

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO**

Civil Action No. 17-CV-02362-RBJ

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff, and

EGAN J. WOODWARD,

Intervenor,

v.

A & E TIRE, INC.,

Defendant.

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**DEFENDANT’S REPLY BRIEF IN SUPPORT OF ITS F.R.C.P. 12(b)(6) MOTIONS TO  
DISMISS PLAINTIFF’S AND INTERVENOR’S COMPLAINTS**

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In their opposition to Defendants F.R.C.P. 12(b)(6) motions, Plaintiffs quote from *Lauer v. Thelin*, 433 Fed. Appx. 686 (10th Cir. 2011): “a motion to dismiss for failure to state a claim is rarely granted.” (Response, Doc. 27, pg 2). While accurate, this quote is incomplete, and ignores the gist of Defendant’s argument which the Court’s full comment addresses:

Although a motion to dismiss for failure to state a claim is "rarely granted," (citation and quotation omitted), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," *Ashcroft v. Iqbal* (citations and quotations omitted). **A complaint that "tenders naked assertions devoid of further factual enhancement" fails to meet this standard.** *Id.* (quotation omitted).

*Lauer* at 686-687 (emphasis added). Although Rule 12(b)(6) does not require a plaintiff to allege every element of a prima facie case with particularity, nor oblige a plaintiff to allege pretext in order to survive a motion to dismiss:

[A] plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, (citations and quotations omitted). Factual allegations must be enough to raise a right to relief above the speculative level, (citation omitted) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact). . .

*Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs fail to satisfy *Twombly* standards

**I. PLAINTIFFS' DO NOT ALLEGE FACTS SUFFICIENT TO ESTABLISH WOODWARD IS A MEMBER OF A CLASS PROTECTED UNDER TITLE VII**

Title VII provides remedies only to members of various protected classes. To state a viable Title VII, claim a plaintiff must establish membership in a protected class. The complaints fail to allege facts demonstrating that Woodward is a member of a protected class. Thus, his Title VII "failure to hire" case should be dismissed under Rule 12 (b)(6).

The complaints allege that Defendant failed to hire Woodward "because of his sex, male, and/or transgender status." Doc 1, ¶ 10, 57 & 58 and Doc 11 ¶ 5, 50 & 52. Under the dispositive law in this circuit, "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." *Etsitty v. Utah Transit Auth.* 502 F.3d 1215, 1222 (10th Cir. 2007). Transsexual status, in and of itself, does not give an individual membership in protected class. In fact, it has been expressly noted that "an individual's identity as a transsexual should be irrelevant to the availability of Title VII protection." *Etsitty*, at 1222 citing to *Smith v. Salem*, 378 F.3d 566, 574 (6th Cir. 2004). "Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male, or because they are female." *Etsitty* at 1222.

Plaintiffs allege no facts suggesting that Woodward was discriminated because he is male or because he was born female. They merely allege that “Defendant failed to hire [Woodward] because of his sex, male, and/or his transgender status.” Doc. 1 ¶11 and Doc. 11 ¶5)

Rather than including specific facts supporting the alleged discrimination against Woodward based on sex (either male or female) as required by *Etsitty*, Plaintiffs’ complaints contain “naked assertions” that Defendant’s decision not to hire Mr. Woodward was because he “did not conform to the Defendant’s sex-or gender-based preferences, expectations, or stereotypes.” Doc 1 ¶ 58 and Doc 11 ¶ 52. This formulaic recitation was clearly included to avoid *Etsitty*’s holding and bring Woodward within a protected class based upon the *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) sex stereotyping/gender nonconformity theory. Notably, however, Plaintiffs have offered no facts to support this conclusory allegation.<sup>1</sup>

While the gender-non-conformity/sexual stereotyping theory may bring a transgendered individual within a class protected under the Act, the notion that one’s status as transgendered, in and of itself, can suffice to support such a claim as Plaintiffs suggest (Doc 27, pg. 7-8) cannot be countenanced. Were it otherwise, the *Etsitty* holding could be readily circumvented merely by alleging that as transgendered, a plaintiff is gender-nonconforming and thus entitled to protected status under *Price Waterhouse*. That notion would eviscerate *Etsitty* and wholly undermine *Twombly* pleading standards as well.

Plaintiffs suggest their position is supported by *Tudor v. SE. Okla. State Univ.*, CIV-15-324-C, 2015 WL 4606079 (W.D. Okla., 07/10/15). (Doc 27, pg. 8). Closer review reveals that,

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<sup>1</sup> As discussed below, Defendant’s innocent inquiry into whether Mr. Woodward inadvertently checked the box indicating he was female on a form he submitted with his application is wholly insufficient to support the notion that Defendant’s hiring decision was predicated on sexual stereotypes or gender non-conformity.

while the *Tudor* Court denied a motion to dismiss a Title VII claim based on Defendant's position, that Plaintiff could not establish membership in a protected class, the Court **did not** find that she stated a cognizable sex-stereotyping/gender non-conformity claim based solely on an allegation she was transgendered. Rather, the Court noted it was "the factual allegations raised by Dr. Tudor" that lead the Court to conclude membership in a protected class was adequately alleged. *Id* at 6. Unlike the complaints here, Dr. Tudor's 35-page complaint (copy attached) was replete with specific facts supporting her assertion that she was subjected to discrimination because she didn't conform to the Defendant's sex- or gender-based preferences, expectations, or stereotypes.<sup>2</sup>

Plaintiffs citation to *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) also fails to note that the *Smith* Plaintiff alleged facts, other than that she was transsexual, to support that claim.<sup>3</sup>

The foregoing cases and those cited in Defendant's Motions (*Rice v. Deloitte Consulting LLP*, 2013 U.S. Dist. LEXIS 95439 (Dist. Colo. 2013) and *Deneffe v. Skywest, Inc.* 2015 U.S. Dist. LEXIS 62019 (Dist. Colo. 2015), involve complaints that contain specific factual allegations supporting the plaintiffs' claimed protected class status due to sex-stereotyping/gender

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<sup>2</sup> Among the allegations in Dr. Tudor's complaint are the following: she was told the University's Vice President of Academic Affairs contacted HR to ask whether she could be fired because her transgender lifestyle offended his religious beliefs (§40); after she began presenting as female, the University's Counseling Center director told her she should take safety precautions because some people, including the Vice President, were openly hostile towards transgendered people (§ 42); she was instructed by HR about what bathrooms she could use (§ 45-47) and counseled not to wear short skirts (§ 64); and the Dean intentionally used inappropriate male pronouns in reference to Dr. Tudor (§ 80), etc.

