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

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

PLAINTIFF DR. RACHEL TUDOR'S REPLY TO DEFENDANTS' OPPOSITION TO REINSTATEMENT

Defendants' Brief (ECF No. 270) is rife with pained metaphors and caustic accusations, but does not bring to light evidence or licit rationales showing it is infeasible to reinstate Dr. Tudor with tenure at Southeastern Oklahoma State University ("Southeastern").

I. Reinstatement with tenure is an appropriate remedy.

Defendants argue that awarding Tudor reinstatement with tenure is "unwarranted," claiming that this Court should not and cannot award true make-whole relief because doing so would impermissibly intrude on tenure decisions (ECF No. 270 at 15–16). But university employers are not entitled

to make discriminatory or retaliatory tenure decisions. As one commentator observes, withholding tenure so as to extend "[j]udicial deference to universities in Title VII cases threatens to subvert Title VII's policy of 'complete relief'." Susan Pacholski, *Title VII in the University: The Different Academic Freedom Makes*, 59 UNIV. CHI. L. REV. 1317, 1318 (1992). Quite tellingly, none of the authorities Defendants cite support their preposterous position that tenure cannot be part of Tudor's make-whole relief.[1]

II. No evidence that reinstatement is infeasible.

Tudor's invocation of her Title VII rights cannot weigh against reinstatement. Defendants argue that Tudor should not return to Southeastern because, when she was last there, she repeatedly complained of discrimination and retaliation (ECF No. 270 at 15) and she vigorously litigated this case (*id.* at 14). Similarly, Defendants argue that Tudor's

[1] In *Thorton v. Kaplan*, the district court correctly observed that true make-whole relief may necessitate award of reinstatement with tenure where a "university has been found to have impermissibly discriminated in making a tenure decision" (937 F.Supp. 1441, 1449 (D.Colo. 1996)), but ultimately granted front pay instead because it found copious evidence of extreme hostilities rendered the preferred remedy infeasible (961 F.Supp. 1433, 1434–36 (D.Colo. 1996)). Meanwhile, *Ford v. Nicks*, 866 F.2d 865 (6th Cir. 1989), affirms reinstatement to both the husband and wife plaintiff professors, affirms the decision to grant the husband tenure, but sends back the wife to the district court on the finding that she had not, under the university's rules, served the term of years necessary to merit tenure. The remaining cases are inapposite. *Gutzwiller v. Fenik*, 860 F.2d 1317 (6th Cir. 1988) contains a brief advisory opinion, cautioning that an award of reinstatement with tenure is rare but nevertheless an available remedy. Both *Seoane-Vazquez v. Ohio State Univ.*, 577 Fed.Appx. 418 (6th Cir. 2014) and *Villanueva v. Wellesley Coll.*, 930 F.2d 124 (1st Cir. 1991) involve appeals of summary judgment decisions but they never touch on whether tenure is an appropriate remedy. *Roebuck v. Drexel Univ.*, 852 F.2d 715 (3d Cir. 1988) and *Jiminez v. Mary Washington Coll.*, 57 F.3d 329 (4th Cir. 1995) are both appeals of final merits judgments, neither of which speak to the availability of tenure as a remedy.

complaints at and subsequent separation from Collin College in May 2016[2]—is evidence of infeasibility (ECF No. 270 at 15, 19). Not so. Invocation of one's Title VII rights cannot as a matter of law give rise to infeasibility. *See, e.g.*, *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir. 1981).

There is no evidence of hostilities weighing against reinstatement. In the rare situation where courts have deemed reinstatement infeasible, they cite evidence of specific deep riffs, unsalvageable work relationships, and divisions over an employee's return that threaten to tear apart the workplace.[3] Defendants have failed to point to evidence that meets that high bar.

