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

UNITED STATES OF AMERICA and DR. RACHEL TUDOR,	)	
Plaintiffs,	)	
v.	)	**Case No. CIV-15-324-C**
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff United States brought the present action to enforce Title VII claims against Defendants based on Defendants' actions towards Plaintiff Dr. Tudor, alleging sex discrimination and retaliation in violation of Title VII. Dr. Tudor then filed a Complaint in Intervention adding a claim for hostile work environment. The premise for each Plaintiff's claims are the alleged actions by Defendants directed at Dr. Tudor following her transition from male to female. Specific to the issues relevant to the present Motion, Dr. Tudor alleges that at the time she announced her intent to change gender Defendants began treating her differently, ultimately denying her tenure application. Dr. Tudor's Complaint also offers details of a number of other actions taken by Defendants, all allegedly the result of her change in gender.

Defendants filed a Motion to Dismiss Dr. Tudor's Intervenor Complaint seeking dismissal of Dr. Tudor's hostile environment claim pursuant to either Fed. R. Civ. P. 12(b)(1) or 12(b)(6). Defendants' 12(b)(1) Motion argues the Court lacks subject-matter jurisdiction to hear Dr. Tudor's hostile work environment claim because she failed to exhaust her administrative remedies. The 12(b)(6) Motion argues that Dr. Tudor has failed to state a claim for relief, as the factual allegations in her Complaint are insufficient to state a claim for hostile work environment. Because the 12(b)(1) Motion attacks the Court's power to decide this case, it will be addressed first.

1. Exhaustion

Defendants do not deny that Dr. Tudor filed a charge with the EEOC, they simply argue that the statement provided by Dr. Tudor to the EEOC was insufficient to notify them that she was pursuing a hostile work environment claim. Initially the Court notes that the exhibits upon which Defendants rely to argue Dr. Tudor did not exhaust are not documents prepared by Dr. Tudor, but rather the documents were prepared by the U.S. Department of Education. Thus, they are not helpful in determining the nature of the claims that Dr. Tudor exhausted. Rather, the Court will consider the statements made by Dr. Tudor when filing her complaint with the EEOC.[*]

[*] As Defendants note, the Court may consider these documents in ruling on the exhaustion challenge without converting the present Motion to one seeking summary judgment. See Jenkins v. Educ. Credit Mgmt. Corp., 212 F. App'x 729, 732-33 (10th Cir. 2007).

The Supreme Court has held that Title VII does not specify the form or content of filings, providing only that charges shall be made in writing under oath or affirmation. See E.E.O.C. v. Shell Oil Co., 466 U.S. 54, 67 (1984). The EEOC is responsible for establishing the detailed requirements for inadequate filings. In that regard, the EEOC has established a regulation which provides "a charge is sufficient when the Commission receives from the person making the charge a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of." 29 C.F.R. § 1601.12(b). The Tenth Circuit has held that "'[w]e are required to construe appellants' EEOC charges with utmost liberality since they are made by those unschooled in the technicalities of formal pleading.'" Green v. Donahoe, 760 F.3d 1135, 1142 (10th Cir. 2014) (quoting Lyons v. England, 307 F.3d 1092, 1104 (9th Cir. 2002), cert. denied, ___ U.S. ___, 135 S. Ct. 1892 (2015)). Finally, "[a] plaintiff's claim in federal court is generally limited by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination submitted to the EEOC." MacKenzie v. City and County of Denver, 414 F.3d 1266, 1274 (10th Cir. 2005) (citations omitted).

The Court finds that when measured by these standards, the complaint filed by Dr. Tudor with the EEOC was sufficient to exhaust a hostile environment claim. First, the letter Dr. Tudor sent to the EEOC provides adequate explanation that at least one of the issues on which her claims were based was her transition in gender and Defendants' employees' reaction to that change. The EEOC Charge of Discrimination signed by Dr. Tudor makes clear that employees of Defendants communicated her gender transition to members of the

administration who reacted negatively, and as a result she was subject to different terms and conditions of employment. These statements were sufficient to put Defendants on notice that Dr. Tudor was pursuing a hostile work environment claim, in addition to the other claims pursued in this case. Therefore, Defendants' Motion to Dismiss for failure to exhaust will be denied.