<sup>3</sup> *Smith*, born male, was a City of Salem firefighter who worked for the fire department for seven years without negative incidents. After being diagnosed with gender identity disorder, *Smith* began expressing a more feminine appearance and manner. "The complaint states that his co-workers began commenting on his appearance and mannerisms as not being masculine enough and that his supervisor at the Fire Department and other municipal agents knew about this allegedly unmasculine conduct and appearance." *Smith* at 572. Shortly thereafter, the City attempted to force his resignation by compelling him to undergo psychological evaluations of his gender non-conforming behavior. *Id.*

nonconformity as recognized by *Price Waterhouse*. Here, there are no facts alleged to support Woodward’s assertion in that regard. Defendant’s lone inquiry about Woodward’s answer in paperwork related to his application may give rise to speculation but it does nothing to nudge his claim, premised on *Price Waterhouse*, from “conceivable to plausible” *Twombly*, 550 U.S. at 547. Nor does it support a reasonable inference that the defendant’s decision not to hire him was “because Woodward did not conform to the Defendant’s sex- or gender-based preferences, expectations, or stereotypes.” Doc 1 ¶58; Doc 11 ¶52. Plaintiffs offer nothing more than surmise to counter the “obvious alternative explanation’ that the decisionmakers simply judged [the person it did hire] to be more qualified and better suited for the position” *McCleary-Evans v. Md. DOT*, 780 F.3d 582, 588 (4<sup>th</sup> Cir. 2015)

Finally, the EEOC requests this Court to permit to use this case as a vehicle to “gather and proffer evidence” to support its position that “sex,” as used in Title VII is not limited to male and female as *Etsitty* held, suggesting that position is outdated (Doc 27, pg. 10). This argument ignores the fact that just months ago, the United States Attorney issued a memorandum indicating:

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. . . .[and] as of [October 4, 2017] the Department of Justice will take that position in all pending and future matters. . . .

(10/04/2017 Memorandum from The Attorney General re: “Revised Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964”).

Given the holding in *Etsitty* and the absence of any facts to affording Woodward protected class status based on a gender nonconformity/sexual stereotyping theory, Defendant requests dismissal of Plaintiffs complaints.

DATED this 12<sup>th</sup> day of **February 2018**.

Respectfully Submitted,

**MARILEE E. LANGHOFF, P.C.**

/s/ Marilee E. Langhoff

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 12, 2018, a true and correct copy of the foregoing **DEFENDANT'S REPLY BRIEF IN SUPPORT OF ITS F.R.C.P. 12(b)(6) MOTIONS TO DISMISS PLAINTIFF'S AND INTERVENOR'S COMPLAINTS** was electronically filed and served via CM/ECF on the following:

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

UNITED STATES OF AMERICA,	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
1. SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
2. THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

**COMPLAINT IN INTERVENTION OF  
PLAINTIFF/INTERVENOR DR. RACHEL TUDOR**

This is an action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (“Title VII”). Dr. Tudor intervenes in this action as an aggrieved person pursuant to 42 U.S.C. § 2000e-5(f). As set forth below, Plaintiff/Intervenor Dr. Rachel Tudor (“Plaintiff/Intervenor”) alleges that Defendants Southeastern Oklahoma State University (“Southeastern”) and the Regional University System of Oklahoma (“RUSO”) subjected Dr. Tudor to sex discrimination, including an unlawful hostile work environment based on sex, and retaliation in violation of Title VII.

**PARTIES**

1. Plaintiff/Intervenor Dr. Rachel Tudor is an English professor who worked

for Southeastern as a tenure track Assistant Professor from 2004 to 2011.

2. Defendant Southeastern is a member of the Oklahoma state system of higher education and is part of the Regional University System of Oklahoma (“RUSO”). Defendant RUSO’s Board of Regents is the governing board for several Oklahoma state universities, including Southeastern. RUSO’s Policy Manual explains how the operations of RUSO and Southeastern interrelate. RUSO has the power to fix compensation and duties of personnel at its regional universities, including Southeastern. RUSO has the power and duty to adopt rules and regulations to govern its regional universities, including Southeastern. Southeastern’s President must report to RUSO on all matters related to employment, discipline, and termination of faculty. For these reasons, Southeastern and RUSO are a single employer for all relevant purposes.

### **JURISDICTION AND VENUE**

3. This Court has jurisdiction over this action under 42 U.S.C. §2000e-5(f) and 28 U.S.C. §1345.

4. Venue is proper in this judicial district under 42 U.S.C. §2000e-5(f)(3) and 28 U.S.C. § 1391(b). Both Southeastern and RUSO are agencies of the State of Oklahoma. At all relevant times, RUSO’s principal place of business has been in Oklahoma City, Oklahoma, and Southeastern’s principal place of business has been in Durant, Oklahoma.

5. Southeastern and RUSO are “persons” within the meaning of 42 U.S.C. §2000e(a) and “employers” within the meaning of 42 U.S.C. §2000e(b).

6. On or about September 9, 2010, Dr. Tudor filed a timely charge of

discrimination alleging, among other things, that Southeastern subjected her to sex discrimination when it denied her application for promotion and tenure during the 2009-10 academic year. Dr. Tudor filed this charge with the U.S. Department of Education, Office for Civil Rights (“DOE”). After notifying Southeastern of the charge, DOE referred the charge to the U.S. Equal Employment Opportunity Commission (“EEOC”) for investigation of Dr. Tudor’s Title VII claim.

7. On or about July 12, 2011, Dr. Tudor supplemented her charge of discrimination filed with the EEOC. She alleged, among other things, that Southeastern subjected her to sex discrimination and retaliated against her because she complained about Southeastern’s discrimination. Specifically, Dr. Tudor alleged that Southeastern unlawfully refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year. Dr. Tudor’s supplemented charge was simultaneously filed with the EEOC and with the Oklahoma Human Rights Commission.