Defendants lean heavily on the anemic declaration of Dr. Randy Prus (ECF No. 270-15). But, at most, Prus' declaration evidences that a single, curmudgeonly Southeastern professor has unsubstantiated concerns about Tudor's return. Though Pus personally believes that "it would not be good for

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[2] Tudor attests that her separation from Collin College was tied up with her complaints—after she complained, Dean Weasenforth recommended that her contract not be renewed for the 2016-17 school term (**Exhibit 1** ¶ 3(c)).

[3] *See, e.g.*, *Fitzgerald v. Sirloin Stockage, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (reinstatement denied where employer engaged in "psychological warfare" against employee and retaliation was guaranteed if she returned); *Starrett v. Wadley*, 876 F.2d 808 (10th Cir. 1989) (reinstatement denied where employee's own psychologist attested that return to workplace would be detrimental to health because of ongoing hostilities). *See also Rabkin v. Or. Health Sci. Univ.*, 350 F.3d 967, 978 (9th Cir. 2003) (evidence showing that mass resignations from specialized liver transplant surgical team, a complete breakdown between current administrators and employee, and fact that employee found equivalent employment elsewhere justify denial of reinstatement); *Robinson v. Se. Pa. Transp. Auth.*, 982 F.2d 892, 899 (3d Cir. 1993) (evidence of irreparable conflict between employee and current supervisors, including employee's own racist statements maligning supervisors, weigh against reinstatement).

this university" if Tudor returned (*id.* ¶ 3) and claims that it would "not be good" for Southeastern's students (*id.* ¶ 5) and that "half" of the English Department would oppose Tudor's return (*id.* ¶ 6), there is no need for (*id.* ¶ 4) or budget to cover Tudor's return (*id.*), he does not point to any particulars supporting these sweeping statements.

Without specifics, it is unclear whether there is any evidence that Tudor's reinstatement is in fact infeasible as opposed to anxiety-ridden for Prus personally. Indeed, the lack of specifics is curious given other evidence. Prus has not formally discussed Tudor's return with tenure to the Department (ECF No. 264 at 483:17–20), despite previously promising to do so (**Exhibit 2** ¶ 3 and accompanying **Exhibit A**), making it unclear how Prus forms his opinion about his colleagues' supposed opposition. Also curious, Prus and President Burrage devised a plan to welcome Tudor back on a temporary basis as recently as November 2017 (*id.*). Additionally, not one single professor in the English Department has corroborated Prus' representations.[4] Moreover, though Defendants attempt to paint Prus as a

[4] *See, e.g.*, Dec. Dr. Dan Althoff, ECF No. 205-17 at 8 ¶ 10 ("[I]f Tudor were to return to Southeastern this would be a non-issue for the faculty. There is no bad blood between Tudor and the Southeastern faculty."); ECF No. 264 at 450:3–6 (Dr. Mark Spencer testifying "I don't have any particular problem" with Tudor returning); *id.* at 429:18–20 (Dr. John Mischo testifying he would welcome Tudor back to Southeastern); **Exhibit 3** ¶ 4(Ms. Carolyn Fridley would "welcome Dr. Tudor back"); ECF No. 268-2 ¶ 4(a)–(e) (Cotter-Lynch supports Tudor's return). *See also* **Exhibit 2** ¶ 4(a)–(e) (Cotter-Lynch attesting that there is a need for more English professors at Southeastern and there are plans in the pipeline to hire new professors soon); *id.* ¶ 4(d) (budget concerns have never been invoked to deny tenure to a English professor at Southeastern).

crusader against Tudor, neither Prus' declaration nor his past testimony or actions evidence he harbors extreme hostilities that render reinstatement infeasible.[5]

II. Spurious criticisms of Tudor do not weigh against reinstatement.

A. Tudor's work product at Southeastern has already been evaluated by the jury.

Defendants claim there is a gap between the jury instructions and the verdict so large that this Court may set aside findings of fact undergirding the verdict (ECF No. 270 at 13). No such gap exists.

