the record. For example, Defendants claim that Tudor's 2009-10 application was reviewed independently by Dean Scoufos and Vice President McMillan—however, there is nothing in the record that supports this position. Defendants also assert that the Southeastern administration "decided to offer [Tudor] 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." This position is unsupported by evidence in the record.

This instruction is also misleading and otherwise confusing. For example, Defendants characterize Tudor's decision to not withdraw her 2009-10 application as "selfish and cavalier." This is plainly inappropriate, attempts to mislead the jury as to Tudor's motivations during the 2009-10 cycle, confuses the issues at hand, and is otherwise unsupported by evidence in the record. Defendants also state that Tudor failed to "accept personal

responsibility for her own inadequacies in a very detail-oriented process" and go on to obliquely describe some but not all of Tudor's internal and external complaints. Defendants' characterization of Tudor's motivations during the 2009-10 cycle is without support in the record and is otherwise misleading. Defendants' cherry-picked references to some but not all of Tudor's grievances is also misleading. Defendants also reference the fact that the United States initiated this lawsuit "five (5) years" after Tudor filed a charge with the Department of Education and thereafter Tudor joined the lawsuit. This portion of the instruction is misleading as it implies Tudor did not act with diligence and it confuses the issues before the jury which is simply whether there is a factual basis to support Tudor's merits claims, not the timing of when this lawsuit was filed.

Defendants' Proposed Jury Instruction No. 2: Objection. This instruction is misleading and otherwise confusing for several reasons.

First, the instruction fails to accurately identify the cycle in which Tudor was denied tenure by the Southeastern administration (the 2009-10 cycle). The failure to accurately identify the cycle at issue is misleading and otherwise confusing.

Second, the instruction only references Tudor's discrimination claim concerning Defendants denial of her 2009-10 application (though not expressly identified as such) and does not mention that Tudor also has a

discrimination claim regarding Defendants' decision to not allow her to reapply in the 2010-11 cycle which led to her termination.[1] This instruction is thus misleading to the extent that it implies Tudor only has a discrimination claim covering the 2009-10 application and not also the 2010-11 application.

Third, this instruction misstates Tudor's legal and factual position as to her discrimination claims covering the 2009-10 and 20010-11 applications. In both applications, Tudor endeavored to seek both tenure and promotion to Associate Professor. However, Defendants' instruction only makes reference to "tenure" not promotion to associate professor.

Fourth, this instruction is misleading because it confuses the distinction between what Tudor sought through her 2009-10 and 2010-11 applications—tenure and promotion to Associate Professor—and the technical legal issue that Tudor in effect sought a form of "promotion."

Fifth, the instruction is misleading and otherwise misstates applicable legal principles to the extent that Defendants intend footnote 1 to this instruction to be a part of the instruction. Footnote 1 makes the legal argument that Title VII's sex discrimination proscription only "encompasses discrimination between men and women but does not encompass

[1] In her Complaint, Tudor alleges that Defendants discriminated against because of her sex when they (a) denied her tenure and promotion application in the 2009-10 cycle ("failure to promote claim") (see ECF No. 24 ¶¶ 162, 172) and (b) denied her the opportunity to reapply for tenure and promotion in the 2010-11 cycle, resulting in her termination ("termination claim") (*see* ECF No. 24 ¶¶ 163, 164, 171, 172).

discrimination based on gender identity *per se*, including transgender status" and goes on to cite the October 4, 2017 memorandum issued by U.S. Attorney General Jeff Sessions. The legal position proffered by Defendants has not been adopted by this Court and is otherwise in tension with this Court's prior order (ECF No. 34 at 4–5). Additionally, this instruction is misleading because it implies to the jury that legal memoranda issued by the U.S. Attorney General settles the legal issue of the scope of legal protection to be afforded to transgender persons under Title VII for the purposes of this case.

