

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

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

**PLAINTIFF/INTERVENOR’S RESPONSE TO DEFENDANTS  
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL  
UNIVERSITY SYSTEM OF OKLAHOMA’S MOTION IN LIMINE  
WITH INCORPORATED BRIEF**

NOW COMES Plaintiff/Intervenor, Rachel Tudor (Tudor), by and through undersigned counsel, and responds to Defendants Southeastern Oklahoma State University and the Regional University System of Oklahoma’s Motion in Limine as follows:

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//

MATTERS I - VII

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

Tudor respects the Court's authority to determine the admissibility of certain statements. However, the parties disagree as to the admissibility of certain statements regarding, or attributed to, Dr. Douglas McMillan. The Court should not exclude the following statements for the reasons set forth herein.

1. Statement that an SEOSU employee "warned [Intervenor] that [SEOSU] Vice-President for Academic Affairs" Douglas McMillan "had inquired whether Dr. Tudor could be fired because her 'transgender lifestyle' offended his religious beliefs."

2. Statement that Intervenor was told by a SEOSU "human resources employee" that the SEOSU human resources employee told Vice-President Douglas McMillan "that Southeastern could not fire [Intervenor] because she was transgender."

3. Statement that Intervenor was told by Jane McMillan that SEOSU Vice-President for Academic Affairs Douglas McMillan told his sister, (Jane McMillan), that "transgender people [are] a 'grave offense to his [religious] sensibilities."

4. Statement that Intervenor was told that Vice-President for Academic Affairs Douglas McMillan "made statements that were repeated to [Dr. Tudor] that her gender expression and gender identity were offensive to [McMillan]."

**A. Argument Regarding Statements 1-4 Attributed to Dr. McMillan**

Hearsay evidence, an out of court statement offered to prove the truth of the matter asserted, is generally inadmissible subject to certain exceptions. Fed. R. Evid. 801, 802. A statement of the declarant's "then-existing state of mind (such as motive, intent, or plan)" is one of the exceptions to the hearsay rule. Fed. R. Evid. 803(3). The state of mind exception "allows the admission of an extrajudicial statement, not to prove the truth of the matter asserted, but to show a future intent of the declarant to perform an act if the occurrence of that act is in issue." *See U.S. v. Freeman*, 514 F.2d 1184, 1190 (10th Cir. 1975) (admitting hearsay testimony when hearsay statements related to motive and intent to purchase equipment where amount of equipment purchased was an issue in the case).

To the extent Tudor wishes to discuss the statements discussed above, the statements can be offered to show Dr. McMillan's then existing state of mind regarding his feelings toward transgender individuals generally and his motive and intent to discriminate against Dr. Tudor specifically based on her sex at a time when Dr. McMillan was a decision-maker in regards to Dr. Tudor's continued employment in 2007, during Tudor's 2009-10 tenure and promotion application, and McMillan wrote the memorandum to Tudor in October 2010 barring her reapplication for tenure and promotion during the 2010-11 cycle, resulting in Tudor's nonrenewal and ultimately her separation from Southeastern in late May 2011. Dr. McMillan has testified to struggling with Dr. Tudor's gender and with transgender people more generally as it relates to his religious beliefs. *See, e.g.,*

Exhibit 1 at 221-22 (describing religious beliefs about gender and changing genders).

Additionally, Tudor may introduce the statements above into evidence through her own testimony at trial for the limited purpose of showing the statements were made to her. *See EEOC v. HBE Corp.*, 135 F.3d 543 (8th Cir. 1998) (approving admission of statements where not offered for “the truth of the matter asserted, but rather only to show that the statements were made”) (*citing* Fed.R.Evid. 801(c)).

Alternatively, to the extent the statements above were made by Defendants’ agents regarding activities within the scope of their employment they are admissible pursuant to Fed. R. Evid. 801(d)(2). *See, e.g., Carter v. Univ. of Toledo*, 349 F.3d 269 (6th Cir. 2003) (deeming as nonhearsay admissions of party opponent admissible; alleged statements by university’s vice provost to professor, to the effect that dean of professor’s department was racist, concerned matter within scope of his employment, and thus statements qualified as admissions of agent of party opponent, not hearsay); *EEOC v. HBE Corp.*, 135 F.3d at 552 (where racist statements both directly attributable to managers and readily inferred as coming from management they are admissible; “This testimony all involved statements by Adam’s Mark agents regarding activities within the scope of their employment and is therefore admissible”).

Defendants argue that because Dr. McMillan and others conveniently denied any such statements after the EEOC and DOJ began investigating whether Dr.

Tudor was unlawfully discriminated against that such statements should be deemed inadmissible. However, Dr. McMillan and others will have an opportunity to testify in this matter and can dispute the validity of any of these statements in front of the jury, who will be able to judge credibility. *Cf. Riordan v. Kempiners*, 831 F.2d 690 (7th Cir. 1987) (“A plaintiff’s ability to prove discrimination indirectly, circumstantially, must not be crippled by evidentiary rulings to keep out probative evidence because of crabbed notions of relevance or excessive mistrust of juries.”).

Defendants further argue that the statements should be barred due to remoteness and vagueness. As for vagueness, the statements are actually quite specific as they relate to Dr. McMillan’s state of mind, motive, and intent to discriminate. As for the remoteness of time argument, the statements are particularly relevant, as they were made close in time to when Dr. McMillan was learning of Dr. Tudor’s gender transition, the Southeastern administration’s meetings involving Cathy Conway and others to determine how the university would respond to Dr. Tudor’s transition. Indeed, Cathy Conway’s representations to Tudor about McMillan’s statements are particularly relevant and there is no colorable argument that they were too remote in time—Conway passed on McMillan’s statements to Tudor during the June 2007 phone call on which Conway imposed conditions on Tudor’s restroom use, dress, and make-up—policies which Tudor alleges contributed to the hostile work environment.