8. Pursuant to Section 706 of Title VII, the EEOC notified the Defendants of Dr. Tudor’s supplemented charge of discrimination. After conducting an investigation of Dr. Tudor’s charges, the EEOC found reasonable cause to believe that Southeastern discriminated against Dr. Tudor because of her sex and retaliated against her because she engaged in protected activity. The EEOC did not render a determination on the issue of hostile work environment based on sex raised by the facts alleged in Dr. Tudor’s original charge and supplemental charge. The EEOC notified the Defendants of its reasonable cause findings, unsuccessfully attempted to conciliate the charges, and subsequently referred the charges to the U.S. Department of Justice.

9. All conditions precedent to the filing of suit have been performed or have occurred.

### FACTS

10. Dr. Tudor is a female citizen of the Chickasaw Nation.

11. Dr. Tudor is also a female citizen of the United States.

12. Dr. Tudor has a feminine gender expression.

13. Dr. Tudor has a female gender identity.

14. Dr. Tudor is a transgender woman.

### *Sex, Gender, Gender Expression and Gender Identity*

15. *Sex* is an ambiguous term of art that includes gender, gender expression and gender identity within its meaning.

16. *Sex stereotyping* refers to the application by an employer of stereotypes related to sex assigned at birth to restrict or disparage an employee's gender expression or gender identity.

17. *Gender* refers to cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes.

18. *Gender expression* refers to a person's gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth. *Transgender expression* is a form of *gender expression*.

19. *Gender identity* refers to characteristics related to a person's internal sense of gender, being male, female, or other. *Transgender identity* is a form of gender

identity.

20. *Gender identity* is intractably rooted in the psyche by the age of two, and cannot be changed.

21. Discrimination against transgender persons for being transgender is based on their gender expression and gender identity, and the discrimination described herein against Dr. Tudor was based on her gender expression and gender identity.

22. Transgender individuals often seek out legal, social, and medical means of aligning external manifestations of their gender with their gender identity. This process is colloquially known as *gender transition* or *transition*.

23. A core component of gender transition entails publicly expressing one's gender as a member of the gender that comports with one's gender identity.

24. Transgender individuals are persons who have a gender expression or gender identity that does not match the sex they were assigned at birth.

25. Native Americans traditionally believe that transgender persons are blessed and have a spiritual responsibility to live their blessing.

26. Dr. Tudor subscribes to the traditional Native American belief that she, as a transgender woman, has a responsibility to discover the nature of her blessing and walk the sacred path set before her.

27. Scientific studies have shown that transgender persons have brain structures that are typical of nontransgender persons with the same gender identity. For example, women with transgender identity (i.e. those assigned male sex at birth but who have female gender identity) have brain structures that are similar to those of

nontransgender women. It is appropriate to refer to a transgender woman who has transitioned with female titles, honorifics (e.g., Miss, Ms. or Mrs.), and pronouns (e.g., her, hers, and she).

28. It is appropriate for a nontransgender woman to use a women's multi-stall restroom.

29. It is appropriate for a transgender woman who has transitioned to use a women's restroom.

30. It is appropriate for a nontransgender woman to wear traditionally female clothing, such as a skirt.

31. It is appropriate for a transgender woman who has transitioned to wear traditionally female clothing, such as a skirt.

32. Another core component of gender transition is utilizing medical therapies to align the patient's body with the patient's gender identity.

33. Myriad peer-review studies demonstrate that medical therapies, including hormone treatments, are one form of medically necessary care for transgender persons.

34. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health ("WPATH") have all publicly endorsed the efficacy of medical therapies, including hormone treatments, for transgender persons.

35. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of

Obstetricians and Gynecologists, and WPATH all recognize that medical therapies, including hormone treatments, are a form of medically necessary care for transgender persons.

36. The American Medical Association, the American Psychological Association, the American Academy of Family Physicians, the American College of Obstetricians and Gynecologists, and WPATH have all publicly called for both private and public insurers to eliminate transgender-specific exclusions in health insurance plans.

***Dr. Tudor's Employment at Southeastern and Transition to Female***

37. In 2004, Dr. Tudor began working at Southeastern as a tenure-track Assistant Professor in the Department of English, Humanities, and Languages (the "English Department"). At that time, she presented as male and had a traditionally male name.

38. Dr. Tudor was the first transgender professor at Southeastern.

39. In the summer of 2007, Dr. Tudor notified Southeastern that she planned to transition from male to female and begin to present as female at work during the 2007-08 academic year.

40. After she informed Southeastern about her transition, Dr. Tudor received a phone call from an employee of Southeastern's human resources office to discuss various issues related to her gender transition. During that call, the human resources employee warned Dr. Tudor that Southeastern's Vice President for Academic Affairs, Dr. Douglas

McMillan, had inquired whether Dr. Tudor could be fired because her “transgender lifestyle” offended his religious beliefs. The human resources employee told Dr. Tudor that Vice President McMillan had been told that Southeastern could not fire her because she is transgender.

41. During the 2007-08 academic year, Dr. Tudor began to present as female at work by, among other things, wearing women’s clothing, styling her hair in a feminine manner, and going by the traditionally female name Rachel.

42. After Dr. Tudor began presenting as female, Jane McMillan, the director of Southeastern’s Counseling Center, told her that she should take safety precautions because some people were openly hostile towards transgender people. She also told Dr. Tudor that Vice President McMillan (who is her brother) considered such people to be a “grave offense to his [religious] sensibilities.”

43. After Dr. Tudor informed Southeastern about her gender identity and intent to transition, she was subjected to disadvantageous terms by unwarranted restrictions on her use of restrooms.

44. Use of male restrooms would subject Dr. Tudor to an unwarranted risk of harassment by males in those restrooms who would likely be severely surprised by her presence there, and who might thereby learn of her transgender identity. It would also subject her to humiliation as a visible woman who was forced to go into a male gender-segregated space.

45. She was instructed by an employee of Southeastern’s human resources office that, once she started presenting as female full-time at work, she should not use the

multi-stall women's restroom located on the same floor as her office or any other multi-stall women's restroom on campus.

46. The employee directed Dr. Tudor to only use a specific single-stall, all-genders restroom for persons with disabilities located on a different floor than Dr. Tudor's office. This restroom was the only single-stall, all-genders restroom for persons with disabilities located within a three-story building that served hundreds of people a day.

47. Dr. Tudor was told that she should use the only single-stall restroom for persons with disabilities in the building her office was located in because Southeastern was concerned that students or other faculty would complain if she used any of the multi-stall female-designated restrooms on campus.

