

Docket Call
November 1, 2017

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

DR. RACHEL TUDOR,)	
)	
Plaintiff,)	
)	
vs.)	Case No. CIV-15-324-C
)	
SOUTHEASTERN OKLAHOMA STATE)	
UNIVERSITY and THE REGIONAL)	
UNIVERSITY SYSTEM OF)	
OKLAHOMA,)	
)	
Defendants.)	
)	

TRANSCRIPT OF DOCKET CALL
BEFORE THE HONORABLE ROBIN J. CAUTHRON
WEDNESDAY, NOVEMBER 1, 2017; 9:30 a.m.
OKLAHOMA CITY, OKLAHOMA

Proceedings recorded by mechanical stenography,
transcript produced by computer.

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A P P E A R A N C E S

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1 (Proceedings had on November 1, 2017.)

2 THE COURT: Be seated, please.

3 The only civil case remaining on my docket this month is
4 United States or, I suppose now, Tudor vs. Southeastern, Case
5 Number 15-324-C.

6 Counsel, make your appearances, please.

7 MR. YOUNG: For plaintiff Dr. Rachel Tudor, Ezra
8 Young.

9 MS. GALINDO: On behalf of Dr. Tudor, Marie Galindo.

10 MS. NOVOTNY: On behalf of Dr. Tudor, Brittany
11 Novotny.

12 MS. COFFEY: On behalf of defendants, Dixie Coffey.

13 MR. BUNSON: On behalf of defendants, Tim Bunson.

14 MR. JOSEPH: On behalf of the State, Jeb Joseph.

15 THE COURT: I missed the middle name over here.

16 What was your name?

17 MS. GALINDO: I'm sorry, Your Honor. Marie Galindo.

18 THE COURT: Galindo?

19 MS. GALINDO: Yes, Your Honor.

20 THE COURT: And are you the lawyers who will be
21 appearing at trial, all three of you?

22 MR. YOUNG: Yes, Your Honor.

23 THE COURT: Who is lead? Who do I look to first?

24 MR. YOUNG: I am, Your Honor. Ezra Young.

25 THE COURT: And same over here. Same question.

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1 Will all three of you be here at trial?

2 MS. COFFEY: Yes, Your Honor.

3 THE COURT: And who's lead?

4 MS. COFFEY: I'm lead.

5 THE COURT: All right. I have rulings on motions in
6 limine.

7 On the first -- let's see. This is defendants' motions
8 regarding the hearsay statements for -- in particular, these
9 are described by both parties in the briefs.

10 And the only person identified who said any of these
11 things is Jane McMillan. Tell me who Jane McMillan is other
12 than the sister of Roger -- Doug McMillan.

13 MS. COFFEY: Ms. McMillan was a counselor at
14 Southeastern.

15 THE COURT: So she was an employee?

16 MS. COFFEY: Yes, ma'am.

17 THE COURT: All right. The other three statements
18 are not attributed to anyone.

19 MR. YOUNG: Your Honor, I believe the statements are
20 attributed to Cathy Conway, as identified in both defendants'
21 and Dr. Tudor's briefs.

22 THE COURT: I am having trouble hearing you.

23 MR. YOUNG: Sorry, Your Honor. I believe the other
24 statements are attributed to Cathy Conway, the former H.R.
25 director at Southeastern.

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1 THE COURT: Well, they are described in No. 1 as "an
2 SEOSU employee," in No. 2, "SEOSU human resources employee,"
3 and No. 4 is not -- who said that is not described at all.

4 Are those Cathy Conway statements?

5 MS. COFFEY: Your Honor, Cathy -- Dr. Tudor contends
6 that Dr. Conway passed on those comments to her.

7 The statement itself came from a third party, Doug
8 McMillan.

9 THE COURT: Yes, I understand that.

10 But plaintiff is arguing that these are statements made
11 by a party opponent.

12 And without knowing who made the statement, it's
13 impossible to know if that is someone with enough authority to
14 be representing the university.

15 What is your position on that?

16 MS. COFFEY: Neither of those individuals have the
17 authority to represent the university with those statements,
18 Your Honor; neither Cathy Conway nor Jane McMillan.

19 THE COURT: Well, without some showing that they do
20 have the authority, I will not find those to be statements of
21 party opponents.