Defendants also spuriously argue that Tudor did not exactly allege the statements were made prior to the filing of this lawsuit (see ECF No. 195 at 10).

However, Tudor complained about McMillan's bias against her and about the conditions placed on her employment both while at Southeastern and during the EEOC investigation. For example, Tudor grieved Dr. McMillan's statements as conveyed to her by Jane McMillan in a complaint filed with Stubblefield in 2010 (see Exhibit 2 at 4). Moreover, as to Conway's conversation with Tudor and whether McMillan ever made the disputed statements to Conway—the fact that McMillan, Conway, and others were asked about these statements during the EEOC investigation shows that Tudor made these allegations far before filing of this lawsuit.

Lastly, Defendants imply that because Dr. Tudor is the key witness to many of these statements that this alone is grounds to exclude them. *See* ECF No. 195 at 4 (“However, the probative value of these hearsay remarks is very low, given the only witness who claims to know anything about them is Intervenor.”). This is absurd. Dr. Tudor is a witness to the hostilities, discrimination, and retaliation she endured. The fact that Tudor is a witness to conversations over which the parties dispute the content of cannot bar Tudor from testifying as to what she witnessed. Moreover, adopting Defendants' proposed rule would frustrate the purposes of Title VII because it would make it impossible for employees to testify to what they endured where the employer disputes the allegations. *Cf. Riordan*, 831 F.2d at 690 (“Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail demonstrating it; and because most employment

decisions involve an element of discretion, alternative hypotheses (including that of simple mistake) will always be possible and often plausible.”).

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

“Rule 408 does not impose an absolute ban on the admission of statements made during settlement negotiations.” *See Southwest Nurseries, LLC v. Florists Mut. Ins., Inc.*, 266 F.Supp. 2d 1253, 1257 (D.Colo. 2003) (citing *Coakley & Williams Const., Inc. v. Structural Concrete Equipment, Inc.*, 973 F.2d 349, 353 (4th Cir.1992)). The Court has already had an opportunity to hear Defendants’ argument regarding the confidentiality of the settlement agreement (“Agreement”) and denied a protective order regarding the Agreement (Order, ECF No. 206 at 3).

Dr. Tudor does not seek to introduce evidence of the substance of settlement discussions to which she was privy with Defendants. *Contra* Defs. Mot., ECF No. 195 at 11. Moreover, Tudor was not a party to the negotiations between Defendants and the United States pertaining to their Agreement and thus has no evidence or knowledge about the substance of their discussions (beyond the disputed content of these discussions which Defendants and the United States brought to the Court’s attention in their respective briefing).

However, Dr. Tudor does seek to introduce the Agreement itself into evidence for a limited purpose. Dr. Tudor is entitled to introduce relevant evidence—including the Agreement—to support her hostile work environment claim at trial. As Tudor has previously advised the Court, she seeks to introduce the Settlement

Agreement into evidence in support of her hostile work environment claim for two limited purposes—(a) to show the feasibility of alternative measures and (b) to rebut Defendants’ *Faragher/Ellerth* defense. *See, e.g.*, ECF No. 174 at 12–18; ECF No. 192 at 12–16.

Excluding otherwise admissible evidence is an “extraordinary remedy” and must be done “sparingly.” *United States v. Smalls*, 605 F.3d 765, 787 (10th Cir. 2010) (Baldock, J.). Moreover, unfair prejudice (if it is found to exist) must “substantially outweigh[] probative value” in order to justify excluding relevant evidence. *United States v. Pettigrew*, 468 F.3d 626, 638 (10th Cir. 2006) (Tacha, J.). In their motion *in limine*, Defendants rehash arguments they raised when seeking a protective order. Just as before, Defendants have failed to make a showing that prejudice is likely or that it is appropriate to presume prejudice in this case. *See* Order, ECF No. 206 at 3. Defendants’ speculative fears alone cannot outweigh the probative value of the Agreement’s use in the limited circumstances Tudor points to. To the extent there is a remote chance of prejudice, it would be appropriate for the Court to use *voir dire* and jury instruction to mitigate potential prejudice rather than exclude the Agreement outright. *Cf.* Order, ECF No. 206 at 3 (finding similar approach will mitigate potential prejudice arising from pretrial publicity of the Agreement).

Because Defendants have failed to present any facts or arguments that overwhelmingly outweigh the probative value of the Agreement, there is no basis for excluding the Agreement from evidence.

### III. HEALTH INSURANCE OPTIONS AND EXCLUSIONS

As part of her hostile work environment claim, Tudor alleges that Defendants' fringe benefit health plans categorically excluded coverage of treatments sought for gender dysphoria by transgender persons despite otherwise covering the same treatments for nontransgender persons seeking care for other conditions. Tudor further alleges that the exclusion was hostile and contributed to the hostile work environment. As noted in her opposition to summary judgment, there is evidence that the exclusion existed between 2007 and 2011, that there was no avenue to grieve the exclusion during Tudor's employ, and Defendants have since removed the exclusion from their fringe benefits plan (ECF No. 205 at 9–10 ¶¶ 3–4).

Defendants' arguments to exclude all evidence of the health plan exclusion and Defendants' subsequent changes to the plan are without merit. First, as this Court previously decided, Tudor has exhausted her hostile work environment claim. *See* ECF No. 34 at 2–3.

Second, Tudor is entitled to present evidence of hostilities she endured, including evidence regarding the existence of the health plan exclusion, evidence speaking to the feasibility of alternative measures, evidence showing that the plan could not be grieved during her employ thereby rebutting a *Faragher/Ellerth* defense, as well as evidence speaking to how the plan exclusion effected her.