48. Southeastern's human resources office has never counseled a nontransgender professor on which gender-segregated restroom they may use nor has the office ever directed a nontransgender professor to not use a gender-segregated multi-stall restroom that is immediately adjacent to the professor's office.

49. Southeastern's human resources office has never counseled a nontransgender professor to use a gender-segregated restroom that did not match the professor's gender identity.

50. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because the employee was uncomfortable with a transgender woman, based on her gender expression and gender identity, using a multi-stall women's restroom frequented by nontransgender women.

51. Southeastern's human resources office counseled Dr. Tudor to use the single-stall restroom described above because a Southeastern administrator told the human resources office that they were uncomfortable with a transgender woman using a multi-stall women's restroom frequented by nontransgender women.

52. Once Dr. Tudor transitioned to female, she followed the direction of Southeastern's human resource office and only used the single-stall, all genders restroom for persons with disabilities described above.

53. For nearly four years, whenever Dr. Tudor was on Southeastern's campus she was only permitted to use the single-stall, all genders restroom for persons with disabilities described above.

54. As a direct result of the restroom use restriction imposed by Southeastern's human resources office, Dr. Tudor was unable to use the restroom on a regular basis whenever she was on Southeastern's campus.

55. Dr. Tudor's busy class schedule made it nearly impossible for her to regularly utilize the only restroom she was permitted to use on campus. For example, Dr. Tudor's teaching schedule often left only ten to fifteen minutes between classes. On many occasions, Dr. Tudor found that she either did not have enough time to travel from the building where she was teaching classes back to the building where the single-stall restroom was located or that the only restroom she was permitted to use was in use for the duration of her break between classes.

56. On occasions where Dr. Tudor was unable to use the single-stall restroom described above, she felt great physical discomfort and humiliation.

57. On occasions where Dr. Tudor was able to use the single-stall restroom described above, she felt profound guilt and humiliation knowing that her use of the restroom for persons with disabilities often inconvenienced persons with physical disabilities including other faculty members and students.

58. On occasions where Dr. Tudor used the single-stall restroom described above and found a line outside the restroom she apologized to those waiting in line for the inconvenience. Having to routinely apologize to persons with physical disabilities whom were inconvenienced by Dr. Tudor's use of the restroom for persons with disabilities made her feel profound guilt and humiliation.

59. Starting in Summer 2007, Dr. Tudor used public women's restrooms whenever she was not on Southeastern's campus.

60. Dr. Tudor never had a negative response from women who used the women's restrooms she frequented off Southeastern's campus.

61. Transgender women routinely use multi-stall women's restrooms in the State of Oklahoma, including restrooms located in state and federal government facilities.

62. The presence of transgender women in gender-segregated multi-stall restrooms poses no threat to nontransgender women.

63. If a nontransgender woman is offended by the prospect of sharing gender-segregated facilities with transgender women, the nontransgender woman is free to seek out and use a single-stall restroom.

64. After Dr. Tudor informed Southeastern about her transition she was also

instructed by an employee of Southeastern's human resources office to not wear certain traditionally female articles of clothing going forward. Among other things, Dr. Tudor was counseled against wearing short skirts.

65. No nontransgender female professor was ever counseled by Southeastern's human resources office against wearing skirts of any length.

66. Both junior and senior female professors with traditional gender identity routinely wore traditionally female articles of clothing, including skirts of varying lengths, during the years Dr. Tudor was employed by Southeastern.

67. From the 2007-08 through the 2010-11 academic years the health insurance plan that Southeastern provided to professors, including Dr. Tudor, had an explicit exclusion that prohibited health care benefits to transgender persons.

68. As a result of the exclusion described above, Dr. Tudor was unable to get her insurance to cover various medically necessary treatments she needed as part of her medical transition to female. This included, but is not limited to, coverage for exogenous hormones and routine blood level tests needed to monitor her hormone levels.

69. Upon information and belief, the health insurance plan Southeastern provided to faculty members otherwise covered medically necessary exogenous hormone treatments and routine blood level tests needed to monitor blood levels as a result of such treatment.

70. As a result of the exclusion described above, Dr. Tudor was forced to pay for her hormone therapy and blood level tests out of pocket.

71. Upon information and belief, if Dr. Tudor were a nontransgender woman,

she could have received full coverage for her hormone treatment and blood level tests under Southeastern's health insurance plan.

***Southeastern's Process for Promotion and Tenure***

72. At Southeastern, Assistant Professors must obtain tenure before the end of their seventh year as an Assistant Professor or else their employment is terminated.

73. The process governing applications for promotion and tenure is set forth in Southeastern's "Procedure for Granting Promotion and Tenure." First, the applicant must submit a written application to her Department Chair, along with a portfolio that contains documentation pertinent to an assessment of her qualifications. Second, the applicant is reviewed by a Promotion and Tenure Review Committee ("P&T Review Committee") comprised of tenured faculty in the applicant's Department. Next, the application is reviewed sequentially by the Department Chair, the Dean of the applicant's school, and the Vice President for Academic Affairs, each of whom must consider whether to recommend the applicant to receive promotion and tenure and then forward his or her recommendation to the next reviewing official. Following the Vice President for Academic Affairs' review, the President of SOSU decides whether to approve or deny the application for promotion and tenure and, if the President approves the application, he submits his recommendation to the RUSO Board of Regents for their approval.

74. It is Southeastern's policy to notify applicants of the intermediate decisions in the process as they occur. On a candidate's request, administrators may provide

explanations of negative recommendations so that candidates for promotion and tenure can address deficiencies before the next level of review.

75. According to Southeastern's Academic Policies and Procedures, to attain a promotion to the position of Associate Professor an applicant must have: (1) an earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher learning; (2) five years of successful higher education teaching experience in full-time appointments; (3) five years of experience at the Assistant Professor rank; (4) demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession (also referred to as "service"), and, in appropriate instances, successful performance of non-teaching or administrative duties; and (5) noteworthy achievement in classroom teaching, research/scholarship, and service, or, in appropriate instances, performance of non-teaching or administrative duties.

76. According to Southeastern's Academic Policies and Procedures, to attain tenure a professor must have: (1) five years of service at Southeastern in a tenure-track appointment as an Assistant Professor, Associate Professor, or Professor; (2) demonstrated effective classroom teaching, research/scholarship, service, and, in appropriate instances, successful performance of non-teaching or administrative duties; (3) demonstrated ability to work cooperatively to strengthen the academic quality of the institution; and (4) noteworthy achievement in classroom teaching and on at least one other criterion: research/scholarship, service, or, in appropriate instances, performance of non-teaching or administrative duties.

