

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

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

**PLAINTIFF DR. RACHEL TUDOR’S MOTION TO STRIKE
DEFENDANTS’ RENEWED MOTION FOR
JUDGMENT AS A MATTER OF LAW AND,
IN THE ALTERNATIVE, FOR NEW TRIAL
WITH INCORPORATED BRIEF**

INTRODUCTION

At the request of counsel for the parties, the Court proffered a schedule for post-verdict briefing on reinstatement and challenges to the jury’s verdict. The deadline set was the same for both—briefs were to be filed no later than December 11, 2017, and responses and replies were to be synchronized.

While Tudor filed her reinstatement motion within the time allotted, Defendants inexplicably filed their combined Rule 50(b) and 59 motion on July 5, 2018—159 days late (ECF No. 316) [hereinafter the “Motion” or

“Defendants’ Motion”]. Defendants’ blatant disregard for the December 11, 2017 deadline flies in the face of this Court’s scheduling directions and is inexcusable. As such, Defendants’ Motion should be stricken.

I. STATEMENT OF FACTS AND BACKGROUND

On November 20, 2017, the jury in this case returned a verdict in Tudor’s favor on three of four claims (ECF No. 262). At the request of Tudor’s counsel, the Court delayed entry of judgment until *after* resolution of post-verdict briefing on reinstatement. At that same hearing, and in light of the Court’s decision to alter the default scheduling of entering judgment, counsel for Defendants requested a deadline for the filing of any motion challenging the jury’s verdict. The Court set the same deadline for both motions, with opening briefs due by December 11, 2017.¹

Later in the day on November 20, 2017, Southeastern president Sean Burrage issued a public statement, expressing support for the jury’s verdict in this case. Burrage’s statement unequivocally indicated that, as of that

¹ See Trial Trans., ECF No. 262 at 873–74:

Ms. Coffey: Your Honor, is this the appropriate time, or do we submit it at some point later, for judgment notwithstanding the verdict on behalf of defendants?

The Court: I would say if you want to file a written motion, the same schedule would apply. Fourteen days from Monday would be your opening brief on that.

point, Defendants did not deem the jury's verdict to be flawed and implied there was no intent to appeal the verdict itself.²

Tudor filed her motion for reinstatement on December 11, 2017 (see ECF No. 268). Once the December 11, 2017 deadline for Rule 50(b) and 59 motions passed, Tudor and her counsel proceeded to brief other sensitive and important matters in this case in reliance on Defendants' election to not challenge the verdict as signaled by their declination to file a timely motion on December 11, 2017 and Burrage's statement. *See* ECF No. 290 at 21 n.16 (indicating the same). In the months that followed, the parties briefed reinstatement and front pay through multiple motions for extension of time and reconsideration.

On April 13, 2018, the Court ordered briefing on the final amount of damages (ECF No. 287). On May 3, 2018, Defendants moved for remittitur, indicating in their brief for the first time that they planned to file a Rule 50(b) and Rule 59 motion (ECF No. 289 at 6). On May 24, 2018, Tudor filed a brief in opposition, therein pointing out that by that point Defendants had already missed the deadline to file such a motion and also pointed out such motions would otherwise be futile because of deficiencies in Defendants' oral

² *See* ECF No. 282-2 at 15 ("Southeastern Oklahoma State University places great trust in the judicial system and respects the verdict rendered by the jury. It has been our position throughout this process that the legal system would handle the matter, while the University continues to focus its time and energy on educating students.").

Rule 50(a) motion, including the failure to preserve the very same arguments Defendants now seek to raise (ECF No. 290 at 21 n.16).

On June 6, 2018, the Court granted remittitur to Defendants (ECF No. 292) and entered final judgment (ECF No. 293). Hours later, Tudor filed a timely notice of appeal to the Tenth Circuit (ECF No. 294). In the days and weeks that followed, the Tenth Circuit set numerous deadlines for Tudor's appeal, including entry of appearance of counsel, transmission of transcripts, filing of the docketing statement, a mandatory mediation conference set for mid-July 2018,³ and proffered a July 30, 2018 deadline for Tudor to file an opening brief which also triggered the deadline for filing of amicus briefs. (All of those deadlines were set by June 28, 2018.⁴)

On June 20, 2018, Tudor's counsel filed lengthy motions for taxing of costs and sought attorneys' fees and expenses (see ECF Nos. 299, 300, 303). The undersigned attests that those substantial filings were prepared on the understanding that Defendants were not challenging the jury's verdict at the

³ The mandatory conference was first scheduled by the 10th Circuit's Mediation Office by letter on June 28, 2018 with the conference set for July 17, 2018. Due to a scheduling conflict, the conference was rescheduled for July 18, 2018. The undersigned attests that at the time of filing this Motion, that conference concluded and no settlement was reached.