Third, Defendants argument that discussion of the health plan and hostilities related to it “will be irrelevant, confusing of the issues, [and] unduly prejudicial”

(ECF 195 at 13) is absurd. The plan exclusion is a constituent hostility giving rise to Tudor's environmental claim—it is thus plainly relevant and does not confuse the issues at stake in this case. Moreover, there is no valid claim of prejudice here—Tudor is entitled to present evidence supporting her claims and rebutting Defendants' defenses.

Fourth, evidence concerning the health plan exclusion—which specifically targeted transgender people, by treating them differently than members of their same identified gender—is more broadly admissible beyond the environmental claim because it speaks to prior discriminatory acts which are probative of intent and thereby not prejudicial. *See, e.g., Jones v. Washington Metro. Area Transit Auth.*, 946 F.Supp. 1011, 1019 (D.D.C. 1996); *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 155 (8th Cir. 1990) (“Because an employer’s past discriminatory policy and practice may well illustrate that the employer’s asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.”).

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

Defendants baldly assert that none of their former employees have been terminated or otherwise disciplined in connection with Tudor's allegations. ECF 195 at 13. Tudor disputes Defendants' unsubstantiated representation. Moreover, to the extent that Defendants' former employees testifying at trial have brought the reasons for their employment transition out of Southeastern into issue during

interviews and/or depositions, Tudor is entitled to present evidence showing they lied concerning the circumstances surrounding their separation to impeach those witnesses. *See generally* Fed.R.Evid. 608(b).

## V. “FOR THE COMMUNITY” ARGUMENTS

Dr. Tudor is entitled to present her case to a jury of her peers and, if she prevails, to request that the jury compensate her for her injuries. The very nature of a jury is that it stands in the place of the community from which it is drawn to judge claims based on the evidence presented to it. Defendants’ spurious claim—that Tudor’s counsel should be gagged at trial on a broad range of potential issues because they could *potentially* prejudice the jury is utterly absurd. This case involves a transgender woman, employment discrimination issues arising at a university, and arises under the Civil Rights Act of 1964. To prevent Tudor’s counsel from even obliquely mentioning those facts in any way is totally unsupported by law. Moreover, if the Court were to deem counsel for Defendants *or* Tudor to make inappropriate statements at trial, this could be cured by proper jury instruction. *See, e.g., Learmoth v. Sears, Roebuck and Co.*, 631 F.3d 724, 732–33 (5th Cir. 2011).

## VI. PURPORTED DRESS CODES

Defendants’ objection to Tudor’s accusations regarding dress code restrictions is totally without merit.

First, as this Court previously decided, Tudor has exhausted her hostile work environment claim. *See* ECF No. 34 at 2–3. Tudor’s accusation that Defendants

conditioned her employment in part on the dress restrictions should be presented to the jury as it is a constituent component of Tudor's environmental claim.

Second, the fact that Tudor attests that her employment was conditioned in part by the dress restriction and Defendants' former employees dispute that dress restriction was ever placed on Tudor is ultimately a dispute that the jury must decide, not something that should be kept from the jury.

Third, evidence concerning the dress restrictions imposed on Tudor—is more broadly admissible beyond the environmental claim because it speaks to prior discriminatory acts which are probative of intent and thereby not prejudicial. *See, e.g., Jones v. Washington Metro. Area Transit Auth.*, 946 F.Supp. 1011, 1019 (D.D.C. 1996); *Hawkins v. Hennepin Tech. Ctr.*, 900 F.2d 153, 155 (8th Cir. 1990) (“Because an employer's past discriminatory policy and practice may well illustrate that the employer's asserted reasons for disparate treatment are a pretext for intentional discrimination, this evidence should normally be freely admitted at trial.”).

## **VII. OPINIONS BEYOND THOSE IN DR. ROBERT PARKER'S WRITTEN**

### **EXPERT REPORT**

To the extent that Defendants' seek preemptive limits on Dr. Parker's testimony, such limitations are premature and unwarranted. Dr. Parker should be allowed to provide full relevant expert testimony.

This Court has already decided that Dr. Parker's proposed testimony is relevant and that Parker will be allowed to testify about “his consideration of Dr.

Tudor’s work, and his comparison of that work to other applicants who were offered tenure.” Order, ECF No. 163 at 3. Defendants’ attempt to limit Parker’s testimony—excluding testimony on Tudor’s 2009-10 and 2010-11 portfolios or any comparison of those applications to other portfolios reviewed by Parker is without merit. Plainly, Parker’s testimony speaks to Tudor’s qualifications for promotion and tenure during the 2009-10 and 2010-11 cycles, which will aid the jury in assessing whether Defendants’ nondiscriminatory and nonretaliatory rationales are mere pretext (ECF No. 163 at 4).

Lastly, Defendants critiques of Dr. Parker’s methodology and other supposed deficiencies with his analysis are not a reason to limit his testimony. As this Court previously held, “To the extent Defendants raise challenges to the procedure used by Dr. Parker or challenge his methodology, those arguments are matters to be addressed through proper cross-examination rather than serve as a basis for striking Dr. Parker’s testimony completely.” ECF No. 163 at 4.

#### **VIII. DR. BROWN’S REFERENCES TO INTERVENOR EITHER INDIVIDUALLY OR SPECIFICALLY**

After filing their motion *in limine* as to Dr. Brown’s testimony at trial (ECF No. 195 at 19–20), Defendants filed a *Daubert* motion seeking to totally exclude Brown citing the same rationales as those in the motion *in limine* (ECF No. 211). Dr. Tudor respectfully requests the opportunity to respond to the totally overlapping issues between the motion *in limine* and the *Daubert* motion in her response to the latter.