2. Hostile Environment Claim

Defendants challenge whether or not Dr. Tudor has pled facts to support a hostile work environment claim. "The elements of a hostile work environment claim are: (1) the plaintiff is a member of a protected group; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment was based on the protected characteristic . . . ; and (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of the plaintiff's employment and created an abusive working environment." Asebedo v. Kan. State. Univ., 559 F. App'x 668, 670 (10th Cir. 2014) (citing Dick v. Phone Directories Co., 397 F.3d 1256, 1262-63 (10th Cir. 2005)).

Defendants argue Dr. Tudor fails at the first step because she cannot establish she is a member of a protected class. According to Defendants, in Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007), the Tenth Circuit held a transsexual individual is not within a protected class. However, the reasoning relied on by the Tenth Circuit in Etsitty is inapposite here. The Tenth Circuit's holding was that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." Id. at 1222. The Circuit went on to clarify that "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." Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. The Tenth Circuit recognized this distinction in Etsitty at n.2, when it cited to the Sixth Circuit case of Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."). The factual allegations raised by Dr. Tudor bring her claims squarely within the Sixth Circuit's reasoning as adopted by the Tenth Circuit in Etsitty. Consequently, the Court finds that the discrimination occurred because of Dr. Tudor's gender, and she falls within a protected class. The first element is adequately pled.

The remainder of Defendants' challenge to the hostile work environment claim argues that Dr. Tudor has failed to plead sufficient facts to raise her claim above the speculative level. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). Defendants read Dr. Tudor's Complaint too narrowly. When taken as a whole, it is clear that the factual allegations set forth by Dr. Tudor demonstrate that she was subjected to unwelcome harassment based on the protected characteristic and that the harassment by Defendants' employees was sufficiently severe or pervasive to alter a term, condition, or privilege of her employment and thereby create an abusive work environment. Accordingly, the Court finds

that Defendants' Motion to Dismiss for failure to state claim on the hostile work environment claim will be denied.

3. Laches

Finally, Defendants argue that the Complaint should be dismissed based on the doctrine of laches. According to Defendants, much of the conduct of which Dr. Tudor complains occurred as much as four or five years prior to filing her Complaint. Defendants argue that the delay has prejudiced them because of the lapse of time. In order to establish laches, Defendants must demonstrate (a) inexcusable delay in instituting a suit and (b) prejudice or harm to Defendants flowing from that delay. Alexander v. Phillips Petroleum Co., 130 F.2d 593, 605 (10th Cir. 1942).

Defendants' argument fails on both elements. First, as Dr. Tudor establishes in her Response, she began the administrative process shortly after Defendants' allegedly discriminatory actions. That there was some delay in the lawsuit being filed was primarily as a result of the administrative process and the actions of the EEOC in determining whether or not to pursue the claim on behalf of the United States, rather than anything attributable to Dr. Tudor. Dr. Tudor has acted timely in pursuing her administrative remedy and acted timely in filing her Complaint in Intervention once this action was initiated by the United States. In short, Defendants have failed to meet their burden of establishing that the doctrine of laches should apply.

CONCLUSION

For the reasons set forth herein, Defendants Southeastern Oklahoma State University and The Regional University System of Oklahoma's Amended Motion to Dismiss Plaintiff/Intervenor's Complaint in Part (Dkt. No. 30) is DENIED. Defendants Southeastern Oklahoma State University and The Regional University System of Oklahoma's Motion to Dismiss Plaintiff/Intervenor's Complaint in Part (Dkt. No. 27) is STRICKEN as it was inadvertently filed.

IT IS SO ORDERED this 10th day of July, 2015.

ROBIN J. CAUTHRON
United States District Judge

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

UNITED STATES OF AMERICA and DR. RACHEL TUDOR,	)	
Plaintiffs,	)	
v.	)	Case No. CIV-15-324-C
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

Plaintiff United States brought the present action to enforce Title VII claims against Defendants based on Defendants' actions towards Plaintiff Dr. Tudor. Dr. Tudor has filed a Complaint in Intervention adding a claim for hostile work environment. The premise for each of Plaintiffs' claims are the alleged actions by Defendants directed at Dr. Tudor following her transition from male to female.

In preparation for trial, Plaintiffs have retained Dr. Robert Dale Parker, a professor of English at the University of Illinois at Urbana-Champaign, to offer expert testimony related to the tenure process. Defendants argue that Dr. Parker should not be permitted to testify, as his testimony does not meet the standards set out by Fed. R. Evid. 702 for admissible expert testimony. According to Defendants, the question of who should or should not be granted tenure is such a subjective issue that Dr. Parker's testimony could not be considered objectively reliable on the issue.