Defendants contend that their actions may have been motivated by non-illicit reasons (ECF No. 270 at 2). However, the jury was presented with evidence of Defendants' purported nondiscriminatory rationales and advised of the business judgment rule (ECF No. 257 at 18–19), and nevertheless found for Tudor on her two discrimination claims *and* her retaliation claim. To the extent Defendants attempt to argue they would have made the same decision—they failed to plead this affirmative defense so it is no shield to

[5] Among other things, Prus testified at trial that he stands by the Department's decision to award Tudor tenure in the 2009-10 cycle (ECF No. 264 at 466:12–16) and that he believes that Tudor merited tenure in the 2010-11 cycle (ECF No. 264 at 486:6–14). When Tudor last worked at Southeastern, Prus mentored her to ensure she would get tenure in the 2010-11 cycle (ECF No. 264 at 482:3–8) and offered to write her recommendation letters if she needed new employment (**Exhibit 1** ¶ 5(b) and accompanying **Exhibit I**). Lastly, Prus has never asserted that he would be unwilling to work with Tudor if she returned, or that her return would tear apart the Department let alone Southeastern. *See also* **Exhibit 1** ¶ 5(a)–(d) (Tudor attesting to her certainty that she can work with Prus going forward).

Tudor's discrimination claims. Even if pled, the same decision defense does not apply to retaliation claims because they are proved by the "but for" standard.

As to Defendants' argument that Tudor was separated from Southeastern for non-illicit reasons (ECF No. 270 at 13)—Defendants' own witnesses attest that Tudor was separated from Southeastern *because* she was not awarded tenure, which was a direct result of their actions. *See, e.g.*, ECF No. 265 at 596:8–10 (Scoufos testimony).

B. Tudor's work product after separating from Southeastern does not evidence infeasibility.

Defendants have failed to present any evidence that even one professor or administrator at Southeastern sincerely believes that Tudor's post-separation activities render reinstatement infeasible. This alone is enough to deflate Defendants' arguments—pure argument (no matter how acerbic) from counsel is not evidence. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.9 (1981) ("[a]n articulation not admitted into evidence will not suffice. Thus, the [employer] cannot meet its burden merely through an answer to the complaint or by argument of counsel."). Nevertheless, Defendants criticisms' of Tudor can be set aside on the merits.

Student evaluations at Collin College. Defendants have pointed to a handful of negative student evaluations and complaints from Tudor's

time at Collin College—but these do not prove Tudor is incapable of performing her job at Southeastern.

First, these student criticisms are not evidence Tudor is a bad teacher. Tudor swears that many of the documents Defendants point to are taken out of context.[6] Indeed, if Tudor were such a monster in the classroom, one would expect to see sworn statements from former students, colleagues, and administrators substantiating Defendants' claims. Against these spurious accusations, Tudor swears under penalty of perjury that she never inappropriately singled out, bullied, or otherwise disparaged students in her classes (**Exhibit 1** ¶ 2(b)). Additionally, Mrs. Jonelle Weier, a former Collin College student who successfully transferred to Harvard (**Exhibit 4** ¶¶ 1, 5) and who took two courses with Tudor and whose husband also took a course with Tudor (*id.* ¶ 6), attests Tudor never did the sorts of things Defendants accuse her of (*id.* ¶ ¶ 11–12). Indeed, Weier paints a very different picture of Tudor in the classroom, swearing that, "Dr. Tudor's teaching is a great

[6] Among other things, several of the complaints were filed in quick succession by the same student (**Exhibit 1**¶ 3(b)(i)). Indeed, Collin College ultimately found this same student's complaints were meritless and the student was later investigated for violating Collin College's ethics rules in connection with these complaints (*id.*). As to the issue with Tudor restricting a student's access to Blackboard—Tudor took this step to ensure that the student did not continue to violate her classroom rules and Collin College's ethics rules (*id.* ¶ 3(b)(iv)). As to the other student complaints, they reflect the students' spirited dissatisfaction with Tudor's use of peer review in the classroom—a process that involves students giving feedback to one another and necessarily involves students taking ownership over their writing in the classroom (*id.* ¶ 2(c)). Weier—who took two courses with Tudor—attests that Tudor's handling of the peer review process was always professional (**Exhibit 4** ¶ 13).

exhibit of what professors in higher education should strive to be" (*id.* ¶ 19).