⁴ Fed. R. Ev. 201(b) allows this Court to take judicial notice of facts not subject to reasonable dispute where such facts are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Thus, this Court may take notice of entries on the Tenth Circuit's docket of Tudor's appeal, styled as *Tudor et al. v. Se. Okla. State Univ. et al.*, 18-6102.

district court level since the deadline to file such a motion had long passed. During this same period, the undersigned attests that Tudor's counsel made substantial efforts to complete the work of readying her appeal as well as expended substantial time and resources reaching out to potential *amici* to ensure timely filing of merits and amicus briefs in the Tenth Circuit.

On June 28, 2018, Defendants filed a motion seeking an extension of page limit on what they claimed to be their soon to be filed Rule 50(b) and 59 motion (ECF No. 309). That motion did not seek leave to file the principle motion out of time. On July 5, 2018, Defendants' inexplicably filed their untimely Motion.⁵ At that point, Defendants' Motion was 159 days past the original December 11, 2017 deadline set by this Court. The undersigned attests that on July 13, 2018, counsel for the National Women's Law Center contacted counsel for Defendants to seek permission to file an *amicus* brief in support of Tudor, as is required by the Federal Rules of Appellate Procedure. The undersigned further attests that other *amici* have begun substantial work on briefs in support of Tudor relying upon the deadlines for such briefs triggered by scheduling orders from the Tenth Circuit.

⁵ In addition to being untimely, Defendants' Rule 50(b) and 59 motion purports to challenge the verdict on issues not preserved through a proper 50(a) motion, belatedly challenges the meaning of "sex" despite the fact that Defendants stipulated prior to trial that they would not contest its meaning going forward (ECF No. 225 at 7:22-23 [Ms. Coffey: "Your Honor, we do not intend to dispute the definition of sex."]), and inexplicably seeks remittitur of the jury's award despite the fact that that issue has already been fully briefed and resolved (see Order, ECF No. 292).

By early July 2018, and despite the plain fact that the Tenth Circuit was proceeding with Tudor's appeal at full-speed, Defendants made no efforts to apprise the Circuit or this Court that it would in fact file motions at the trial-court level challenging the verdict out of time let alone indicate which day they would do so. Nor did Defendants move for an extension of time in advance of the original December 11, 2017 deadline, as is required by Local Rule 7.1(h). Nor did they seek leave of any court to file their untimely motion. Defendants did not even attempt to seek a stipulation from Tudor allowing extension of the filing deadline.

This Court unequivocally set deadlines for motions challenging the jury's verdict and otherwise steered the parties through a sensible briefing schedule on all other post-verdict matters. Defendants simply blew past this Court's deadline. If the deadline was missed in error, or another credible reason excusing their lateness existed, it was incumbent Defendants to apprise this Court of the problem and move with all deliberate speed to avoid inconvenience and prejudice. Instead, Defendants ignored the Court's deadline and filed their untimely Motion without seeking leave to do so.

II. ARGUMENT

A. Legal Standard

It is well-settled that this Court has the inherent authority to manage these proceedings. "[D]istrict courts have the inherent authority to manage

their dockets and courtrooms with a view toward the efficient and expedient resolution of cases.” *Dietz v. Bouldin*, 136 S.Ct. 1885, 1892 (2016) (Sotomayor, J.). Further, district courts possess inherent powers that are “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Link v. Wabash R. Co.*, 370 U.S. 626, 630–31 (1962) (Harlan, J.). *See also Hartsel Springs Ranch of Col. Inc. v. Bluegreen Corp.*, 296 F.3d 982, 985 (10th Cir. 2002) (district court has inherent authority to manage its docket to promote judicial efficiency and the “comprehensive disposition of cases”).

It is also well-settled that this Court has the authority to set and enforce deadlines for briefing motions. Indeed, a critical part of a district court’s power to manage dockets is establishing a schedule for motion practice and policing the filing of motions. “A case management schedule serves important purposes.” *A-Cross (A+) Ranch, Ltd. v. Apache Corp.*, 2007 WL 7754451 at *1 (W.D.Okla. Feb. 20, 2007).

Parties that ignore court schedules do so at their own risk. Where deadlines are missed and untimely motions filed, this Court may act on its inherent authority to impose sanctions to address abuses of the judicial process. *Steinert v. Winn Grp., Inc.*, 440 F.3d 1214, 1227 n.15 (10th Cir. 2006). A district court’s power to sanction a party who fails to follow local rules or a court order is well-established. *See Issa v. Comp USA*, 354 F.3d

1174, 1178 (10th Cir. 2003); *Gripe v. City of Enid, Okla.*, 312 F.3d 1184, 1188 (10th Cir. 2002). Striking filings is a method of sanctioning. *Med. Supply Chain, Inc. v. Neoforma, Inc.*, 2008 WL 11333741 at *3 (D.Kan. July 8, 2008) (citing *Lynn v. Roberts*, 2005 WL 3087841, at *6 (D.Kan. Nov. 1, 2006)).