In preparing his expert report, Dr. Parker examined five Southeastern Oklahoma State University professors based upon whether or not they deserved tenure and then ranked each. Defendants attack this process, arguing that Dr. Parker's evaluation of the other professors was unreasonably subjective and that he lacked the necessary expertise to properly evaluate each of the other professors' works, as he does not have experience in each of the areas on which those professors were writing. Defendants also argue that Dr. Parker's testimony should be excluded because it lacks relevance. Finally, Defendants argue that Dr. Parker's testimony should be excluded because it will not assist the jury and is unfairly prejudicial. According to Defendants, Dr. Parker's testimony improperly relies upon factors which are within the understanding of a lay witness and therefore outside the scope of necessary expert testimony.

In response, Plaintiffs argue that Dr. Parker's testimony cannot properly be reduced to simply professing a subjective belief that Dr. Tudor should have been granted tenure; rather, the direction given was to address whether, in his professional judgment, Dr. Tudor met Southeastern's standards for promotion and tenure based on a comparison between her qualifications and the qualifications of her colleagues. Plaintiffs note that Dr. Parker has an extensive experience reviewing tenure portfolios in the field of English and that he has participated in deliberations for over 100 promotions and has served on multiple appeals committees for promotions at the University of Illinois. As for Defendants' challenge that Dr. Parker's methodology was not sound or reliable, Plaintiffs note that because Dr. Parker's opinion is based upon his experience, the reliability inquiry is different, noting the advisory committee notes to Rule 702 state: "If the witness is relying solely or primarily

on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." According to Plaintiffs, Dr. Parker's report addresses each of those factors and therefore is sufficiently reliable.

Finally, Plaintiffs argue that Dr. Parker's testimony is relevant as it provides a comparative analysis of the qualifications of Dr. Tudor as compared to successful tenure and promotion candidates. Additionally, Plaintiffs argue that Dr. Parker's opinion is directly relevant on determining whether or not Defendants' stated reasons for denying Dr. Tudor tenure were a pretext for discrimination. Specifically, Dr. Parker's report provides evidence that the stated reason for denying Dr. Tudor tenure – that her research and service are not only deficient but the poorest seen in twenty years – was not true. Plaintiffs argue that Dr. Parker's testimony will unquestionably assist the jury as it will provide some explanation and understanding of the tenure process and provide insight into Dr. Tudor's qualifications as they existed within the tenure package.

After the consideration of the arguments raised by the parties, the Court finds that Dr. Parker will be permitted to offer expert testimony in this matter. While he certainly could not offer an opinion on the ultimate issue – that is, did Defendants improperly discriminate against Dr. Tudor – he certainly is qualified to explain to the jury the tenure application process, his consideration of Dr. Tudor's work, and his comparison of that work to other applicants who were offered tenure. This testimony will be helpful to the jury in evaluating the veracity of Defendants' stated reasons for denying Dr. Tudor tenure. The average layperson has no experience or knowledge of how the tenure process works, what

methodology is used to evaluate their qualifications or scholarship. Thus, Dr. Parker's opinion will provide at least some relevant insight on these issues. To the extent Defendants raise challenges to the procedure used by Dr. Parker or challenge his methodology, those arguments are matters to be addressed through proper cross-examination rather than serve as a basis for striking Dr. Parker's testimony completely.

Finally, to the extent Defendants argue that Goswami v. DePaul University, 8 F. Supp. 3d 1019 (N.D. Ill. 2014), resolves the issue, the Court agrees with Plaintiffs that that case is distinguishable. At a minimum at this stage where a motion for summary judgment may still be filed questions of pretext are still relevant to this case. Certainly, Dr. Parker's testimony will provide some relevant evidence on that issue. Therefore, the Goswami opinion is not dispositive of the matter.

For the reasons set forth herein, Defendants' Second Motion in Limine (Dkt. No. 98) is DENIED. Dr. Parker will be permitted to testify in this matter, subject to the limitations noted herein.

IT IS SO ORDERED this 6th day of September, 2017.