To the extent that Defendants' seek preemptive limits on Dr. Brown's testimony, such limitations are premature and unwarranted. If the Court decides that Dr. Brown should be deemed an expert witness, Dr. Brown should be allowed to provide full relevant expert testimony. Much of Defendants concern seems to arise because Defendants declined the opportunity to depose Dr. Brown during discovery. Indeed, Defendants raise many questions concerning what Dr. Brown's report did or did not cover, what Dr. Brown's familiarity with Dr. Tudor is, and whether Dr. Brown will opine on Tudor's sex and/or diagnosis (ECF No. 195 at 19–20). As this Court previously noted, it was Defendants whom elected to not depose Dr. Brown during discovery, despite ample opportunity to do so (ECF No. 206 at 2–3). Defendants' foolish discovery strategy should not limit Brown's relevant testimony in this matter. Similar to Dr. Parker's testimony, many of Defendants' concerns regarding procedure and methodology "are matters to be addressed through proper cross-examination rather than serve as a basis for striking [] testimony completely." ECF No. 163 at 4.

#### **IX. EXPERTS OPINING ON MATTERS OF LAW**

Dr. Tudor does not proffer experts to opine on matters of law.

Dated: October 24, 2017

/s/ Brittany M. Novotny  
Brittany M. Novotny (OBA 20796)  
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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/ Brittany M. Novotny

Brittany M. Novotny (OBA 20796)

# Exhibit 1

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

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

DEPOSITION OF DOUGLAS MCMILLAN

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 10, 2016

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REPORTED BY: ROSIE STANDRIDGE, CSR

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A P P E A R A N C E S

For the Plaintiff:

Mr. Allan K. Townsend  
Ms. Valerie L. Meyer  
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Mr. Jeb E. Joseph  
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LITIGATION DIVISION  
313 Northeast 21st Street  
Oklahoma City, Oklahoma 73105  
405.521.3921

Also present:

Ms. Rachel Tudor

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T A B L E O F C O N T E N T S

	PAGE
STIPULATIONS . . . . .	4
EXAMINATION BY MR. TOWNSEND. . . . .	5
EXAMINATION BY MR. YOUNG . . . . .	231
JURAT. . . . .	252
CORRECTION SHEET . . . . .	253
REPORTER'S CERTIFICATE . . . . .	254

E X H I B I T I N D E X

NO.	DESCRIPTION	PAGE
158	AUDIO VIDEO FILES VN520016.WMA	13
159	AUDIO VIDEO FILES Douglas McMillan.wav	14
160	ACADEMIC POLICIES & PROCEDURES MANUAL EXCERPT	166

(Exhibits 1 - 157 marked in previous depositions)

**Douglas McMillan**

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S T I P U L A T I O N S

It is hereby stipulated and agreed by and between the parties hereto, through their respective attorneys, that the deposition of DOUGLAS MCMILLAN may be taken on behalf of the Plaintiff, on August 10, 2016, in Oklahoma City, Oklahoma, by Rosie Standridge, Certified Shorthand Reporter for the State of Oklahoma, pursuant to the Federal Rules of Civil Procedure and notice.

\* \* \* \* \*

**Douglas McMillan**

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08:21 1 (Deposition commenced at 8:23 a.m.)

08:21 2 DOUGLAS MCMILLAN,

08:21 3 having been first duly sworn/affirmed, deposes and

08:21 4 says in reply to the questions propounded as follows:

08:23 5 EXAMINATION

08:23 6 BY MR. TOWNSEND:

08:23 7 Q. Could you please state and spell your name  
08:23 8 for the record, please?

08:23 9 A. Sure. Douglas McMillan, D-o-u-g-l-a-s  
08:23 10 M-c-M-i-l-l-a-n.

08:23 11 Q. Good morning, Dr. McMillan. We've met  
08:23 12 before. My name is Allan Townsend. I represent the  
08:23 13 United States in this lawsuit against Southeastern  
08:24 14 Oklahoma State University and the Regional University  
08:24 15 System of Oklahoma.

08:24 16 Also with me today is Valerie Meyer. She's  
08:24 17 also an attorney for the United States. To her right  
08:24 18 is Ezra Young. He is an attorney that represents Dr.  
08:24 19 Tudor. And Dr. Tudor is to his right. And I'm sure  
08:24 20 assuming you know Mr. Joseph, who is sitting there to  
08:24 21 your left.

08:24 22 Could you please provide your home address?

08:24 23 A. Yes. It's 4047 Woodlawn Road, Denison,  
08:24 24 Texas 75021.

08:24 25 Q. Do you have any plans to relocate anytime

Douglas McMillan

221

16:17 1 A. Me --

16:17 2 MR. JOSEPH: Object to the --

16:17 3 A. -- personally?

16:17 4 MR. JOSEPH: -- form.

16:17 5 Q. (By Mr. Townsend) Yes, you personally.

16:17 6 A. Okay. Yes, for that and a variety of other.  
16:17 7 I don't -- I don't struggle with that issue.

16:17 8 Q. Now, you just said a little bit ago there  
16:17 9 were two antithetical teachings about transgender  
16:17 10 people. What were those two teachings?

16:17 11 A. One was that it was -- that God created male  
16:17 12 and female and those -- with the implication that  
16:17 13 gender is based on biological -- what we're born as in  
16:17 14 terms of gender.

16:17 15 The other one said in an interesting  
16:17 16 contradiction that it's a biological thing that a  
16:17 17 person would feel, say, for example, a woman trapped  
16:18 18 in a man's body, that -- and that it is not a -- it's  
16:18 19 not a -- a sin necessarily.