Filing of an otherwise untimely motion may be excused by this Court. *Pepe v. Koreny*, 189 F.3d 478, 1999 WL 686836 at *2 (10th Cir. 1999) (“The inherent authority of a district court to manage its docket includes discretion to grant or deny continuances or extensions of time.”). However, this Court’s power to excuse an exceedingly untimely motion is limited. “Federal Rule of Civil Procedure 6(b)(1)(2) permits the Court, for good cause, to allow a party that has failed to act after the time to do so has expired to file or respond on a showing of excusable neglect.” *Pourchot v. Pourchot*, 2008 WL 11338418 at *1 (W.D.Okla. Oct. 17, 2008) (Cauthron, J.).

Determination of whether neglect is excusable is “an equitable one, taking account of all relevant circumstances surrounding the party’s omission’ [...] including [1] the danger of prejudice to [the non-moving party], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.” *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship*, 507 U.S. 380, 395 (1993) (cleaned up). See also *Quigley v. Rosenthal*, 427 F.3d 1232, 1238 (10th Cir. 2005)

(finding no abuse of discretion in refusing to consider untimely motion “[b]ecause it is well established that inadvertence, ignorance of the rules, and mistakes construing the rules do not constitute excusable neglect for the purposes of Rule 6(b).”).

B. Defendants’ Motion is Untimely

Defendants filed their Motion 159 days after the deadline set by this Court, long after other subsequently scheduled post-verdict motions, past preliminary deadlines for Tudor’s appeal in the Tenth Circuit, and on the eve of the deadline for the filing Tudor’s opening brief in the Circuit. By all measures, Defendants’ Motion is untimely.

There was no ambiguity as the deadline to file motions challenging the jury’s verdict in this case. Indeed, the record reflects that Defendants’ counsel expressly sought clarification from the Court at the close of trial as to the time to file such motions and the Court unequivocally declared the deadline would be December 11, 2017—the same date Tudor’s opening brief on reinstatement was due. *See* ECF No. 262 at 873–74.

To the extent that Defendants argue that they innocently relied upon the default deadlines of the Federal Rules of Civil Procedure rather than the deadline set by this Court, that position totally lacks merit. This Court has the power to set deadlines and manage its docket, plainly empowering it to adjust deadlines given the exigencies of a particular case and to facilitate an

expeditious resolution. *Diaz*, 136 S.Ct. at 1892. Moreover, it would be disingenuous at best for Defendants to claim they were confused about the deadline for their Motion given the fact that it was they whom requested at the November 20, 2017 hearing a date certain to file—which the Court unequivocally set as December 11, 2017. *See* ECF No. 262 at 873–74.

The Court’s sequencing of other post-verdict motions makes plain that the Court and the parties all proceeded for months along a path of briefing post-verdict relief that hinged on Defendants’ timely filing of any motion challenging the verdict. Indeed, it makes perfect sense that the Court sought motions challenging the verdict early on—if the verdict was disrupted, deciding Tudor’s equitable relief would be unnecessary.

In a similar vein, this Court’s care to sequence the other post-verdict motions by a combination of orders directing scheduling and reliance on default rules not disturbed by the Court’s superseding scheduling orders—on front pay (ECF No. 275 at 4), extension on time to file motion on front pay (ECF No. 278), remittitur (ECF No. 287), and attorneys’ fees and costs (triggered by final judgment, as expressly intended as of the November 20, 2017 hearing⁶)—makes plain the intent was to hear motions challenging the verdict *before* entry of judgment.

⁶ *See* ECF No. 262 at 873:18–21:

Lastly, Defendants' Motion is wildly untimely in light of the stage of Tudor's appeal to the Tenth Circuit and Tudor's diligence to stay on top of all deadlines throughout these proceedings. Up to this point, Tudor has filed every motion timely and, where her counsel's workload threatened timeliness set by default rule or court order, she sought scheduling relief. Tudor also took care to file a timely notice of appeal and, as it should, the Tenth Circuit has moved that proceeding forward with all deliberate speed. If Defendants desired to challenge the jury's verdict, they should have followed the briefing schedule set by the Court. Given this context, Defendants' Motion is plainly untimely.

C. Defendants' neglect to file a timely motion is inexcusable.

While this Court is empowered to allow for the filing of late motions, Defendants bear the burden of demonstrating that there is excusable neglect allowing for late filing. Under the *Pioneer* factors, Defendants' 159-day late motion is patently inexcusable.

Factor 1: Prejudice to Tudor. Defendants' Motion was filed 159 days past the deadline this Court set for it, long after other inter-dependent post-verdict briefing was completed in this case, after Tudor and her counsel made

Mr. Young: I believe the cost application is due 14 days from the date you enter judgment on the verdict.