77. Southeastern's Academic Policies and Procedures state that, "[f]aculty status and related matters are primarily faculty responsibility; this area includes . . . promotions [and] the granting of tenure." The Academic Policies and Procedures further state that, in considering applications for promotion and tenure, the "governing board and president should...concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail."

***Dr. Tudor Prepares to Apply for Promotion and Tenure***

78. In the summer of 2009, as Dr. Tudor was about to enter her sixth year as an Assistant Professor, she made preparations to apply for tenure and promotion to the position of Associate Professor.

79. At the end of August 2009, Dr. Tudor met with the Dean of the School of Arts and Sciences, Dr. Lucretia Scoufos. It was Dean Scoufos' customary practice to meet with professors applying for promotion and tenure to discuss the format and content of the portfolio that they had to prepare in support of their applications.

80. Dean Scoufos learned that Dr. Tudor was a transgender woman. Despite being informed of this fact, Dean Scoufos intentionally misgendered Dr. Tudor (i.e., used inappropriate male pronouns such as he and his) in subsequent meetings.

81. Misgendering is the practice of using incorrect gender referents (e.g., pronouns, titles, and name) in describing or conversing with a transgender person. When intentional, the purpose of misgendering is to communicate one's belief that the subject is not truly a member of their post-transition gender and/or to express disregard for the

subject's gender identity.

82. During this meeting, Dr. Tudor told Dean Scoufos that she believed another faculty member in her Department had been discriminating against her since she had begun to present as female at work. Dr. Tudor said that she would prefer if this faculty member did not serve on the Faculty Committee that would review her portfolio. Dean Scoufos did not report Dr. Tudor's concern to Southeastern's Affirmative Action Officer—the person at Southeastern responsible for investigating discrimination complaints.

***Dr. Tudor's Application for Promotion and Tenure***

83. In October 2009, Dr. Tudor submitted her application for tenure and promotion to the position of Associate Professor to the Chair of the English Department, Dr. John Mischo.

84. Both the P&T Review Committee assigned to review Dr. Tudor's application and portfolio, as well as Dr. Mischo, recommended that she receive promotion and tenure.

85. On or about November 29, 2009, Dr. Mischo notified Dean Scoufos that he and the P&T Review Committee recommended that Dr. Tudor receive a promotion to the tenured position of Associate Professor.

86. In January 2010, Dean Scoufos sent Dr. Tudor a letter informing her that, despite the recommendations of Dr. Tudor's Department Chair and the P&T Review Committee, she had decided to oppose Dr. Tudor's application for promotion and tenure.

Dean Scoufos' letter contained no explanation for her decision.

87. Dean Scoufos passed her recommendation that tenure and promotion be denied and Dr. Tudor's portfolio along to Vice President McMillan.

88. In February 2010, Vice President McMillan sent Dr. Tudor a letter informing her that he also had decided to oppose her application for promotion and tenure. Like Dean Scoufos' letter, Vice President McMillan's letter contained no explanation for his decision.

89. Shortly afterwards, Vice President McMillan forwarded Dr. Tudor's portfolio to the President of Southeastern, Dr. Larry Minks. He also forwarded to President Minks his own negative recommendations for Dr. Tudor's promotion and tenure, as well as the recommendations of the P&T Review Committee, the Chair of the English Department, and Dean Scoufos.

90. Dr. Tudor asked Vice President McMillan and Dean Scoufos to explain why they had decided to oppose her application. That information would have enabled Dr. Tudor to supplement her portfolio before the President reviewed it.

91. Both Vice President McMillan and Dean Scoufos refused to explain to Dr. Tudor why they decided to oppose her application.

92. In refusing to discuss with Dr. Tudor why he opposed her application, Vice President McMillan treated Dr. Tudor differently than similarly-situated nontransgender professors. Indeed, in the previous academic term Vice President McMillan treated differently a similarly situated nontransgender male English professor, to wit: Vice President McMillan met with the other professor to discuss how that professor could

strengthen his portfolio. The other professor followed Vice President McMillan's advice and supplemented his portfolio before it was submitted to the President of Southeastern for a final decision on his application. Based on his supplemented portfolio—and the guidance that he received from Vice President McMillan—the nontransgender professor.

93. In February 2010, Dr. Tudor filed a grievance with President Minks and requested a hearing before Southeastern's Faculty Appellate Committee ("FAC"). In her grievance, she alleged that Dean Scoufos and Vice President McMillan had denied her the due process provided by Southeastern's policies when they refused to explain why they had opposed her application for promotion and tenure.

94. The following month, the FAC ruled in Dr. Tudor's favor and recommended to President Minks' designee that Vice President McMillan and Dean Scoufos explain to Dr. Tudor why they had opposed her application.

95. Pursuant to Southeastern policy, President Minks designated the Assistant Vice President for Academic Affairs ("Assistant Vice President") to communicate to Dr. Tudor both the FAC's recommendation and his decision whether to comply with that recommendation. Southeastern policy also required that Dr. Tudor receive this information within ten workdays. Dr. Tudor would have the right to appeal the Assistant Vice President's decision to President Minks.

96. The Assistant Vice President decided not to follow the FAC's recommendation. Vice President McMillan directed the Assistant Vice President to wait until after President Minks made his decision on Dr. Tudor's promotion and tenure application before informing her that he had decided not to follow the FAC's

recommendation. Thus, Dr. Tudor received no notification within the ten workday deadline.

97. By violating Southeastern policy and withholding timely notification of the Assistant Vice President's decision, Southeastern denied Dr. Tudor the ability to appeal Vice President McMillan's and Dean Scoufos' refusals to provide explanation of their negative recommendations prior to President Minks' ultimate decision on her tenure and promotion application. Thus, she was deprived of the opportunity to supplement her portfolio to address their reasoning prior to President Minks' decision.

98. In April 2010, President Minks sent Dr. Tudor a letter informing her that he had decided to deny her application for promotion and tenure. In that letter, President Minks did not explain why Dr. Tudor's application was denied, but he did let her know that Vice President McMillan would inform her of the reasons for the denial in a separate communication.

99. President Minks' decision was the first time Southeastern had denied an English professor's application for tenure and promotion after he or she had obtained a favorable tenure recommendation from a P&T Review Committee and the Department Chair.