22 I can't see they are excepted from hearsay because they
23 show state of mind because the state of mind is the truth of
24 the matter asserted.

25 If you are not offering it to show Mr. McMillan's beliefs

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1 as reflected in those hearsay statements, then there is no
2 point to them at all.

3 I tend to believe that all of these are not admissible,
4 and I grant the motion in limine.

5 But when these things come up in context, I may well
6 change my mind. So that ruling is not written in stone, but I
7 instruct you not to introduce any such evidence until you have
8 my permission.

9 The settlement negotiations and the results of the
10 settlement negotiations and anything said during the
11 settlement negotiations are excluded from evidence in this
12 case. There is no reason shown to the contrary, and that
13 motion is granted.

14 Health insurance options and exclusions. That motion is
15 granted. That is excluded.

16 Regarding whether employees retired, resigned, were
17 fired, I can't even tell from the briefs what this argument is
18 about. I am simply going to hold this one in abeyance until I
19 hear it in context and can understand what your arguments are.

20 Generally, no one will be allowed to argue for the
21 community, for the good of the community, set an example.

22 Specifically, it's impossible to define that. So I'm
23 going to generally say you can't go outside the parameters of
24 this lawsuit and this plaintiff, and I will consider any
25 objection when it is asserted.

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1 The argument to keep any dress code evidence out is
2 denied.

3 The expert reports. Again, I'm not certain I understand
4 what the argument is about or may become about, but I will
5 tell you this, no expert can testify to anything not included
6 in his or her expert report.

7 And that is -- seems to be the basis of your objection to
8 Dr. Robert Parker and Dr. Brown.

9 Dr. Brown adds an additional problem for me in that I
10 don't know how any of that is relevant.

11 Mr. Young, can you tell me the relevance of his
12 testimony?

13 MR. YOUNG: Yes, Your Honor.

14 I believe he is potentially not relevant now that you've
15 issued your decision on the summary judgment.

16 His relevance was really only going towards issues as to
17 the definition of sex, which I believe is no longer something
18 that should be presented to the jury at trial.

19 To the extent that the defendants are attempting to renew
20 that argument, we would want to bring Dr. Brown in as an
21 expert to educate the jury.

22 MS. COFFEY: Your Honor, we do not intend to dispute
23 the definition of sex.

24 THE COURT: All right. So he's not going to testify
25 because he's not relevant.

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1 And I agree with everybody who agrees with each other
2 that nobody is going to testify on matters of law.

3 Okay. On plaintiff's motions in limine, the first three
4 are basically the same subject matter, just different
5 evidence.

6 One is the personnel file, one is to Newell, and one is
7 to Weasenforth.

8 And plaintiff argues that you can't use this as
9 after-acquired evidence. And defendants argues they never
10 intended to use it as after-acquired evidence.

11 I'm not sure that I'm not getting caught up in the vortex
12 of what, to me, is very circular argument ending nowhere.

13 I think the relevant question is this: When -- I've even
14 read your trial brief on damages and mitigation of damages,
15 and I can't tell what you're asking for.

16 In most cases, the plaintiff's damages -- back pay
17 damages would be cut off the minute she's hired somewhere
18 else, and that's the end of that inquiry.

19 Is that your position?

20 MR. YOUNG: Respectfully, it is not, Your Honor.

21 There is Title VII case law on mitigation of damages not
22 being cut off if someone, in good faith, seeks reemployment
23 and, for reasons outside of their control, they lose that
24 employment.

25 It's similar to traditional tort doctrine, that if

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1 there's sort of an intervening third party that creates more
2 damage that wouldn't have occurred but for the original
3 injury, you can continue to get damages from the
4 original person who injured you.

5 THE COURT: All right. That makes all of that
6 evidence relevant.

7 If you're going to seek damages beyond her acceptance of
8 the job at Collin County, then why she lost that job, how,
9 where she went, who she interviewed with is all relevant to
10 damages and mitigation.

11 And your motion on those three items of evidence will be
12 overruled.

13 If you at any time want to change on the record and
14 without ability to change your mind later and say that her
15 damages stop at the moment she's employed at Collin County,
16 then none of that evidence is relevant.

17 All right. Next, I go to -- let me put away what I've
18 finished with. There is a motion to strike deposition
19 designations. This was just filed, has not been responded to.