The Court: Okay. Well, I'll just not enter judgment then.

consequential litigation decisions in that other briefing on the reasonable belief that Defendants would not file such a motion (see ECF No. 290 at 21 n.16), and in the midst of quickly moving deadlines in Tudor's timely appeal to the Tenth Circuit (see discussion *supra* Part I). Accepting Defendants' untimely Motion at this juncture would undeniably prejudice and inconvenience Tudor and her counsel, as well as *amici* whom are preparing briefs at this very moment to file with the Tenth Circuit. Any one of those considerations is sufficient to tilt the first factor in favor of not finding excusable neglect.

Factor 2: Length of delay and impact. If Defendants' 159-day late motion is accepted, this Court will potentially be forced to revisit a slew of earlier issued orders touching on post-verdict relief sought by Tudor (e.g., reinstatement and front pay), Defendants (e.g., remittitur), as well as would potentially make a nullity other motions filed by both parties which have already been briefed on the implicit understanding that Defendants would not challenge the jury's verdict in this Court (e.g., Tudor's motions for attorneys' fees and costs). Moreover, accepting Defendants' Motion 159 days late and in the midst of Tudor's timely merits appeal stands to throw a wrench into the earlier scheduled proceedings before the Tenth Circuit, which are already underway. Given the foregoing, the second factor tilts in favor of not finding excusable neglect.

Factor 3: Reason for delay and control. To date, Defendants have not proffered a credible reason for failing to file their Motion in a timely matter let alone failing to seek leave from this Court to file out of time. The closest Defendants have gotten to proffering an excuse is to allude to the position that they intended to abide by the default deadline of Rule 50(b) rather than that set by this Court. *See* ECF No. 316 at 2 (arguing that the deadline for their motion is set by default as 28 days after the entry of judgment). However, given the fact that Defendants sought a deadline certain for their Motion to be filed and the Court declared December 11, 2017 as the due date (ECF No. 262 at 873–74), pointing to a default deadline that was plainly modified by this Court misses the mark. Indeed, that particular excuse is plainly an inadequate explanation weighing in favor of rejecting a finding of excusable neglect. *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1253 (10th Cir. 2017) (“[A]n inadequate explanation for delay may, by itself, be sufficient to reject a finding of excusable neglect.”).

As to control, it is plain that it was wholly within Defendants’ control to either file their Motion by the deadline originally set by this Court *or*, once that deadline had passed, to promptly seek leave to file their Motion out of time early enough to avoid the inconvenience and prejudice that would necessarily result from accepting it at this late juncture. The fact that it was wholly within Defendants’ control to make the original deadline let alone

seek leave to file their untimely Motion in the months leading up to Tudor's timely appeal to the 10th Circuit weighs heavily against Defendants. *See, e.g., United States v. Munoz*, 664 Fed.Appx. 713 (10th Cir. 2016) (affirming denial of prisoner's motion for leave to file untimely notice of appeal on finding that prisoner's failure to act in three-day period during which he had complete control is dispositive as to inexcusability). Given the foregoing, the third factor also weighs in favor of not finding excusable neglect.

Factor 4: Good faith. To date, Defendants have not moved this Court to file their untimely motion let alone proffered a credible excuse. They simply filed their Motion 159 days late and baldly asserted it is timely under the default rule rather than head-on facing the December 11, 2017 deadline set by this Court. By all reasonable measures, Defendants have failed to demonstrate good faith. *Contrast with Flores v. Monumental Life Ins. Co.*, 2009 WL 10671776 (W.D.Okla. June 25, 2009) ("attorneys acted, at all times, in good faith, bringing this matter to the prompt attention of the court and recounting what happened in an unvarnished manner"). Thus, the fourth factor also weighs in favor of not finding excusable neglect.

D. Striking Defendants' Motion is an appropriate sanction.

Given the exceedingly untimely nature of Defendants' Motion, and the fact that Tudor's appeal has been docketed and is otherwise moving along in the Tenth Circuit at full-speed, it is appropriate for this Court to strike

Defendants' untimely Motion as a sanction. Sanctions are appropriate where a party fails to follow local rules or a court order. *See Issa v*, 354 F.3d at 1178; *Gripe*, 312 F.3d at 1188. Striking a filing is one form of sanction available. *See, e.g., Med. Supply Chain*, 2008 WL 11333741 at *3 (*citing Lynn*, 2005 WL 3087841, at *6). And, in this particular case, striking Defendants' untimely Motion will go a long way towards promoting judicial economy as well as preserving the integrity of this process and these proceedings.

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully requests that that the Court grant her motion to strike **Defendants' Renewed Motion for Judgment as a Matter of Law and, in the alternative, for New Trial** (ECF No. 316).

Dated: July 18, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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