16:18 20 So I've heard two very opposite teachings  
16:18 21 about it which I think reflected people don't know --  
16:18 22 don't know what the -- what the reality of that is or  
16:18 23 that Christians haven't closed the book on that issue  
16:18 24 yet.

16:18 25 Q. So where do you come down on those two

Douglas McMillan

222

16:18 1 antithetical views?

16:18 2 A. Still considering, still reflective about  
16:18 3 it.

16:18 4 Q. Have you ever thought that transgender  
16:18 5 people were immoral?

16:18 6 A. Immoral?

16:18 7 MR. JOSEPH: Object to the form.

16:18 8 Q. (By Mr. Townsend) Well, let me strike that.  
16:18 9 Have you ever had any religious beliefs  
16:18 10 about transgender people being immoral?

16:18 11 MR. JOSEPH: Object to the form. Are you  
16:18 12 asking, are transgenders engaged in immoral activity?  
16:19 13 Or are you asking their nature is immoral?

16:19 14 MR. TOWNSEND: All right. I'll clarify.

16:19 15 Q. (By Mr. Townsend) Have you ever had any  
16:19 16 religious beliefs about transgender people by their  
16:19 17 nature being immoral?

16:19 18 A. We're all -- from a biblical perspective, we  
16:19 19 all are in that same situation.

16:19 20 Q. Have you ever had any religious beliefs  
16:19 21 about transgender people being immoral because they  
16:19 22 are presenting themselves as a gender that's different  
16:19 23 than the gender they were assigned at birth?

16:19 24 A. I don't -- I don't have that question closed  
16:19 25 in my thinking.

# Exhibit 2



2

Amended Complaint

To: Dr. Claire Stubblefield, Special Assistant to the President/Director of Institutional Diversity & Affirmative Action Officer

From: Dr. Rachel Tudor, Department of English Languages & Humanities

Re: Discrimination in Promotion and Tenure & Retaliation

Date: 28 October 2010

According to the Regional University System of Oklahoma (RUSO) 5.2 (a) all persons should be given "equal opportunity for employment and advancement in employment regardless of race, religion, disability, color, ethnicity, national origin, sex, age, political affiliation, or status as a veteran." It is the responsibility of the Affirmative Action Officer of each university to ensure compliance with the policy and to ensure that each institution meets its (b) "responsibilities under the Civil Rights Act of 1964; commitments as a federal contractor under Executive Order 11246 and Executive Order 11375; and Oklahoma State Regents for Higher Education policies." It is my duty to inform you, as Southeastern's Affirmative Action Officer, of egregious breaches of policy and law in reference to discrimination in promotion and tenure. Following is a brief synopsis of the pertinent dates, events, and personnel involved in violating my rights under policy and law:

I was recommended for tenure and promotion by my department's Faculty Tenure and Promotion Committee in the Fall of 2009. Subsequently, Dean Scoufos and Interim Vice President for Academic Affairs McMillan denied my application for tenure and promotion. Dean Scoufos steadfastly refused to disclose her reasons for not supporting the recommendation of EHL's Tenure and Promotion Committee (Exhibit A). Dr. McMillan not only refused to disclose his reasons, he also refused to even meet with me (Exhibit B). I appealed to the Faculty Appellate Committee to review their behavior as inconsistent with Southeastern's policy and practice (Exhibit C). The Faculty Appellate Committee supported my point of view and issued a recommendation that Dean Scoufos and Dr. McMillan explain the rationales for their decisions. However, instead of respecting the common sense approach recommended by the Faculty Appellate Committee and honoring their wisdom, they contacted legal counsel and requested a legalistic legerdemain to avoid extending to me the same spirit of cooperation and collegiality that was recently freely extended to a white male candidate for tenure and promotion in my department (Exhibit D, para 3). At this point, I need to call your attention to Dr. Charles Weiner's (Assistant Vice President for Academic Affairs) role in events. The Faculty Appellate Committee met and rendered a judgment in my favor on March 22<sup>nd</sup>, however Dr. Weiner did not inform me of the Committee's decision until April 29<sup>th</sup> (Exhibit D, see date). Policy states unequivocally that I have the right to be informed of the Committee's decision within ten days of the rendering of a verdict. It is not only inexcusable that Dr. Weiner waited five weeks to inform me of the Committee's decision, but his deliberate delay in violation of policy is evidence of collaboration between parties in the administration to delay and hinder my rights to due process and equal treatment. As a matter of fact, before I was informed of the Committee's decision the most egregious breach of my right to due process and equal opportunity for advancement in employment occurred. On April 6<sup>th</sup> I was summoned to Dean Scoufos' office. Dean Scoufos demanded that I immediately withdraw my application for tenure and promotion. When I asked for some time to think about it, she said that if I did not immediately withdraw my application, I would not be allowed to reapply in academic year 2010-2011. I mentioned that policy states tenure-track faculty have six years to apply for tenure, and I was only in my fifth year. She responded that the policy simply says tenure-track