20 Deposition testimony is hearsay testimony. You can use
21 it for many purposes, all purposes perhaps against a party,
22 but you can't just read depositions of witnesses who are here
23 at trial.

24 Is that your intent?

25 MR. YOUNG: No, Your Honor. In excess of caution,

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1 because both Dr. Tudor and defendants named a great deal of
2 witnesses and we only have seven days of jury trial, we simply
3 designated in excess of caution.

4 That's the traditional practice in other courts I
5 practice in. I understand, after having conferred with
6 defense counsel yesterday, that it's not the practice here.

7 THE COURT: It is not the practice here.

8 MR. YOUNG: Okay. So that is my apology, Your
9 Honor. That has been the practice in other courts I practice
10 in.

11 THE COURT: All right. So I will grant the motion
12 to strike, and we are wiping out that document.

13 If there are witnesses that you intend to present by
14 deposition that justifies the work that both defendants'
15 counsel and I have to put in to review those designations --
16 the emphasis here is on the Court -- then you can refile it.

17 MR. YOUNG: Thank you, Your Honor.

18 THE COURT: But as to the three witnesses who were
19 not listed on the pretrial report, if they're not on the
20 pretrial report, they can't testify by deposition or any other
21 way. So that obviates the need for any response to that
22 motion.

23 The motion to unseal -- no. Well, yeah, that's next.
24 The motion to unseal.

25 I realize you have a brief due on Friday. I'm not sure I

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1 understand the purpose of this.

2 Any protected documents are protected no longer once
3 we're at trial, at least if they are offered into evidence as
4 an exhibit. That protective order doesn't mean that can't
5 happen.

6 You-all may have agreed to the contrary in a protective
7 order that I simply approved and didn't read. If so, you need
8 to tell me now.

9 Otherwise, if this is all for the purpose of the
10 settlement documents, that's all moot.

11 So is there a need for any further ruling on this?

12 MR. YOUNG: Given your decision on the settlement
13 documents, Your Honor, I do not believe it is needed at this
14 time.

15 THE COURT: All right. So you have a brief due
16 Friday. I am not going to grant this motion to unseal
17 documents because I believe it may reach much further than I'm
18 going to rule.

19 My ruling is, any document necessary to be admitted into
20 evidence at trial is no longer protected.

21 So they may remain sealed in the court file, but they're
22 not going to be sealed in open court in a jury trial.

23 Okay. The motion in limine -- or the Daubert motion on
24 Brown is where we reach whether he's relevant. That's the
25 same expert I already said --

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1 MR. YOUNG: That's correct, Your Honor.

2 THE COURT: All right. So that motion is, let's
3 see, granted on relevance grounds.

4 As far as I'm aware, that's all the motions that are
5 pending. Do you-all have anything else?

6 MS. COFFEY: No, Your Honor.

7 MR. YOUNG: No, Your Honor.

8 THE COURT: Okay. You know that we will be
9 selecting a jury on Wednesday, November 8th.

10 Our Court selects all juries for trials the month of
11 November on the same day in order to save money on jurors.

12 I, at this point, have no idea how many other people will
13 be selecting juries. It's possible we will be delayed,
14 waiting on enough jurors to come in. That almost never
15 happens.

16 So I'd like for you to be ready -- be here in place and
17 ready to begin by 9:30.

18 If we learn, before Wednesday, something that's going to
19 interfere with that schedule, I will have Linda let all of you
20 know. But if you do not hear from us, be here Wednesday
21 morning at 9:30. The trial will begin on Monday, the 13th.

22 You've indicated in your pretrial report that you believe
23 seven days for trial.

24 Is that still what you believe?

25 MR. YOUNG: Respectfully, Your Honor, I think we

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1 need to confer again given your summary judgment decision. I
2 think some of the issues may be streamlined now.

3 THE COURT: Well, I understand you're going to Judge
4 Goodwin for a settlement conference when you leave here, and I
5 hope you'll take that opportunity to not only resolve the
6 case, but, if you don't, to come up with a realistic schedule.

7 It helps us plan the rest of our month if we know how
8 many days you'll be in trial.

9 Ms. Coffey, were you going --

10 MS. COFFEY: No. I was just responding to any
11 questions or inquiries.

12 I might -- when you mentioned going to settlement
13 conference, Counsel are going down to see Judge Goodwin when
14 we finish here, but our actual -- the settlement conference in
15 which all the clients will be present will be November 8th
16 after -- whenever we finish jury selection.