100. In June 2010, Dr. Tudor received a letter from Vice President McMillan. That letter—which purported to be dated over a month earlier, on April 30, 2010—stated that President Minks had denied Dr. Tudor's application because her record in the areas of “research/scholarship” and “university service” were deficient.

101. Dr. Tudor's qualifications for promotion and tenure were comparable, if

not superior to, the qualifications of at least three other similarly-situated nontransgender English professors who were considered for, and received, tenure during Dr. Tudor's time at Southeastern. For example, the number of publications Dr. Tudor had in her portfolio was greater than the number of publications that another successful applicant had in hers. One applicant received promotion and tenure even though she, unlike Dr. Tudor, had no peer-reviewed publications. Likewise, in the area of university service, Dr. Tudor's performance was also comparable to her nontransgender departmental peers who successfully applied for promotion and tenure.

102. Vice President McMillan's criticisms of Dr. Tudor's record in the area of scholarship also rested on his assertion that the Southeastern administration had been unable to verify that Dr. Tudor had served as an editor for two symposia listed in her portfolio. However, no one in the Southeastern administration ever requested that Dr. Tudor provide additional documentation to verify that she had served as an editor of the symposia. Moreover, copies of the published proceedings from the symposia were available in a reading room on Southeastern's campus and Dr. Tudor's role as editor was prominently displayed on the covers of both publications.

#### ***Dr. Tudor's Re-application and Grievances***

103. Southeastern permits faculty members who have been denied promotion or tenure to reapply as long as they remain within their seven-year term of initial employment. In at least one other RUSO institution, professors have re-applied for promotion and tenure the year after the President denied their applications.

104. In August 2010, Dr. Tudor informed her Department Chair that she intended to re-apply for promotion and tenure during the 2010-11 academic year.

105. That same month, Dr. Tudor also filed a grievance in which she requested a hearing with the FAC so that she could dispute Southeastern's decision to deny her 2009-10 application for promotion and tenure. In September 2010, the FAC informed Dr. Tudor that it had no authority to overrule the President's decision to deny her promotion and tenure.

106. A few weeks later, in October 2010, Vice President McMillan sent Dr. Tudor a letter stating that Southeastern would not permit her to re-apply for promotion and tenure during the 2010-11 academic year. In the letter, which had been approved by President Minks, Vice President McMillan recognized that Southeastern policy did not prohibit Dr. Tudor from re-applying. But he nevertheless announced that he had decided that it was not in the "best interests of the university" to permit her to re-apply.

107. In his letter, Vice President McMillan offered several explanations for denying Dr. Tudor's request to re-apply for promotion and tenure. Among his reasons was his belief that deficiencies in Dr. Tudor's application from the prior academic year could not be corrected that quickly. Vice President McMillan also expressed concern that if the administration once again overruled positive recommendations from the P&T Review Committee and the Department Chair, its action would potentially "inflame the relationship between faculty and administration."

108. In October 2010, Dr. Tudor filed a grievance with the FAC and President Minks challenging Southeastern's decision not to let her re-apply for promotion and

tenure during the 2010-11 academic year.

109. In response to Dr. Tudor's grievance, Vice President McMillan sent a letter to the FAC stating that he had opposed Dr. Tudor's 2009-10 application for promotion and tenure because she had submitted "the poorest portfolio [he had] ever reviewed in the 20 years" he worked at Southeastern, and there was "very little chance" that Dr. Tudor could have corrected the deficiencies in the period since the initial decision.

110. In support of her grievance, Dr. Tudor submitted four letters of recommendation from tenured English professors at Southeastern detailing their positive assessments that Dr. Tudor was qualified for promotion and tenure.

111. Another tenured English professor submitted a letter to the FAC, in support of Dr. Tudor's grievance, which pointed out that "Dr. Tudor ha[d] published more research than any other member of the [English] department, tenured or untenured." The letter writer therefore maintained that Vice President McMillan was "clearly mistaken in his opinion that consideration of Dr. Tudor's tenure file would be a waste of time."

112. In December 2010, the FAC recommended that Southeastern permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year.

113. President Minks designated Southeastern's Vice President for Business Affairs, Ross Walkup, to respond to the FAC's decision. In January 2011, Vice President Walkup sent a letter to the FAC stating that Southeastern would not comply with the FAC's recommendation because Southeastern policy prohibited professors from re-applying for promotion and tenure after the President denied their applications. In his letter, Vice President Walkup indicated that President Minks agreed with this

interpretation of Southeastern policy.

***Dr. Tudor's Discrimination Complaint***

114. In August 2010—at the same time she was seeking to re-apply for promotion and tenure—Dr. Tudor also filed a written discrimination complaint with Southeastern's Affirmative Action Officer, Dr. Claire Stubblefield. In that complaint, she alleged, among other things, that Southeastern had discriminated against her on the basis of her sex when it denied her 2009-10 application for promotion and tenure.

115. Dr. Tudor filed a similar discrimination complaint with DOE, and DOE informed Southeastern of the complaint in a letter dated September 15, 2010. This complaint specifically referenced “odious bullying” “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.”

116. In October 2010, Dr. Tudor supplemented the discrimination complaint that she had filed with Dr. Stubblefield. She alleged that Southeastern had retaliated against her because of her discrimination complaints when it refused to permit her to re-apply for promotion and tenure during the 2010-11 academic year.

117. Dr. Stubblefield issued a report ostensibly addressing Dr. Tudor's discrimination and retaliation complaints in January 2011. Dr. Stubblefield found that Southeastern had not discriminated against or retaliated against Dr. Tudor.

118. Dr. Stubblefield's report did not address all of Dr. Tudor's allegations of discrimination and retaliation. For example, the report did not mention Southeastern's

decision not to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, even though Dr. Tudor had expressly complained that this decision to not let her re-apply was retaliatory. Similarly, Dr. Stubblefield's report did not address Dr. Tudor's allegation that Vice President McMillan had treated her differently from one of her peers by meeting with a nontransgender English professor to discuss his portfolio before the President rendered a decision on his application for promotion and tenure, while denying Dr. Tudor the opportunity to have such a meeting.

***Dr. Tudor's Employment with Southeastern is Terminated***

119. Since Dr. Tudor failed to attain tenure before the end of her seventh year as an Assistant Professor, Southeastern terminated her employment on May 31, 2011.