ROBIN J. CAUTHRON
United States District Judge

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

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

MEMORANDUM OPINION AND ORDER

Plaintiff[1] was employed as a professor at Southeastern Oklahoma State University. She advised Defendants that she was transitioning from a male to a female. Plaintiff alleges that following this announcement she began suffering significant discrimination and harassment. The alleged discrimination culminated in denial of her application for tenure and dismissal from the University. Defendants have filed a Motion for Summary Judgment arguing the undisputed material facts and law entitle them to judgment on each of Plaintiff's claims. Plaintiff objects to Defendants' Motion and argues there are questions of material fact remaining in this matter.

STANDARD OF REVIEW

Summary judgment is appropriate if the pleadings and affidavits show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

[1] Although Plaintiff is an Intervenor, the original Plaintiff has been dismissed. For simplicity, in this Order Ms. Tudor will be referred to as Plaintiff.

matter of law. Fed. R. Civ. P. 56(c). "[A] motion for summary judgment should be granted only when the moving party has established the absence of any genuine issue as to a material fact." Mustang Fuel Corp. v. Youngstown Sheet & Tube Co., 561 F.2d 202, 204 (10th Cir. 1977). The movant bears the initial burden of demonstrating the absence of material fact requiring judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). A fact is material if it is essential to the proper disposition of the claim. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). If the movant carries this initial burden, the nonmovant must then set forth "specific facts" outside the pleadings and admissible into evidence which would convince a rational trier of fact to find for the nonmovant. Fed. R. Civ. P. 56(e). These specific facts may be shown "by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves." Celotex, 477 U.S. at 324. Such evidentiary materials include affidavits, deposition transcripts, or specific exhibits. Thomas v. Wichita Coca-Cola Bottling Co., 968 F.2d 1022, 1024 (10th Cir. 1992). "The burden is not an onerous one for the nonmoving party in each case, but does not at any point shift from the nonmovant to the district court." Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998). All facts and reasonable inferences therefrom are construed in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

1. Hostile Environment

Defendants first challenge Plaintiff's ability to establish a prima facie case of hostile environment. According to Defendants, when examining Plaintiff's evidence there are an insufficient number of instances where she faced any actions which could be construed as

hostile. Thus, Defendants argue, Plaintiff has failed to demonstrate a work environment permeated with intimidation and ridicule. See Morris v. City of Colo. Springs, 666 F.3d 654, 656-69 (10th Cir. 2012) (gathering cases which hold that isolated incidents or sporadic offensive behavior as opposed to a steady barrage of opprobrious harassment, is not enough to make out a hostile work environment claim, unless those few events amount to such extreme behavior as physical or sexual assault). In response, Plaintiff argues that she suffered more than a handful of sporadic insults, incidents, or comments. Rather, she argues that every day over the course of a four-year period she had restrictions on which restrooms she could use, restrictions on how she could dress, what makeup she could wear. She also was subjected to hostilities from administrators targeting her gender, such as using an improper pronoun to refer to her and other gender-based hostilities.[2] Although Plaintiff's proof is not well organized or her facts well presented, she has offered sufficient evidence from which a reasonable jury could find that her work place was filled with a sufficient amount of offensive or insulting conduct that it was sufficiently severe or pervasive. See Lounds v. Lincare, Inc., 812 F.3d 1208, 1228 (10th Cir. 2015).

Defendants next argue that even if the Court finds a hostile environment existed, Plaintiff's claims should fail as she failed to take advantage of the preventive and corrective opportunities that were available to her. See Faragher v. City of Boca Raton, 524 U.S. 775, 118 S. Ct. 2275, 2283 (1998), and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 118 S.

[2] Plaintiff also argues about the benefits permitted under her health plan. However, as Defendants note, Plaintiff has not exhausted her administrative remedies regarding these issues and therefore that portion of her claim will not be considered.

Ct. 2257, 2270 (1998). Defendants argue that while employed at Southeastern Oklahoma State University ("SEOSU") Plaintiff never submitted a complaint or grievance regarding the allegedly harassing events. Plaintiff argues Defendants have failed to demonstrate that the policies in existence at the time she suffered harassment were sufficient or could redress the hostilities she alleged. See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72-73 (1986), and Debord v. Mercy Health Sys. of Kan., Inc., 737 F.3d 642, 653 (10th Cir. 2013). According to Plaintiff, at the time of her employment, Defendants did not have any policy addressing transgender discrimination or the type of hostility that she endured as a result of her status as a transgender person. Indeed, the evidence provided by Plaintiff demonstrates that, at the time Plaintiff was subjected to the alleged harassment, the policies in existence at SEOSU did not address transgender persons. Whether or not Plaintiff should have understood that the sexual harassment or sex discrimination policies could have reached her claims and therefore should have been required to file a report is immaterial, as the cases cited by Plaintiff require a more specific policy before a defendant is entitled to the Faragher/Ellerth defense.