17 THE COURT: Oh. I bet I knew that. I was just
18 thinking it was after today instead of after next week. Okay.

19 MS. COFFEY: Thank you, Your Honor.

20 THE COURT: Okay. I have given you 15 minutes'
21 worth of individual voir dire.

22 I want to put some prohibitions on you. This is
23 difficult to describe, but I know it when I hear it, and you
24 don't want me to hear it.

25 I don't want you to get all touchy-feely with these

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1 people nor do I want them to put you -- nor do I want you to
2 put them on the spot by calling them out individually on their
3 personal beliefs.

4 I know that's exactly why you want individual voir dire,
5 but I think it's intrusive. Our jurors are very important to
6 us. We protect them a lot.

7 If you repeat any question that I have already asked
8 them, I will invite you to sit down immediately.

9 My schedule used to be 9:00 to 5:00, but the older I get
10 and the less I'm in court, the shorter my days get. So you
11 will enjoy the laziness that I have become used to in your
12 schedules as well.

13 I'm aiming for 9:30 to 4:00 or 4:30. I do always want to
14 get the jury out of here before the bad traffic starts, which,
15 for you people from out of town, is not bad traffic at all,
16 but for us it's worse.

17 So that's my schedule. We'll take an hour for lunch at
18 midday, a 15-minute break morning and afternoon. Any of that,
19 of course, may be changed by the needs of the jurors.

20 There is perhaps on your table a form for witnesses and
21 exhibits. I know no one has typewriters anymore to fill in
22 forms. Really, all we need is something vaguely similar to
23 that.

24 I want only the witnesses and exhibits that you truly
25 intend to use. And you're not waiving anything. Your

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1 pretrial order still controls. This is really a blueprint, a
2 map for me, for the court clerk, and for the court reporter.

3 So we want this -- we don't want it all messed up by
4 things that aren't going to be introduced. Just put in there
5 what you really think you're going to do.

6 Once you've done that, I hope -- I direct that counsel
7 get together at some point and agree on any exhibits to which
8 there will be no objection and somehow mark those on your
9 exhibit list.

10 That saves us really a surprising amount of time not to
11 have to go through that little dance with exhibits in front of
12 the jury. So anything you can agree on, please do.

13 Does anyone expect at this time to use a video
14 deposition?

15 MR. YOUNG: Not for plaintiff, Your Honor.

16 MS. COFFEY: Your Honor, there's a possibility that
17 we have a witness, due to her undergoing cancer treatment,
18 that she would be allowed to testify remotely from video
19 conference.

20 I understand we need to seek permission from the Court.
21 We just found out about this on Friday. She -- I think she
22 was hoping that it would never come to fruition and,
23 therefore, didn't want to share the personal information with
24 us.

25 THE COURT: Where is she?

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1 MS. COFFEY: She is in Durant.

2 THE COURT: And are there suitable facilities there?

3 MS. COFFEY: Yes, Your Honor. The university has
4 the capabilities of setting up a video -- of video
5 conferencing.

6 THE COURT: And who is the witness?

7 MS. COFFEY: It is Cathy Conway.

8 THE COURT: Do you have any objection?

9 MR. YOUNG: To the extent that Cathy Conway might,
10 due to her illness, be unavailable, just in an excess of
11 caution, Your Honor, I think we would want to refile the
12 deposition designations and only, I guess, after we confirm.

13 THE COURT: Well, is she unavailable; or is she, for
14 her own convenience, asking to be available remotely?

15 MS. COFFEY: For her own convenience and for her
16 health because she is not permitted to be exposed for a
17 certain number of days after chemo treatments to, you know,
18 potential for germs.

19 So she has asked, if possible, to not have to come into
20 the federal courthouse.

21 THE COURT: Well, I think that doesn't make her
22 unavailable. I could order her here and cause her certain
23 death, which I'm not going to do.

24 I can order her to be available remotely, which gives you
25 the opportunity to cross-examine, and she will be considered

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1 to be a present witness.