Sixth, the instruction is misleading and otherwise misstates the applicable law as to Defendants' defense. The instruction states that "SEOSU and RUSO claim the decision was based on lawful reasons, i.e., Intervenor was not qualified for tenure." However, the instruction leaves out that Defendants must demonstrate by at least a preponderance of the evidence that Tudor was not qualified for tenure (and promotion) in order to make out this defense. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F3d 1419, 1427 (10th Cir. 1993).

Seventh, portions of this instruction purport to set forth the position of the parties despite the instruction being labeled "Unlawful Discrimination." The parties positions do not speak to what constitutes as a legal matter "unlawful discrimination"—thus, portions of Defendants' instruction

speaking to the parties' positions alone constitute improper advocacy of a party position in a jury instruction and should be struck.

Defendants' Proposed Jury Instruction No. 3: Objection. This instruction is misleading and otherwise misstates applicable legal principles. In sub-part 3, Defendants instruct that "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." The legal position proffered by Defendants has not been adopted by this Court and is otherwise in tension with this Court's prior order (ECF No. 34 at 4–5). Moreover, Title VII reaches all forms of sex discrimination—not just "discrimination between men and women." *See, e.g.*, *also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) ("But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."). Additionally, this instruction is misleading because it implies that transgender persons such as Dr. Tudor are unable to

avail themselves of the protections of Title VII even where they face sex discrimination.

Defendants' Proposed Jury Instruction No. 4: Objection.

First, this instruction is confusing because it is labeled "essential elements" but does not indicate the claim for which is sets forth "essential elements."

Second, to the extent Defendants intended for this instruction to set forth the "essential elements" of Tudor's sex discrimination claims, it does not set forth the elements of those claims. This instruction inappropriately presents the *McDonnell Douglas* test to the jury and uses technical legal terms without defining them (e.g., "adverse action," "business judgment," and "preponderance of the evidence") both of which are inappropriate. *See, e.g.*, *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.").

Third, this instruction misstates applicable law. Defendants' instruction claims that "[i]n 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." However, where Tudor makes out the other essential elements of her discrimination claims, if the jury disbelieves Defendants' nondiscriminatory rationale this is grounds that gives rise to an inference of discrimination which may sustain a verdict in favor of Tudor. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Fourth, the instruction misstates Tudor's legal and factual positions because it only references Tudor's discrimination claim concerning Defendants denial of her 2009-10 application (though not expressly identified as such) and does not mention that Tudor also has a discrimination claim regarding Defendants' decision to not allow her to reapply in the 2010-11 cycle.[2]

Fifth, this instruction misstates Tudor's legal and factual position as to her discrimination claims covering the 2009-10 and 2010-11 applications. In both applications, Tudor endeavored to seek both tenure and promotion to

[2] See discussion and citations *supra* note 1.

Associate Professor. However, Defendants' instruction only makes reference to "tenure" not promotion to Associate Professor.

Sixth, this instruction is misleading and verges on misstating applicable law to the extent Defendants endeavor to instruct the jury that "business judgment" decisions cannot be scrutinized without also instructing the jury that, to the extent that Defendants claim they had a nondiscriminatory rationale for not granting Tudor's 2009-10 application and not allowing her to apply in the 2010-11 cycle, that their nondiscriminatory rationale must be demonstrated by a preponderance of the evidence. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 5: Objection. This instruction misstates applicable legal principles and is otherwise misleading and confusing. Tudor's claims for discrimination and hostile work environment arise under Title VII which simply states that discrimination "because of . . . sex" is forbidden. Moreover, Title VII does not state that "[g]ender refers to the quality of being male or female."

Defendants' Proposed Jury Instruction No. 6: Objection.

First, this instruction is confusing to the extent that it does not indicate which of Tudor's claims a "failure to conform to sex stereotypes" is relevant to. The jury should properly be instructed that this theory of sex

discrimination is relevant to the discrimination and hostile work environment claims, but is not relevant to the retaliation claim.