2. Discrimination

Defendants next challenge Plaintiff's ability to establish a Title VII claim of discrimination. According to Defendants, Plaintiff is not subject to protection under Title VII because her status as a transgender person is not a protected class, relying on Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1215, 1220 (10th Cir. 2017). The Court has previously resolved Defendants' arguments related to the Etsitty case, see Dkt. No. 34. Defendants offer nothing in the present Motion to warrant changing that determination.

Defendants next argue that Plaintiff fails to demonstrate that she was treated less favorably than similarly situated employees outside of her protected class, again relying on Plaintiff's status as a transgender person, that is, that she was neither male nor female. Defendants offer no legal authority to support their claim other than the apparent further reliance on the Etsitty case. Accordingly, this argument, too, is foreclosed by the Court's prior decision.

Defendants argue that Plaintiff fails to meet a prima facie case because she cannot demonstrate the job was filled by someone outside the protected class. Defendants misstate the applicable law. The Supreme Court has specifically held that age-discrimination plaintiffs need not show disparate treatment as compared to co-workers outside the protected class. See O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 311-12 (1996). Although O'Connor dealt with age discrimination, in Perry v. Woodward, 199 F.3d 1126, 1135-40 (10th Cir. 1999), the Tenth Circuit extended the same basic point to other forms of alleged discrimination. Plaintiff has established a prima facie case.

Defendants argue that even if Plaintiff meets her prima facie case, her claims still fail, as she cannot overcome the legitimate non-discriminatory reason they have offered for her termination; that is, Plaintiff cannot demonstrate pretext. Defendants argue that their decision to deny Plaintiff tenure was a subjective matter based upon decisions made at the administrative level and that the Court should grant deference to the administration's decisions on this issue. As Defendants note, it is not necessary that the reasons for their decision were correct, only that they believed them to be correct. Tran v. Trustees of State Colls. in Colo., 355 F.3d 1263, 1268–69 (10th Cir. 2004). In response, Plaintiff argues that

she can demonstrate pretext because she has offered evidence which suggests substantial procedural irregularities in the decision to deny her tenure. For example, she notes one of the decisionmakers on her tenure initially refused to give her any reason for the denial. Later, that same person planted a backdated letter in her portfolio spelling out some rationales for the denial. A second decisionmaker, McMillan, refused to provide his reasons for denial and persisted even after the faculty advisor committee ordered him to disclose them. Finally, after the president's denial he directed McMillan to write the letter giving the president's reason for the denial of tenure. Plaintiff argues that each of these actions demonstrate some weakness or implausibility in Defendants' assertion that her tenure submission was clearly insufficient. Plaintiff further directs the Court to Dr. Parker's expert report demonstrating in some detail that Defendants' evaluations of Plaintiff's scholarship and service did not match the articulated criteria for tenure and promotion evaluation.

After consideration, the Court finds that Plaintiff has offered at least some evidence demonstrating that Defendants' reasons for denying her tenure were pretextual. That is, Plaintiff's evidence demonstrates some weakness, implausibility, inconsistency, or incoherencies in Defendants' proffered reason. Jones v. Barnhart, 349 F.3d 1260, 1266 (10th Cir. 2003).

3. Retaliation

Finally, Defendants argue that Plaintiff cannot go forward with her retaliation claim, as she cannot establish a prima facie case. Defendants again revisit their argument that Plaintiff is not entitled to protected status. That argument warrants no further discussion.

Defendants next argue that Plaintiff only made one factual allegation in her Complaint in support of her retaliation claim, namely, that she was denied the opportunity to reapply for tenure during the 2010-11 academic year. Defendants argue that any repeated application would have been contrary to administrative practice, as any portfolio not withdrawn prior to denial by the president was never considered for reapplication. In response, Plaintiff notes that she engaged in additional protected activities. For example, she filed an internal grievance and sent a letter to the U.S. Department of Education, complaining of discrimination hostilities she suffered during the 2009-10 tenure cycle. The Court finds that Plaintiff has come forward with sufficient facts from which a reasonable jury could find she was subject to retaliation by Defendants.