Second, there is copious evidence that Tudor is a strong classroom teacher. Tudor's archives of student evaluations, emails, notes, and assignments (**Exhibit 1** ¶ 2(e) and accompanying **Exhibit A**) and her high ratings on RateMyProfessors.com—where out of 219 reviews, only 14 students (6.4% of respondents) rate Tudor as less than "good," the website's highest rating (**Exhibit 5**)—reveal similar high regard. Tudor's peers also think highly of her teaching. Classroom observations from both Southeastern and Collin College repeatedly highlight Tudor's strong teaching. *See generally* **Exhibit 6**. Many of Tudor's Southeastern and Collin College colleagues have written Tudor glowing letters of recommendation that laud her teaching. *See* **Exhibit 7** (Southeastern letters) and **Exhibit 1** ¶ 3(a). and accompanying **Exhibit C** (Collin College letters). Most tellingly, during her last two years at Southeastern, she was nominated for the Faculty Senate Recognition Award for Teaching (**Exhibit 1** ¶ 2(f) and accompanying **Exhibit B**).

Tudor's scholarship and service. Confusingly, Defendants claim—purely on the word of their counsel Mr. Joseph, who lacks any qualifications as an English professor or academic—that Tudor's scholarship and service since leaving Southeastern is so "poor" as to weigh against reinstatement

(ECF No. 270 at 17–19). Once again, bald argument of counsel is not evidence. *Burdine*, 450 U.S. at 255 n.9.

As to the substance of Mr. Joseph's critiques—they have no basis whatsoever in fact. There is no evidence that, if reinstated at Southeastern, Tudor would be unwilling or unable to contribute to service and scholarship on par with other similarly situated professors. Tudor has committed herself to doing the work asked of her if she is reinstated at Southeastern (see, e.g., ECF No. 268-1 ¶ 7). Dr. Cotter-Lynch attests that Tudor is both competent to return (ECF 268-2 ¶ 4(a)–(e)) and, as to Tudor's scholarship, that it is on par with that of many senior, tenured members of the Department (**Exhibit 2** ¶ 5(d) and accompanying **Exhibit B**). As to Prus' purported beliefs concerning Tudor's work (ECF No. 270 at 18)—Prus has never stated under oath that Tudor is incapable of performing her job at Southeastern. *See also supra* note 5 (collecting sworn testimony of Prus showing support for Tudor).

III. Tudor is entitled to front pay.[7]

Defendants misunderstand the duty to mitigate. There is no rule that if new employment is secured that front pay (or reinstatement) is cut off. *See McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1146 (10th Cir. 2006) (erroneous for front pay to be denied because employee found subsequent

[7] Defendants confuse Dr. Tudor's entitlement to back pay and front pay in their Brief (see ECF No. 270 at 20–21). In this Reply, Tudor limits her response to the issue of front pay.

employment). In order for front pay to be denied there must be a finding that the employee failed to take reasonable steps to mitigate damages—it is Defendants' burden to demonstrate this failure. *Spulak v. K Mart Corp.*, 894 F.2d 1150, 1158 (10th Cir. 1990). Moreover, the employee need not be successful in her job search efforts in order to get front pay. *Id.* ("A claimant need only make reasonable good faith effort, and is not held to the highest standards of diligence.").

Defendants have pointed to one unsuccessful interview at Seminole State University (ECF No. ECF No. 270 at 11–13) and one unsuccessful application to Rogers State University (*id.* at 17), arguing these evidence of Tudor's failure to mitigate. *But see* **Exhibit 1** ¶ 4(b) (providing context to Seminole State interview); *id.* ¶ 4(c) (speaking to Rogers State application). But these do not evidence a failure to mitigate—they simply show that Tudor's job search efforts were unsuccessful.

Dated: December 29, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 29, 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
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