Second, this instruction is also misleading. The instruction states that "[i]t is not sufficient for the a jury to merely disbelieve the reason offered by the Defendants." However, where Tudor makes out the other essential elements of her discrimination claims, if the jury disbelieves Defendants' nondiscriminatory rationale this may give rise to an inference of discrimination which may sustain a verdict in favor of Tudor. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Third, the second paragraph of this instruction is misleading and/or otherwise misstates applicable law. For example, it is not reasonably disputed that Tudor is female. Defendants—at various points—have admitted Tudor is female. *See, e.g.*, ECF No. 212 at 10 (identifying Tudor as female in conclusion). It is improper to instruct the jury that Tudor must *prove* at trial that she is female in order to reap the protection of Title VII.

Fourth, the portion of this instruction which states that 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" is misleading and/or otherwise misstates applicable law. As a threshold matter, Tudor has discrete act sex discrimination claims, a hostile work environment claim, as well as a retaliation claim—thus the jury is charged with several "questions." As to Tudor's discrimination claims—the "ultimate" question is whether Tudor was discriminated against because of her sex—sex-stereotyping is but one legal theory by which Tudor may show discrimination occurred but it should not limit the evidence or issues the jury considers.

Fifth, the portion of the instruction that states that Tudor must show that she "did not conform to general notions of femininity" and she was "discriminated against based upon her nonconformity" does not comport with binding precedent and is otherwise misleading. Sex stereotype discrimination can be articulated and proven in many different ways, especially where transgender persons are concerned. For example, in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), the Tenth Circuit conceived of sex stereotyping discrimination involving a transgender woman as being employment decisions based on the assumption that persons assigned a particular sex at birth would act or appear to as that sex.

Fifth, the portion of this instruction which states the jury "must believe [Tudor] was the victim of intentional discrimination" is misleading and misstates applicable law to the extent that Tudor's environmental claim can

be evaluated under a disparate impact theory wherein intentional discrimination need not be demonstrated. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')"); *id.* 577–578 (recognizing that in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Court interpreted Title VII to reach "facially neutral practices that, in fact, are discriminatory in operation").

Defendants' Proposed Jury Instruction No. 7: Objection. This instruction misstates the applicable law pertaining to discriminatory remarks in the workplace and is otherwise misleading and confusing.

First, the jury may consider both direct and indirect evidence of bias, including biased remarks made by decision-makers. To the extent that this instruction implies that direct evidence should be afforded a different weight than indirect evidence it is improper. *See generally Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (employee need not present direct evidence of discrimination in a mixed motive case).

Second, as to Tudor's hostile work environment claim, though Title VII does not prescribe a "code of workplace conduct," *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005), it is well recognized that a barrage of animus

ridden statements, combined with other allegations, is sufficient to support a hostile work environment claim. *See, e.g.*, *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413–14 (10th Cir. 1997) (holding that aggregation of other hostilities with "[a]t least three . . . disparaging remarks directed at Plaintiff were severe enough to affect a reasonable person's identity as a woman."). *See also Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *11–12 (Apr. 1, 2015) (repeated references to a transgender woman with male pronouns by a coworker gives rise to a claim of hostile work environment).

Third, as to Tudor's discrimination claims, animus ridden statements made by the persons Tudor claims discriminated against her have probative value, in combination with other evidence, to the ultimate question of whether discrimination occurred. *See, e.g.*, *Meyers v. Cuyahoga Cnty., Ohio*, 182 Fed.Appx. 510, 520 (6th Cir. 2006) ("calling a transsexual or transgendered person a "he/she" is a deeply insulting and offensive slur, and we agree that using that term is strongly indicative of negative animus towards gender nonconforming people"). *See also Jamison v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

Fourth, this instruction misstates applicable law—Tudor need not irrefutably prove, as Defendants contend, "that the employer actually relied on gender in making its decision." Tudor need only present evidence showing it was more likely than not that gender played some role in the decision-making process. *See, e.g.*, *Sorensen v. City of Aurora*, 984 F.2d 349, 351 (10th Cir. 1993) ("When alleging disparate treatment on the basis of sex, the plaintiff must prove by a preponderance of the evidence that the defendant had a discriminatory motive or intent.").