faculty "may" apply, it does not say that tenure-track faculty "must" be allowed to apply. When I did not immediately fold, she said, "You may think you are safe because the date for non-renewal of your contract without cause has passed, but you may still be non-renewed with cause if you don't withdraw your application." I asked her if she was speaking on her own authority or on behalf of Dr. McMillan. Dean Scoufos said that she was speaking on behalf of Dr. McMillan and President Minks. She said that they had met and decided to demand that I withdraw my application and to inform me of the consequences of refusing to comply with their demand. Although I was taken aback by the threats, I placed my faith in my colleagues' judgment, both the Faculty Tenure and Promotion Committee and the Faculty Appellate Committee, and refused to withdraw my application. To me, withdrawing my application would indicate that I was rejecting the good judgment of my colleagues in my department and did not have faith in the sound judgment of my colleagues in the Faculty Senate as well as surrendering to odious bullying. These events seem incredible, but Dr. John Mischo (Chair of English, Humanities, & Languages) was a witness to the meeting with Dean Scoufos and her attempts to coerce me into withdrawing my application. On April 21<sup>st</sup> President Minks denied my application for tenure and promotion. On April 29<sup>th</sup> Dr. Weiner informed me of the Faculty Appellate Committee's recommendation and of the administration's decision not to respect its judgment (Exhibit D). On April 30<sup>th</sup> Dr. McMillan composed a letter (in response to the Faculty Appellate Committee's recommendation) stating President Minks' reasons for denying my application (Exhibit E). And, here is where another egregious violation of my rights to due process and equal rights occurs, Dr. McMillan fails to mail the letter to me until June 9<sup>th</sup> (Exhibit F), almost six weeks later. Taken individually, any one of these events evidence a hostile attitude arising from discrimination; taken collectively, they demonstrate a pattern of calculated adversarial behavior intended to thwart my equal opportunity to advancement in employment—an opportunity protected by policy and law. As a matter of fact, the actions documented are in contradistinction to RUSO Affirmative Action policy 5.2 (c) "to reach out to all persons, including women and racial minority members, in recruitment, placement, development and advancement." Instead of reaching out to me, I was stonewalled, threatened, and denied timely access to vital information at every step of the process. Finally, note should be made of the purported reasons for President Minks denying my application (Exhibit E). President Minks' letter does not indicate any "compelling reason or exceptional case" for overruling the Faculty Tenure and Promotion Committee's judgment as required by policy. Policy states explicitly that faculty are the best judges of what constitutes substantive and meritorious contributions in their area of expertise—policy specifically eschews the type of second guessing and micromanaging described in the letter (*Policy and Procedures* 3.7.4 Role of the Faculty). As indicated by the minutia cited in his letter, President Minks clearly usurped the rights and responsibilities of the Faculty Tenure and Promotion Committee as well as undermined the principles of shared governance defined in the *Policy and Procedures Manual*. Omitted from mention in his letter are many significant contributions I have made to the university, such as designing and co-teaching a course on Native American history, literature, and law under the auspices of OSLEP (Oklahoma Scholar Leadership Enrichment Program). Most telling is his attitude toward any activities and contributions with respect to Native Americans. For example, President Minks minimizes not only my contributions to the Native American Symposium but demeans the Symposium itself. In his letter, he slights contributions that are culturally specific and valuable to Native Americans, such as preserving the oral tradition of Native American poetry. It must be noted that the Faculty Tenure and Review Committee was able to evaluate the chapbooks containing my poetry—assessment of the quality of literature is an area of expertise President Minks and Dr. McMillan lack the background and education to perform—nevertheless, President Minks and Dr. McMillan dismiss the texts and the expert judgment of the English faculty without even reading the texts or consulting the faculty as to the merits of the work. Likewise, President Minks summarily dismisses my presentation at the Native American Symposium, without so much as reading the text of my presentation in order to assess its merits, as

being neither "noteworthy nor excellent" simply because it was presented at the Symposium instead of another, presumably more respectable, venue. In addition, President Minks likewise dismisses the *Proceedings* of the Native American Symposium. Astonishingly, President Minks apparently has never so much as viewed a copy of the *Proceedings* since he repeatedly affirms in his letter that he was unable to verify that I was an editor of two editions of the Journal. If he had glanced at the cover of the *Proceedings*, he would have seen my name prominently displayed in bold print on the cover, along with Dr. Spencer, as an editor (Exhibit G). Copies of the *Proceedings* are readily available in Southeastern's Native American reading room. Of course, if President Minks (or any of the administrators who were unable to verify that I was an editor of two editions of the *Proceedings*) truly valued the Native American Symposium, then surely copies of the *Proceedings* of the Symposium would be readily accessible in his personal library. It was distressing to discover in President Minks' letter how little regard the administration has for the dedicated effort and sacrifice of all those at Southeastern who make the Native American Symposium possible as well as the low regard the administration has for the contributions of the participants—many of whom travel great distances at their own expense simply because they consider the Native American Symposium a "noteworthy and excellent" event. In re-reading President Minks' letter, I continue to be startled by the callousness with which he dismisses all things Native American. The lack of cultural appreciation is made more troubling by the fact that the letter was composed by another administrator, Dr. McMillan, who is clearly as dismissive of the value of Native American contributions to Southeastern as President Minks.

In conclusion, please note how different the experience of applying for tenure was for a white man in my department, Dr. Mark Spencer. The university president (who was Dr. Jesse Snowden) and Interim Vice President for Academic Affairs Doug McMillan repeatedly met with Dr. Spencer, went over his tenure portfolio, instructed him how to revise it, invited him to provide supplemental material which included articles that he had submitted or planned to submit for publication, and allowed him to fully explain and discuss his contributions to the university as well as providing him ample opportunity to proffer any "verification" required. Dr. Spencer received not only cooperation but a welcoming hand, guidance, and support to shepherd him through, what in the best of times is, a path wrought with anxiety. I do not resent Dr. Spencer's treatment, but affirm his experience as exemplary of the type of cooperation and collegiality between administration and faculty that characterizes a healthy university. With Dr. Spencer's experience as an exemplar, the question must be asked: why did the administration cooperate with and facilitate the tenure and promotion of a white man while adopting an adversarial and hostile demeanor toward a Native American woman? I deserve an answer to that question; but, more importantly, law and justice demands it.