120. Before Dr. Tudor's employment ended, Southeastern's Faculty Senate awarded her with the Faculty Senate Recognition Award for Excellence in Scholarship for the 2010-11 academic year.

121. Since her employment was terminated by Southeastern, Dr. Tudor has attempted to but been unable to secure a tenure-track professorship that is comparable to the one she held at Southeastern.

***Dr. Tudor's Desire To Return to Southeastern***

122. One of the remedies Dr. Tudor and the United States have requested is reinstatement as Assistant Professor, with tenure. This relief is particularly important given Dr. Tudor's connection to Oklahoma.

123. In the 1830s the Chickasaw were removed from their ancestral lands east of the Mississippi River and moved, at gunpoint, to lands in present-day Oklahoma.

124. Nearly three thousand Chickasaw traveled along the Trail of Tears; an estimated five hundred Chickasaw perished along the way.

125. Today, members of the Chickasaw Nation believe that the lands sold to the Chickasaw in Oklahoma by the federal government in the 1830s have been made sacred by the tears, sweat, blood, and bones of their ancestors.

126. Dr. Tudor believes that the land Southeastern lies upon has been made sacred by the tears, sweat, blood, and bones of her ancestors.

127. Southeastern's campus lies in the historic boundary of the lands sold to the Chickasaw and Choctaw Nations by the federal government in the 1830s. In 2004 Dr. Tudor was offered a lucrative tenure-track professorship at Northern Michigan University. Dr. Tudor was also offered a tenure-track professorship at Southeastern.

128. Dr. Tudor accepted the tenure-track professorship at Southeastern over the offer from Northern Michigan University because she wanted to spend the rest of her career teaching, working, and living on lands lying within the historic boundary of the relocated Chickasaw Nation.

129. Since her employment was terminated by Southeastern, Dr. Tudor has been unable to secure a tenure-track professorship at an institution that lies within the historic boundaries of the removed Chickasaw Nation.

**COUNT ONE**

**Title VII, 42 U.S.C. § 2000e, *et seq.*  
Hostile Work Environment Based on Sex  
(Gender, Gender Expression, and Gender Identity)**

130. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

131. After Dr. Tudor disclosed her intent to transition to female during the 2007-08 school term, Southeastern’s administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping, including gender, gender expression, and gender identity, and adopted an attitude of adversarial and hostile demeanor. This harassment continued through Tudor’s termination from Southeastern in May 2011.

132. Dr. Tudor was targeted for harassment by administrators because of her sex, including gender, gender expression, and gender identity.

133. Dr. Tudor was nonetheless able to maintain cordial and productive relationships with the members of her department.

134. The discriminatory acts involved the same type of employment actions, occurred relatively frequently, were perpetuated and/or directed by the same core group of administrators, were egregious, numerous and concentrated, and formed part of the same hostile work environment, as detailed herein.

135. The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficiently severe or pervasive to alter the conditions of Dr. Tudor’s employment and to create an abusive working environment, as detailed herein.

136. Dr. McMillan made statements that were repeated to Dr. Tudor that her

gender expression and gender identity were offensive to him, as detailed above.

137. Southeastern administrators, including but not limited to Dr. McMillan, openly denied the legitimacy of Dr. Tudor's feminine gender expression and female gender identity and encouraged others under their direction to do the same. This conduct includes but is not limited to: administrators directing human resources to counsel Tudor against using the multi-stall women's restroom closest to her office and against wearing skirts and other traditionally female articles of clothing in Fall 2007; administrators, including Dean Scoufos, failing to notify the Affirmative Action Office of discrimination reported by Dr. Tudor in 2009; administrators, including Dean Scoufos and Vice President McMillan, publicly and privately misgendering or otherwise expressing their distaste for persons with nontraditional gender identity and expression generally and Dr. Tudor specifically.

138. Dean Scoufos had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

139. Vice President McMillan had the power to impose or participate in discipline of Dr. Tudor and to interfere with or stop her tenure and promotion.

140. Dean Scofous was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

141. Dean Scofous was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

142. Vice President McMillan was acting as the Defendants' agent in taking the actions regarding Dr. Tudor detailed herein.

143. Vice President McMillan was acting within the scope of his employment in taking the actions regarding Dr. Tudor detailed herein.

144. Southeastern administrators, including upon information and belief Dr. McMillan, repeatedly attempted to craft formal and informal policies with the intended effect of forcing Dr. Tudor to suppress her feminine gender expression and female gender identity. This conduct includes but is not limited to: administrators directing Southeastern's human resources office to counsel Dr. Tudor to use a different restroom than that used by other female faculty, causing Dr. Tudor daily humiliation for four years; administrators directing Southeastern's human resources office to counsel Dr. Tudor to not wear traditionally female or feminine articles of clothing; and administrators repeatedly interfering with the tenure review process over the course of two years.

145. The requirement that Dr. Tudor not use female restrooms, and use only a specific single-stall restroom exposed her to disadvantageous terms as detailed herein.

146. The Defendants provided and maintained a health insurance plan for all faculty, including Dr. Tudor, that had an explicit exclusion for transgender health care, as detailed herein. The health insurance policy explicitly excluded all transition-related care for transgender persons. As a result of this exclusion, the plan denied care to transgender persons, solely on the basis of sex and regardless of medical necessity. As a result of this discriminatory exclusion, Dr. Tudor was unable to receive coverage for medically necessary care, she was forced to bear out-of-pocket costs, and was subjected to humiliation which contributed to the hostile work environment.

147. This hostile environment unreasonably interfered with Dr. Tudor's ability

to perform her job duties, by the disruption of her relationship to the University Administration and her Department colleagues, by the unreasonable public criticism and questioning of her abilities as a professor, by her inability to use restrooms appropriate to her gender, by the need to spend many hours on otherwise unnecessary grievance and review processes and other means of seeking relief, and by the necessity of having to create a new tenure application, a time-intensive task involving reviewing and assembling hundreds of pages and requesting and following up on recommendation letters, and other factors.

148. Many events contributing to this hostile work environment occurred within the 300 day period prior to Dr. Tudor's first charge dated September 9, 2010, including but not limited to the daily humiliations caused by the restroom restrictions and misgendering, the maintenance of the discriminatory insurance policy exclusion, dress restrictions, administrators repeatedly interfering with the tenure review process and the constant threat of termination.