2 If there is anything about that remote examination that
3 you think prejudices the plaintiff, I'll revisit it --

4 MR. YOUNG: Okay.

5 THE COURT: -- but not until after that.

6 Now, Linda, let me make sure. Do you know what we need
7 to do to make sure that can happen?

8 THE CLERK: Yes. I just need to know from Dixie
9 when she intends to call her.

10 THE COURT: Do we not need to know if their
11 equipment is compatible?

12 THE CLERK: I'm going to have Automation contact
13 them.

14 THE COURT: Okay. Ms. Coffey, if you'll make sure
15 you confer with Linda before you leave, we need to get our IT
16 with somebody there to make sure it will work.

17 So if there is a deposition designation resubmitted other
18 than Ms. Conway's on which I need to rule on objections, I
19 need to be sure that you understand I need to have some time
20 to rule on those objections.

21 So if you resubmit any deposition, you've got -- I don't
22 know -- two or three days to submit counter designations. At
23 some point you need to get me the deposition for ruling -- I
24 just want to make sure you understand that -- before the day
25 or time that you intend to call that witness by deposition.

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1 I think I have covered everything I need to cover.

2 What do you need from me?

3 MR. YOUNG: Your Honor, I need to confer with
4 defendants' counsel about this, but I wanted to ask about your
5 personal practice.

6 Given that Dr. Tudor has proven her prima facie case, it
7 seems as if it might streamline trial and avoid repetition if
8 the defendants present their defenses and then Dr. Tudor rebut
9 them, rather than Dr. Tudor present her case, they present a
10 defense, and we present rebuttal witnesses.

11 THE COURT: Well, her prima facie case is gone with
12 the denial of summary judgment. We now start out with
13 plaintiff has the burden of proof at all times of all elements
14 of her case, and she goes first.

15 MR. YOUNG: Okay. Thank you, Your Honor.

16 THE COURT: In that regard, I think there was some
17 fuss at one point just putting her in the place of plaintiff
18 and forgetting about the United States.

19 Is there any objection to our referral from now on to her
20 as plaintiff?

21 MS. COFFEY: No, Your Honor. And we apologize for
22 any confusion in the pleadings. I think everybody --
23 plaintiff, plaintiff intervenor, plaintiff is fine with
24 defendants from here on, assuming it's fine with you.

25 MR. YOUNG: Also acceptable to Dr. Tudor, Your

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1 Honor.

2 THE COURT: All right. You've been handed a
3 statement of the case. As you can see, this is the bare
4 bones. This is meant for me to read to the jury panel when
5 they come in just so they'll have a vague notion of what this
6 case is about.

7 I don't get very specific with that because they don't
8 remember anything I say until we're about halfway through in
9 here.

10 So is this agreeable with everybody?

11 Mr. Young, you are nodding your head?

12 MR. YOUNG: If it's agreeable to defendants, only to
13 the extent that Defendant Regional University System of
14 Oklahoma isn't mentioned. I'm not sure if that's -- we
15 stipulated that it's the same actor, so I think this is
16 agreeable.

17 MS. COFFEY: We're agreeable to it.

18 THE COURT: All right. Anything else?

19 MS. COFFEY: Your Honor, we had submitted objections
20 to voir dire. I assume -- I mean, it was the voir dire that
21 they had submitted for the Court to give.

22 I'm assuming the Court will take those under advisement
23 and make a decision when the Court poses voir dire.

24 THE COURT: And I don't know, but if it's something
25 I think is unusual or needs further discussion, I'll invite

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1 you to the bench the morning of jury selection and have you
2 flesh that out a little.

3 Normally, I just ask what I'm going to ask no matter what
4 you-all add or ask to add to that, except as it is relevant to
5 this specific case. In that regard, it's helpful to have your
6 submissions.

7 Okay. So if you have any questions about procedure,
8 Linda or Automation -- Linda is generally able to help you.

9 I've introduced Jeff Lynch, who is my law clerk who will
10 be working with you on this case. So you'll get to know him
11 as you get through instructions. Let us know if we can help
12 you.

13 For now, we'll be adjourned, and Counsel may be excused.
14 (Adjourned at 10:00 a.m.)

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REPORTER'S CERTIFICATE

I, SHERRI GRUBBS, Federal Official Court Reporter in and for the United States District Court for the Western District of Oklahoma, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 6th day of November, 2017.

/S/ SHERRI GRUBBS

SHERRI GRUBBS, RPR, RMR, RDR, CRR
State of Oklahoma CSR No. 1232.
Federal Official Court Reporter