Defendants' Proposed Jury Instruction No. 8: Objection.

First, this instruction is confusing because it does not indicate whether it is to apply to all of Tudor's claims or just Tudor's discrete action discrimination claims.

Second, this instruction is confusing because it does not indicate whether it is applicable to Tudor's discrimination claims that proceed under a disparate impact theory.

Third, this instruction misstates Tudor's factual and legal position. Tudor claims that she was discriminated against on the basis of sex when Defendants denied her 2009-10 application for tenure and promotion to Associate Professor and again when Defendants refused to allow her to reapply in the 2010-11 cycle. Defendants' instruction only mentions that

Tudor applied for "tenure" (leaving out promotion) and does not specify that Tudor has two discrimination claims which must be separately evaluated.

Fourth, this instruction misstates applicable law insofar as Tudor's 2010-11 application is concerned. It is Defendants—not Tudor—whom carry the burden of proving by a preponderance of the evidence that Tudor would not have received tenure and promotion in the 2010-11 cycle because she was not qualified, had her application been considered. *See Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) (defendant has burden of proof by at least a preponderance of the evidence to show plaintiff were allegedly not qualified).

Fifth, Tudor need not prove that she was "overwhelmingly better qualified for tenure then [*sic.*] others granted tenure." *McDonnell Douglas Corp. v. Green*, makes clear that at trial an employee need only show that she applied for and was qualified for the job sought and, despite her qualifications, she was rejected and the reasons proffered by the employer are not believable or are otherwise pretextual. *McDonnell Douglas*, 411 U.S. at 802. *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 187–88 (1989) ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretexual by showing that she was

in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing. . . . She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual."). *See also Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1220–21 (10th Cir. 2016) ("But the relevant inquiry at the prima face stage is not whether an employee or potential employee is able to meet all the objective criteria adopted by the employer, but whether the employee has introduced some evidence that she possesses the objective qualifications necessary to perform the job sought. Thus, to establish a prima face case, the employee need only put forward credible evidence that [s]he meets the employer's objective requirements necessary to perform the job. A failure to satisfy either subjective criteria or objective qualifications that have no bearing on an applicant's ability to perform the job sought, cannot be used to defeat a plaintiff's prima facie case.") (cleaned up).

Sixth, this instruction is confusing to the extent it claims that Tudor must demonstrate at trial that she "was denied tenure." Neither Tudor nor Defendants dispute that Tudor was denied tenure and promotion during the 2009-10 cycle or that Tudor was not permitted to reapply for tenure and promotion during the 2010-11 cycle, ultimately resulting in Tudor's termination in late May 2011.

Defendants' Proposed Jury Instruction No. 10: Objection. This instruction misstates applicable law. The jury must scrutinize Defendants' nondiscriminatory rationales for their decision to not give Tudor promotion and tenure during the 2009-10 cycle and to not allow her to reapply in the 2010-11 cycle, not simply accept Defendants' nondiscriminatory rationales at face value. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . ."); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 12: Objection.

First, this instruction inappropriately states that Tudor must prove "by the greater weight of the evidence that SEOSU and/or RUSO intentionally discriminated against [her] because of her gender status and failing to conform to traditional gender types." Tudor is not required by law to prove *both* that she experienced gender discrimination and that she failed to conform to gender stereotypes—the ultimate question as to Tudor's discrimination claims is whether she was discriminated against because of her gender.

