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

RACHEL TUDOR, Plaintiff, v. SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA, Defendants.	**Case No. 15-cv-324-C**

DEFENDANTS' REPLY IN FURTHER SUPPORT
OF THEIR RENEWED MOTION FOR JUDGMENT
AS A MATTER OF LAW AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

In response to Defendants' renewed motion for judgment as a matter of law and, in the alternative, for a new trial, Plaintiff again puts forth questionable claims, misrepresentations, and false statements. Here are some of the most egregious examples.

Religion

Plaintiff claims the "Defendants put McMillan's religion into issue." [Doc. 324, p. 17]. This statement is demonstrably false. Not only was Plaintiff undeniably the first to inject religion during trial, despite Plaintiff's bizarre post-hoc denial of this, but Plaintiff and her federal government cohorts were the first to make Dr. McMillan's religious beliefs an issue well before trial, even though there was no evidence to corroborate the accusations.

Let us go back to the beginning. On March 30, 2015, the United States (as Plaintiff) submitted the following language in its Complaint: a "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.'" [Doc. 1, ¶15]. The United States further alleged: "Jane McMillan . . . told Dr. Tudor that Vice President McMillan (who is her brother) considered transgender people to be a 'grave offense to his [religious] sensibilities.'" *Id.* at ¶ 17. Tudor's "Complaint in Intervention," [Doc. 24], made the same type of allegation on May 5, 2015, stating: "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." *Id.* at ¶40. Plaintiff continued the attack on Dr. McMillan's religious beliefs two paragraphs later: "Jane McMillan . . . told Dr. Tudor that Vice President McMillan (who is her brother) considered such people to be a 'grave offense to his [religious] sensibilities.'" *Id*. at ¶42.

Defendants attempted to prevent this line of attack in advance of trial. Specifically, Defendants moved to have testimony and evidence regarding Plaintiff's uncorroborated insinuations about Dr. McMillan's religion excluded [Doc. 195], a motion which the Court granted. [Doc. 224]. But, as described in Defendants' Motion for a New Trial, Plaintiff nevertheless first broached the issue of Dr. McMillan's religious beliefs during Plaintiff's questioning of Plaintiff's own witness, Mindy House:

> Q. Have you ever had conversations with Douglas McMillan, the former vice president of academic affairs at Southeastern, where he shared with you his religious beliefs?

(*Trial Transcript*, Vol.. 3, p. 510, ln. 16-18). Counsel for Defendants immediately objected. The Court overruled the objection, however, and Plaintiff continued:

> Q. Okay. Did you think the conversations you had with Douglas McMillan where religion was brought up were appropriate?
> A. No. It had nothing to do with my employment.
>
> Q. Did Douglas McMillan make an employment decision –
> A. Yeah.
>
> Q. -- on the basis of his religion?
> A. Yes.
>
> Q. Did that make you feel uncomfortable?
> A. Yes.
>
> Q. Did Douglas McMillan frequently bring up his religion at work?
> A. I don't know frequently, but, yes –

Id. at ln. 2-14.

In closing, Plaintiff's counsel zeroed in on Dr. McMillan's faith once again, arguing, "[f]rankly, you'd think that a true man of faith might just come out and confess to doing the obvious. Something was rotten at Southeastern. I guess he's not yet ready to admit it." *Trial Transcript*, Vol. 5, p. 841, ln. 14-17. So, Plaintiff's counsel planted the seeds of religious bigotry in the jury's mind in the opening, let those seeds germinate for the remainder of the trial, and then when it came time for closing arguments reaped the insidious intolerance he had sewn.

Again, it is undeniable—though Plaintiff nevertheless denies it—that Plaintiff put Dr. McMillan's religion at issue in this case, and that Plaintiff raised it first at trial, despite a motion in limine being granted against this. Plaintiff's counsel now

complains that "Defendants' Motion endeavors to paint the undersigned as harboring bigotry for persons of faith, which is patently offensive given his own faith." [Doc. 324, p. 19, fn. 4]. Whether Plaintiff's counsel is offended has no relevance here; nor do his own religious beliefs. What is relevant is that Plaintiff's counsel told the jury that if Dr. McMillan were a "true man of faith" he would admit to being guilty, thereby insinuating that, since he had not admitted guilt, he was not a "true man of faith." Sliming Dr. McMillan in this way is inexcusable in an American court of law—where religious exercise is respected and people, presumed innocent, have no obligation to confess—regardless of counsel's own faith or beliefs. A new trial should be granted.

Waiver Arguments and Expert Testimony

Plaintiff argues that Defendants have waived a number of issues. This contention is without merit. As a reminder, Plaintiff has a habit of making frivolous waiver claims. Recently, Plaintiff argued that Defendants had somehow waived the statutory damages cap under Title VII, [Doc. 290], despite the fact that the Title VII cap was listed by the parties in the joint pretrial report as a "Stipulated Fact." [Doc. No. 207]. The Court rejected this absurdity, stating, "Plaintiff's arguments of waiver are without merit." [Doc. 292, p. 3]. Plaintiff also argued that Defendants had "waived" the use of so-called after-acquired evidence (regarding Plaintiff's non-renewal at Collin College), even though Defendants' use of that evidence was not as 'after-acquired' evidence at all. The Court found this waiver argument to be "without merit" as well. *Id*. at p. 2.