#### Additional Information

After filing my initial complaint, I discovered that two candidates (Dr. Virginia Parrish and Dr. Margaret Cotter-Lynch), in addition to Dr. Spencer, were also awarded tenure and promotion by the administration even though their applications were not significantly different from mine. First, I want to state that Dr. Parrish and Dr. Cotter-Lynch are both deserving of tenure and promotion, and I have the utmost respect for them. The fact that an objective evaluation of their records demonstrates that my scholarship and service record is equivalent to theirs in no way demeans their accomplishments or value. Because our records are equivalent, it is entirely disingenuous for the administration to allege deficiencies in scholarship and service in denying my application last year. And, it is particularly onerous for Dr. Doug McMillan to presently deny me the opportunity to reapply for tenure this year because of alleged deficiencies in my scholarship when it is an indisputable fact that I presently have more articles accepted for publication in peer-reviewed scholarly journals than the combined record of the last three candidates at the time that he recommended them for tenure and promotion. Dr. McMillan's decision

to not allow my application for tenure and promotion to proceed, ~~is clearly not based on facts, but on his own prejudices.~~ A candid analysis of his memorandum halting my tenure and promotion application demonstrates that the memorandum lacks knowledge, thought, and reasons—vital safeguards against bigotry.

It is most important to note that the awarding of tenure and promotion to two cis women in my department does not in any way diminish the fact that the administration has discriminated against me as a trans woman. As a matter of fact, the disparate treatment of cis women and a trans woman demonstrates a profound disregard for fair and equal treatment by the administration as required by policy and law. For example, if an employer discriminated against women who have children by denying them promotion while promoting women without children; then discrimination has occurred. There are many categories of women and it is not necessary that a party discriminate against all categories of women to be guilty of discriminating against women. It is also pertinent to bear in mind that Southeastern Oklahoma State University, and the other universities in Oklahoma, allowed some minorities to enroll and graduate while specifically discriminating against Ada Sipuel (*Sipuel v. Board of Regents of Oklahoma*) and later placed unequal obstacles in the way of the education of George McLaurin (*McLaurin v. Oklahoma State Regents*). It is simply beyond doubt that different policies, practices, and standards are being applied to me than to other candidates, white men (Dr. Mark Spencer) and white cis women (Drs. Cotter-Lynch and Parrish), for tenure and promotion.

Finally, I would like to call your attention to Dr. Doug McMillan in particular. Dr. Doug McMillan's own sister, Dr. Jane McMillan, disclosed to me that Dr. Doug McMillan considers transgender people a grave offense to his "Baptist sensibilities." Dr. Doug MacMillan's "Baptist sensibilities," as he expressed them to his sister, Dr. Jane McMillan, prevents him from tolerating, much less accepting or welcoming, transgender people to Southeastern. Quite simply, my presence at Southeastern is intolerable to him. The evidence demonstrates, quite unequivocally, that Dr. Doug McMillan has abused the power of his office to deprive me of my rights; rights protected by policy and the law.

I would also like to document the fact that Dr. Scoufos repeatedly uses inappropriate pronouns when speaking to and about me. Although Dr. Scoufos' use of inappropriate pronouns is intermittent, it has occurred too often to be attributable to mere carelessness.

Finally, please do not misconstrue the focus of this additional information to diminish in any way my conviction that racial discrimination is also a factor in the disparate treatment accorded me in reference to tenure and promotion. Indeed, intolerant people often hold multiple and overlapping prejudices.

#### Retaliation Complaint

On October 7<sup>th</sup> Dean Scoufos informed me that Dr. Doug McMillan has decided to refuse to allow me to apply for tenure and promotion. Dr. McMillan's unprecedented action is not supported by policy, procedure, or practice. Dr. McMillan's order is in violation of RUSO policy. RUSO specifically prohibits retaliation for filing a grievance or complaint. (RUSO 5.6; 5.7).

Dr. McMillan claims in his letter delivered to me October 7, 2010 that his unprecedented decision is based on his BELIEF that (1) alleged deficiencies in scholarship and service in my 2009-2010 application have not been remedied, (2) allowing my application to proceed would be a waste of the time of faculty and administration, and (3) that there would be an "inflammation" of relations between the administration and faculty. However, he offers no evidence except his unwarranted opinion to support his belief.

In reference to the claim of alleged deficiencies in scholarship and service, I offer the following evidence. In Dr. McMillan's letter dated April 30, 2010, Dr. McMillan claims that the administration was unable to verify that I was a co-editor of two editions of the Native American Symposium *Proceedings*. My 2010-2011 application provides unequivocal testimony from the other editor, Dr. Mark Spencer, that I did indeed co-edit two editions of the *Proceedings*. In fact, I presently have eight articles accepted by peer-reviewed scholarly journals, three conference papers, edited two editions of the Native American Symposium *Proceedings*, and one chapter in an anthology of postcolonial literature to my credit. It is an empirical and uncontestable fact that my scholarly record significantly exceeds the scholarly record of other candidates who were granted tenure and promotion. In reference to service, of course I have another year of service to the university since my 2009-2010 application, but more importantly I have letters of reference from the Tenure and Promotion Committee that recommended me for tenure and promotion in 2009-2010 specifying in detail my service and value to the university. In addition, I revised my 2010-2011 application to specifically detail my service. My additional service and the revision of my application should address any perceived or alleged deficiencies in regard to service.