Second, this instruction verges on misapplying the law where it states that, "The law does not require that an employer reach a decision which the

Intervenor or anyone else would necessarily agree was reasonable and correct." This language in the instruction implies that Defendants' employment decisions cannot be scrutinized. However, binding precedent teaches that where an employer's decision is so irrational or unreasonable and/or circumstances are so unusual that the nondiscriminatory rationale may be deemed unworthy of credence. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Third, this instruction is confusing as to the weight to be afforded to a nondiscriminatory rationale. While Defendants are correct that a legitimate nondiscriminatory rationale is a total defense to disparate treatment, this defense must be proven by Defendants by a preponderance of the evidence. *See Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) (defendant has burden of proof by at least a preponderance of the evidence to show plaintiff were allegedly not qualified). Moreover, the proposed framing that "simply because you happen to disagree" with the employment decision is confusing—this suggests that if the jury *disbelieves* the nondiscriminatory rationale that that is insufficient to find for Tudor, which is contrary to law. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is

simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Defendants' Proposed Jury Instruction No. 13: Tudor does not object to this instruction, but points out that there is a typo. The beginning of the third sentence should read "The other is indirect ***or*** circumstantial evidence . . . ."

Defendants' Proposed Jury Instruction No. 14: Objection. This instruction misstates applicable law. To defend against Tudor's evidence of pretext at the jury trial stage, Defendants must do more than simply proffer a nondiscriminatory rationale—they must prove their defense by a preponderance of the evidence. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 15: Objection.

This instruction—when read in connection with other instructions—is confusing to the extent that it refers to Tudor as "Plaintiff" and the other instructions refer to Tudor as "Intervenor." See also General Objection No. 1.

This instruction also misstates applicable law. To the extent that Tudor points to comparators in support of her disparate treatment theory of discrimination, the comparators need not be the exact same as Tudor in all respects but for her protected status. *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338, 1354 (2015) ("Neither does it require the plaintiff show

that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."). *See also EEOC v. TriCore Reference Labs.*, 849 F.3d 929, 941 (10th Cir. 2017) (recognizing *Young*'s guidance on comparator evidence as controlling).

Defendants' Proposed Jury Instruction No. 16: Objection.

First, this instruction is misleading because it is labeled "essential elements" of "Title VII Retaliation Claim," but it does not set forth the elements of retaliation. Instead, it sets forth the prima facie test portion of the burden-shifting *McDonnell Douglas* test.

Second, this instruction inappropriately presents the *McDonnell Douglas* test to the jury and uses technical legal terms without defining them (e.g., "*prima facie* case," "protected opposition to Title VII discrimination," "adverse employment action," and "causal connection between the protected activity and the adverse employment action") both of which are inappropriate. *See, e.g.*, *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts,

therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges."); *Schobert v. Ill. Dept. of Transp.*, 304 F.3d 725, 732 (7th Cir. 2002) (holding presentation of *prima facie* test to jury is inappropriate because elements of that test are for the Court, not the jury, to decide).

Third, the first two sentences of this proposed instruction are misleading and confusing to the extent that they purport to present the parties' positions yet they are included in an instruction that is labeled "Essential Elements" of a "Title VII Retaliation Claim." The parties positions are not part of the essential elements—thus, this portion of Defendants' instruction constitutes improper advocacy of a party position in a jury instruction and should be struck.

Fourth, the instruction misapplies the law to the extent that it charges the jury to determine whether Tudor suffered an adverse action rather than whether Tudor suffered retaliation because of protected activity. *Schobert v. Ill. Dept. of Transp.*, 304 F.3d 725, 732 (7th Cir. 2002) ("The jury here should have been asked only to consider whether the plaintiffs suffered retaliation because of protected activity, rather than decide whether the allegedly adverse consequences amounted to an adverse employment action.").

Defendants' Proposed Jury Instruction No. 17: Objection.

First, this instruction is confusing. It appears to set forth elements of a hostile work environment claim (first full paragraph) and then goes on to set forth criteria two different numbered sets of criteria by which the jury should determine whether the environment was "hostile or abusive."

Second, this instruction is confusing to the extent that it uses legal terms of art that are undefined (e.g., "sufficiently severe or pervasive to alter the conditions of Intervenor's employment and create an abusive work environment").