149. Dr. Tudor perceived the working environment to be abusive or hostile.

150. A reasonable person in Dr. Tudor's circumstances would consider the working environment to be abusive or hostile.

151. The actions of Defendants' agents, including but not limited to Dean Scofous and Vice President McMillan, in creating the hostile work environment resulted in tangible job consequences to Dr. Tudor, including but not limited to her termination, her denial of promotion and tenure, her inability to reapply for promotion and tenure, her restriction in regard to using restrooms and her inability to obtain health care coverage

for medically necessary treatments.

152. The Defendants did not have any policy prohibiting discrimination based on gender expression or gender identity, and there were therefore no preventive and corrective opportunities available to Dr. Tudor for discrimination based on her gender expression or gender identity.

153. In fact, the Faculty Senate unanimously approved resolutions to prevent discrimination based on gender expression and gender identity on January 19, 2011, and they were sent to Vice President McMillian, who in turn presented the resolutions to Southeastern's President. Both resolutions were rejected.

154. Dr. Tudor took advantage of the preventive and corrective opportunities available to her to the extent they existed, by complaining to Defendants of discrimination based on her sex.

155. The Defendants were on notice of the hostile work environment, including actual notice by means of complaints made by Dr. Tudor to the University detailed herein, and vicariously and constructively by means of the acts perpetrated by her direct supervisors detailed herein.

156. The Defendants should have known of the hostile work environment because of Dr. Tudor's complaints and the acts perpetrated by the administrators, as detailed herein.

157. The Defendants made no efforts to stop the hostile environment detailed herein.

158. In the alternative, the Defendants did not undertake prompt and reasonable

efforts sufficient to stop the hostile environment detailed herein.

159. As a direct and proximate result of Defendants' unlawful discrimination, Dr. Tudor incurred damages including, but not limited to humiliation, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

**COUNT TWO**

**Title VII, 42 U.S.C. § 2000e, *et seq.***

**Unlawful Discrimination Based on Sex**

**(Gender, Gender Expression, and Gender Identity)**

160. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

161. Defendants engaged in adverse employment actions against Dr. Tudor because of her sex and sex stereotyping, including gender, gender expression, and gender identity, as defined and detailed below.

162. Defendants denied Dr. Tudor's application for promotion and tenure during the 2009-10 academic year.

163. Defendants refused to permit her to re-apply during the 2010-11 academic year because of Dr. Tudor's gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

164. Had Dr. Tudor been permitted to re-apply during the 2010-11 academic year, she would have obtained tenure and promotion, absent further sex discrimination by Defendants.

165. Defendants created policies and practices that had a disparate impact on

persons based on gender expression and gender identity, and had a disparate impact on Dr. Tudor.

166. Defendants created a policy and practice that required certain female persons, based on their gender identity, including Dr. Tudor, not to use any women's restrooms on campus, but to use only all genders single-stall restrooms for persons with disabilities.

167. This policy and practice had a disparate impact on certain female persons based on their gender identity, including Dr. Tudor.

168. The creation and maintenance of this policy and practice was an adverse employment action.

169. These restroom restrictions also subjected Dr. Tudor to disparate treatment.

170. These restroom restrictions subjected certain persons, based on their gender identity, including Dr. Tudor, to disadvantageous terms based on sex, as detailed herein, and constituted unlawful sex discrimination in violation of Title VII.

171. Defendants terminated Dr. Tudor because of her gender, gender expression and gender identity, which constitutes unlawful sex discrimination in violation of Title VII.

172. Defendants' purported reasons for denying Dr. Tudor's application for promotion and tenure during the 2009-10 academic year and for refusing to allow her to re-apply in the 2010-11 academic year are a pretext for sex discrimination.

173. As a direct and proximate result of Defendants' unlawful sex discrimination, Dr. Tudor incurred damages including, but not limited to, lost income,

humiliation, loss of enjoyment of life, damage to her professional reputation and other pecuniary and non-pecuniary losses.

**COUNT THREE**  
**Title VII, 42 U.S.C. § 2000e, et seq.**  
**Retaliation**

174. Plaintiff/Intervenor re-alleges each and every allegation contained in paragraphs 1–129.

175. By refusing to permit Dr. Tudor to re-apply for promotion and tenure during the 2010-11 academic year, Defendants retaliated against Dr. Tudor in violation of Title VII because she (a) opposed their discrimination against her that she reasonably believed violated Title VII; and (b) participated in a Title VII proceeding by filing a complaint with DOE.

176. Defendants' purported reasons for not allowing Dr. Tudor to re-apply for promotion and tenure in the 2010-11 academic year are a pretext for unlawful retaliation.

177. But for Defendants' unlawful retaliation, Dr. Tudor would have obtained tenure and promotion, and thereby incurred damages including, but not limited to, lost income, loss of enjoyment of life, damage to her professional reputation, and other pecuniary and non-pecuniary losses.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiff/Intervenor requests that the court grant the following relief:

- a) Enjoin Defendants from subjecting employees to unlawful sex discrimination (including on the basis of gender, gender identity, gender

- expression, and sex stereotypes) and retaliation that violates Title VII;
- b) Order Defendants to institute and carry out new policies, practices, and programs to prevent unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation that violates Title VII;
  - c) Order Defendants to institute and carry out policies, practices, and programs to report, investigate, and effectively address complaints about unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and/or retaliation that violates Title VII;
  - d) Order Defendants to train their employees on Title VII's prohibitions against unlawful sex discrimination (including on the basis of gender, gender identity, gender expression, and sex stereotypes) and retaliation;
  - e) Order Defendants to train their employees who investigate complaints of Title VII violations on how to conduct effective investigations;
  - f) Order Defendants and their managers and supervisory employees to refrain from engaging in retaliation against any individual for giving testimony in this matter or participating in this matter in any way;
  - g) Order Defendants to compensate Dr. Tudor with monetary relief for the damages she suffered including, but not limited to, lost income, loss of fringe benefits, humiliation, loss of enjoyment of life, and damage to her professional reputation.
  - h) Order Defendants to award Dr. Tudor the position of Associate Professor

with tenure;

- i) Order any further relief necessary to make Dr. Tudor whole;
- j) Award such additional relief as justice may require, together with the Plaintiff/Intervenor's costs, disbursements, and attorneys' fees in this action.

Dated: May 5, 2015

Respectfully Submitted,

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