In reference to Dr. McMillan's second rationale for prohibiting my 2010-2011 application moving forward, (2) allowing my application would be a waste of the time of faculty and administration. My initial reaction is that this is an example of an *argumentum ad ignorantiam*. One simply may not make a claim about something without looking at the evidence or consulting someone who is familiar with the evidence. Dr. McMillan has not viewed my 2010-2011 application or talked with anyone who has. This brings up another important point. In our department the Chair reviews applications and advises candidates on whether or not, in their reasoned judgment, the application merits submitting to the Tenure and Promotion Committee. Our Chair, Dr. Prus, has already reviewed my 2010-2011 application and granted permission to proceed. Dr. Prus was as surprised as I was to discover Dr. McMillan's halting of the process, especially in view of the fact that Dr. McMillan made the decision without consulting him. As a matter of fact, a significant amount of time has already been invested in my 2010-2011 application by the faculty—as evidenced by the letters of recommendation for tenure and promotion by Drs. Allen, Coleman, Parrish, and Spencer, as well as the review of my portfolio by the Chair of my department, Dr. Prus. Furthermore, reviewing applications for tenure and promotion is one of the responsibilities of the faculty and administration. Policy and procedure does not allow administrators to shun duties and responsibilities simply because they BELIEVE it may be a waste of time.

In reference to the third point in Dr. McMillan's letter, (3) that allowing my application to proceed would result in an "inflammation" of relations between the administration and faculty. This claim contradicts Dr. McMillan's second (2) claim inasmuch as he assumes that the faculty Tenure and Promotion Committee will recommend me for tenure and promotion on my merits and that the administration will reject their recommendation. Dr. McMillan's assertion is troubling on many levels. For example, it demonstrates a conscious disingenuousness in reference to claims (1) and (2). The fact is, relations will be "inflamed" by Dr. McMillan's unprecedented act of arbitrarily and unilaterally suspending the right<sup>d</sup> of tenure-track faculty to address any alleged deficiencies in an application in a subsequent application for tenure and promotion within the time limits provided by RUSO 3.3.4. In addition, Dr. McMillan's newfound assertion of the power of the office of Interim Vice President of Academic Affairs to refuse to allow candidates to address alleged deficiencies effectively removes the purpose of the explanatory letter from the president, required by policy (*Policy and Procedures Manual* 3.7.4). Dr. McMillan's exercise of a new power by the office of Interim Vice President of Academic Affairs not only renders the president's explanatory letter meaningless, but arguably makes it an act of cruelty if it contains easily remedied technical deficiencies; such as letters from the Tenure and

Promotion Committee justifying their decision to recommend a candidate for tenure and promotion, or readily obtainable documentation of accomplishments, while the same candidate is prohibited from offering a subsequent application that addresses the president's concerns. Furthermore, it is unjustifiably punitive to begin forbidding ensuing applications for tenure and promotion because the process has recently become adversarial instead of cooperative.

Finally, since the alleged rationales for deciding to halt my application are demonstrably spurious, it is unassailable that Dr. McMillan's decision is simply an act of retaliation for my exercising rights afforded to faculty and citizens. This semester I have exercised my rights as provided by the policy and law to file a grievance and complaint against Dr. McMillan. RUSSO (5.6; 5.7) specifically prohibits retaliation for exercising my clearly delineated rights under policy and law.

Unfortunately, Dr. McMillan also introduces a claim that is extraneous to the purpose of his letter—which is to prohibit the advancement of my application and provide the rationale for his action. I am referring to his assertion that an offer was made to me in April 2010 to renew my contract for the 2010-2011 year and to allow me to reapply for tenure and promotion in 2011-2012. I am uncertain why he would introduce this extraneous assertion into his letter except as an attempt to misrepresent me as being uncooperative and to present himself in a favorable light. However, there are significant factual errors in respect to his account of the purported offer. The offer he is referring to was proffered by Dean Scoufos under most peculiar circumstances. Dr. Mischo, who was the Chair of our department in 2009-2010, and I were called to Dean Scoufos' office in April 2010. Dean Scoufos said I may be allowed to reapply for tenure only (not promotion) in the 2010-2011 academic year if I withdrew my 2009-2010 application. She demanded an immediate decision. I asked for the offer in writing, and she refused. I asked what would be the requirements for the administration to approve a tenure only application, and she refused to discuss the specific requirements with me. When I asked for more time to consider the offer, she threatened to not renew my contract "for cause" for the 2010-2011 academic year (the date set by policy for non-renewal without cause had already passed). The offer, as described in the letter delivered to me October 7, 2010, purports to be one in which I am not allowed to apply for either tenure or promotion in the 2010-2011 academic year, but may apply for tenure and promotion in 2011-2012. This is patently false. (I welcome you to contact Dr. John Mischo in reference to the offer and the circumstances surrounding the offer to verify which account is accurate.) The offer, as described by Dr. McMillan, could not have been legitimately made because only the Board of Regents may approve the renewal of a tenure-track faculty member after seven years (RUSSO 3.3.4; *Policy and Procedures Manual* 4.6.4). The 2011-2012 academic year would be my eighth year. Dr. McMillan did not have the authority to make such an offer. Dr. McMillan's introduction of this spurious and extraneous claim is simply further incontrovertible evidence of his impassioned and unreasonable hostility toward me because of my membership in groups that have suffered egregious violations of our civil and human rights.

<sup>1</sup> *Cisgender* can be used in place of less accurate terms such as *biological* or *genetic* male or female since transgender people are also "biologically" (and not made from some non-biological material), while the "genetically"-argument falls when one considers the genetic variations present in *intersex* people. *Born* male or female is equally inaccurate, since transgender and transsexual people feel that they are born with a male or female gender identity irrespective of their physiological sex. The use of the term *real* male or female is both inaccurate, because each and every point that is usually attributed to "real" (=cisgender) women either does not apply to all cisgender women either, or to transwomen and/or many intersex women as well, or to transmen as well, who are usually not counted as "real women". (The same of

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course applies to "real men"). When used comparatively these expressions are often seen as disrespectful to and by transgender and transsexual people. (From *WordIQ.com*)  
" A "right" in a democratic society may be defined as a practice which is routine and expected. Indeed civil society depends upon members of society interacting with one another in predictable and equitable ways.