Third, this instruction misstates the applicable law. The instruction only references behaviors or actions, but binding precedent recognizes (and Tudor alleges herein) that policies that have a disparate impact can give rise to and/or otherwise contribute to a hostile work environment. *See Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Defendants' Proposed Jury Instruction No. 18: Objection.

First, this instruction is confusing to the extent that it uses legal terms of art that are undefined (e.g., "alter the conditions of the victim's employment").

Second, this instruction misstates the applicable law. The instruction only references behaviors, but binding precedent recognizes (and Tudor alleges herein) that policies that have a disparate impact can give rise to and/or otherwise contribute to a hostile work environment. *See Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Defendants' Proposed Jury Instruction No. 19: Objection.

As a threshold matter, Defendants are not entitled to a *Faragher/Ellerth* defense to Tudor's hostile work environment claim. There is evidence in the record that Tudor suffered tangible employment actions—denial of "promotion" (her applicable for tenure and promotion to Associate Professor was denied in the 2009-10 cycle) and denial of the opportunity to reapply for tenure and promotion in the 2010-11 cycle, which lead to her nonrenewal and ultimately her termination in late May 2011. Because Tudor suffered tangible employment actions, the *Fargher/Ellerth* defense is not available. *See, e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 (2004) (affirming that *Faragher/Ellerth* defense is unavailable where a tangible employment action has been taken); *Wilson v. Union Pac. R.R.*, 56

F.3d 1226, 1232 (10th Cir. 1995) ("[A] party is entitled to an instruction based on its theory of the case whenever it produces evidence to support it.").

This instruction is also misleading and otherwise misstates applicable law in numbered sentence one, which suggests that only "harassing behavior" is pertinent to an environmental claim. Tudor alleges—and evidence shows—that Defendants maintained policies that Tudor found hostile and which contributed to the hostile work environment. Under binding precedent, policies (in addition to harassing behavior) can properly give rise to a hostile work environment. *See, e.g.*, *Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

This instruction is also misleading and otherwise misstates applicable law in numbered sentence one, because it suggests that harassment is only that which is "sexually harassing." Binding precedent teaches that gender-neutral abuse can give rise and/or also contribute to a hostile environment. *See, e.g.*, *O'Shea v. Yellow Technology Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999) ("Facially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly gender-discriminatory conduct."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987)

(any unequal treatment, even if not gendered in nature, perpetrated because of sex, can give rise to a hostile work environment claim). Additionally, heightened scrutiny—of the ilk Tudor alleges she was subjected to—which may otherwise appear to be gender neutral can also constitute evidence of hostilities. *See, e.g.*, *Barnes v. Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005) (finding heightened scrutiny of transgender officer by nontransgender supervisor was perpetrated with the intent of building a poor performance record to justify adverse employment action).

Defendants' Proposed Jury Instruction No. 20: Objection.

Defendants' instruction states in part that Tudor's own subjective belief of whether she "has been discriminated or retaliated against is not sufficient to establish her claims." This is misleading, confusing, and verges on misstating applicable law because, as to her environmental claim, Tudor's subjective belief as to whether the environment was a hostile one goes to an element of her environmental claim—that the harassment was unwelcome. *See* Tudor's Proposed Jury Instruction No. 14, ECF No. 199 at 18 ("such conduct was unwelcome").