Plaintiff's current assertions of waiver are also without merit. To give just one example, Plaintiff takes issue with Defendants' argument regarding Dr. Parker. Plaintiff claims that Defendants waived their objections to Dr. Parker's testimony. But, it is undisputed that Defendants sought to exclude Dr. Parker's testimony and his report entirely via their Second Motion in Limine (*Daubert*) [Doc. 98]. The Court denied this motion. [Doc. 163]. Plaintiff cites *McEwen v. City of Norman* for the proposition that Defendants' objections to Dr. Parker were waived by insufficient objections voiced during the trial itself. 926 F.2d 1539 (1991). Plaintiff's reliance on *McEwen* is misplaced. In 1993, the Tenth Circuit held that, "an adequately presented motion in limine may preserve an objection if it concerns an issue that can be and is definitely ruled upon in a pretrial hearing." *United States v. Mejia-Alarcon*, 995 F.2d 982, 987–88 (10th Cir. 1993). The *Mejia-Alarcon* case noted that its holding was *not* inconsistent with *McEwen* because the district court in *McEwen* "expressly *reserved* ruling on the plaintiff's motion in limine until trial." *Id*. at 988 (emphasis added).

Here, the district court expressly denied Defendants' motion in limine. The Court's "Memorandum Opinion and Order" of September 9, 2017 [Doc. 163], definitively addressed the issues of whether Dr. Parker could testify at trial and whether his report could be submitted. According to the Court: "Dr. Parker will be permitted to offer expert testimony in this matter," his "testimony will be helpful to the jury," and "Defendants' Second Motion in Limine (Dkt. No. 98) is DENIED." [Doc. 163, pp. 3-4]. Thus, the present matter is directly analogous to *Mejia-Alarcon* and not *McEwen*, and the matter of Dr. Parker was not waived by Defendants.

Handicaps at Trial

Lastly, Plaintiff continues to make numerous misleading statements regarding the procedural hardships foisted on Defendants during trial. Plaintiff baselessly asserts Defendants "fail to mind their duty of candor" with respect to Plaintiff's failure to follow a basic local rule regarding the marking of exhibits and the disadvantage this failure posed on Defendants. Despite Plaintiff's counsel's direct statement to the Court that "this was the first he heard of this problem," Plaintiff was informed multiple times prior to trial, in writing. *Trial Transcript,* Vol. 1, p. 5, ln. 23 – p. 6, ln.12*,* and [Doc. 243-1]. Plaintiff was even admonished by the Court, and restricted from presenting exhibits until Plaintiff's counsel remedied their procedural failure. *Id.* at p. 6, ln.13-21.

Next, Plaintiff misrepresents the hardship caused by Plaintiff's failure to serve trial subpoenas on witnesses in a reasonable time as required by Fed. R. Civ. P. 45. Rather than focus on trial preparation, Defendants' counsel had to field multiple calls from individuals at the University who were requesting assistance in quashing the subpoenas calling for their appearance the next day. Plaintiff's counsel was given the clear statement of the Court that "one day's notice would not be reasonable. For many people, two day's notice is not reasonable." *Trial Transcript,* Vol. 2, p. 201, ln. 13-15. Despite the rule only requiring the movant prove only one element for quashing a subpoena, Defendants' counsel were required (on behalf of the various witnesses subpoenaed by Plaintiff at the proverbial eleventh hour) to show ***both*** unreasonable

time to comply ***and*** that it subjected the person to undue burden. This effectively changed the rule from "or" to "and," resulting in unfair prejudice against Defendants.

Finally, Plaintiff falsely claims that there was merely a "mistaken release of one day of trial transcripts during the pendency of trial." But, in fact, trial for this matter commenced on Monday, November 13 and the release of the transcripts was not discovered by the Court, and Defendants, until Thursday, November 16. That would mean that Plaintiff released three (3) days' transcripts, not just one. Furthermore, it was not a mistake. Daily transcripts were ordered by, and provided to Plaintiff, whereby she or her counsel released them to the media for online publication contemporaneous with trial, much to the Court's concern. *Trial Transcript,* Vol. 3, p. 556, ln. 4 – p. 557, ln. 12.

CONCLUSION

Plaintiff failed to put forth sufficient factual evidence to sustain the jury verdicts here. Most prominently, Plaintiff put on a transgender identity case, which is not encompassed by Title VII under Tenth Circuit precedent, rather than a sex-stereotyping case. As such, Defendants renew their motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.

In the alternative, Defendants move under Rule 59 for a new trial because: (1) Plaintiff's evidence was insufficient and tainted by religious bigotry; (2) Plaintiff's expert should not have been allowed to testify, as was made apparent by his unfounded and subjective trial testimony; (3) even with the Title VII statutory cap applied, Plaintiff's award was wrongly based on emotional distress and otherwise

unsupported by the evidence; and (4) Plaintiff's trial presentation was misleading and unfairly prejudicial. It injected inappropriate religious animus into the jury's deliberations. Plaintiff's unwillingness or inability to follow basic precepts of civil procedure, service of process, and trial conduct handicapped Defendants in the presentation of their defenses at trial. Defendants respectfully ask this Court to grant the motion for judgment notwithstanding the verdict, and in the alternative for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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