Defendants' instruction also states that Tudor's coworkers' beliefs regarding whether Tudor was discriminated against are "not sufficient to support [Tudor's] claims and the jury cannot base a finding of discrimination or retaliation solely on a co-worker's opinion that [Tudor] should have been

granted tenure." This portion of the instruction is misleading, confusing, and verges on misstating applicable law. Both Tudor's and the testimony of other professors in the English Department pertaining to Tudor's qualifications for promotion and tenure during the 2009-10 and 2010-11 cycle are pertinent to the ultimate issues of discrimination and retaliation in this case. The jury cannot be instructed to disregard testimony of Tudor and her coworkers where such testimony is informed by substantive assessment of Tudor's qualifications in the 2009-10 and 2010-11 cycle. *See, e.g.*, *Curtis v. Okla. City Pub. Schls. Bd. of Educ.*, 147 F.3d 1200, 1217 (10th Cir. 1998) (noting that "[t]estimony of other employees may be relevant in assessing an employer's retaliatory intent if the testimony establishes a pattern of retaliatory behavior or tends to discredit the employers assertion of legitimate motives.").

Defendants' Proposed Jury Instruction No. 24: Objection.

First, this instruction is confusing because its terms imply that Tudor is only seeking (and only entitled to) damages for her discrimination claims not her retaliation and/or hostile work environment claims.

Second, this instruction is confusing to the extent it says that Tudor must demonstrate "each element" of damages to be entitled to damages but it does not set forth what the elements are.

Third, this instruction misstates Tudor's position as to which injuries she suffered entitle her to damages. For instance, the instruction claims Tudor is seeking damages for "emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." However, Tudor is actually seeking damages for "lost income, loss of fringe benefits, humiliation, loss of enjoyment of life, and damage to her professional reputation" (Complaint, ECF No. 24 at 34) and garden variety emotional distress.

Defendants' Proposed Jury Instruction No. 25: Objection. This instruction is misleading and otherwise misstates applicable law.

Defendants' instruction misstates the applicable burdens. Once discrimination and/or retaliation is demonstrated by Tudor, it is Defendants' burden (not Tudor's) to show that Tudor did not exercise reasonable diligence in mitigating damages caused by Defendants' illegal actions. *See, e.g.*, *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979) ("A claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort."); *id* at 937 ("once a violation has been demonstrated and back pay has been awarded, the employer has the burden of showing that the discriminatee did not exercise reasonable diligence in mitigating damages caused by the employer's illegal action.").

Defendants' instruction is also misleading to the extent that it does not define what "reasonable efforts" are to mitigate damages and otherwise implies that if Tudor did not "seek out or take advantage of a business or employment opportunity"—without defining what kinds of opportunities are relevant—Tudor failed to mitigate damages. This is not the appropriate standard. *See, e.g.*, *Metz v. Merrill Lynch*, 1991 WL 355199, at *7 (W.D.Okla. 1991) (Cauthron, J.) ("Plaintiff is not required to be the best or even average in terms of interim earnings to entitle her to an award of back pay. Instead, the defendant has the burden of showing that plaintiff did not exercise reasonable diligence in mitigating her damages.").

Defendants' are also not entitled to a mitigation of damages affirmative defense instruction because they have failed to produce evidence that Tudor failed to mitigate damages. The evidence produced shows that Tudor applied to more than one-hundred jobs in the seven years since her separation from Southeastern. Defendants have not introduced (and cannot introduce) evidence that Tudor did not take sufficient steps to attempt to find reemployment. Indeed, the mere fact that Tudor has had difficulties finding reemployment is not evidence of failure to mitigate damages. *See, e.g.*, *Metz*, at *7. Because there is no evidence that Tudor failed to mitigate damages, Defendants are not entitled to this instruction. *See, e.g.*, *Wilson v. Union Pac. R.R.*, 56 F.3d 1226, 1232 (10th Cir. 1995) ("[A] party is entitled to an

instruction based on its theory of the case whenever it produces evidence to support it.").

Defendants' Proposed Jury Instruction No. 27: Objection. The proposed verdict form is confusing and otherwise misleading. As written, the proposed verdict form only allows the jury to reach a verdict in favor of Defendants.

WHEREFORE, Plaintiff/Intervenor Dr. Tudor respectfully requests that this Court take notice of the foregoing objections to Defendants' proposed jury instructions (ECF No. 196).

Dated: October 24, 2017

/s/ Ezra Young
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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2017, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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