CONCLUSION

For the reasons set forth herein, Defendants' Motion for Summary Judgment (Dkt. No. 177) is DENIED.

IT IS SO ORDERED this 26th day of October, 2017.

ROBIN J. CAUTHRON
United States District Judge

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

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

ORDER

This Order will memorialize the Court's oral rulings from the docket call in this matter:

Defendants' Motion in Limine:

I. Seeking to preclude hearsay remarks attributed to Dr. Douglas McMillan is granted. However, Plaintiff may seek reconsideration at the appropriate time;

II. Seeking to preclude evidence related to the settlement between Plaintiff United States and Defendants is granted;

III. Seeking to preclude evidence related to health insurance options made available to employees of Defendants is granted;

IV. Seeking to preclude evidence related to the work status of certain former employees of Defendants is held in abeyance pending providing appropriate context at trial;

V. Seeking to preclude any "for the community" or similar arguments is granted to the extent that all parties are directed to focus their remarks on the issues and parties in this case. The Court will entertain specific objections at the appropriate time;

VI. Seeking to preclude evidence related to Defendant's imposition of certain dress codes is denied;

VII. Seeking to limit expert witness testimony to matters contained in their report is granted. No expert will be permitted to testify to matters not contained in their reports;

VIII. Seeking to preclude certain testimony from Dr. Brown is moot as the Court has found Dr. Brown's proposed testimony lacks relevance to the issues remaining for trial;

IX. Seeking to prevent experts from opining on the law is granted. No witness will be permitted to offer testimony on issues of law.

Plaintiff's Motions in Limine: Plaintiff seeks to prevent Defendants from offering into evidence her personnel file from her employment at Collin College and the testimony of Holly Newell and Dr. Don Weasenforth. Because Plaintiff intends to seek damages beyond the start of her employment with Collin College, this evidence is relevant on the issue of mitigation of damages and her Motions will be denied. In the event Plaintiff agrees to limit her damage request to the date she started employment at Collin College, the challenged evidence lacks relevance and will be excluded.

Defendants' Daubert Motion seeking to preclude Dr. George R. Brown's testimony is granted as Plaintiff agrees that Dr. Brown's testimony is no longer relevant. This issue may be revisited upon appropriate request by Plaintiff.

Plaintiff's Motion to Unseal is granted subject to the following provisions: Any document needed at trial is no longer subject to any protective order or sealing order and may be used if consistent with the other orders of the Court. To the extent Defendants wish to be heard further on the matter, their Response remains due November 3, 2017.

Defendants' Motion to Strike Plaintiff's Deposition Designations is granted, as the witnesses will be presented live. In the event these circumstances change, Plaintiff may refile the designation. Defendants shall then note objections and the deposition will be provided to the Court far enough in advance of the presentation of the testimony to permit the Court to rule on the objections. Any witness not listed on the Pretrial Report will not be permitted to testify.

As set forth more fully herein, Defendants' Motion in Limine (Dkt. No. 195) is GRANTED in part and DENIED in part; Plaintiff's Motion in Limine to Exclude Dr. Rachel Tudor's Personnel File from Collin College (Dkt. No. 189) is DENIED; Plaintiff's Motion in Limine to Exclude Defendants' Witness Holly Newell (Dkt. No. 190) is DENIED; Plaintiff's Motion in Limine to Exclude Defendants' Witness Dr. Don Weasenforth (Dkt. No. 191) is DENIED; Defendants' Motion to Exclude Dr. George R. Brown (Dkt. No. 211) is GRANTED; Plaintiff's Motion to Unseal Documents (Dkt. No. 220) is GRANTED; and Defendants' Motion to Strike Plaintiff's Deposition Designations (Dkt. No. 222) is GRANTED.

IT IS SO ORDERED this 2nd day of November, 2017.

ROBIN J. CAUTHRON
United States District Judge

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

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

MEMORANDUM OPINION AND ORDER

Plaintiff brought the present action asserting that Defendants violated Title VII during the course of her employment as an associate professor at Southeastern Oklahoma State University ("Southeastern"). The matter was tried to a jury, which found in favor of Plaintiff. Plaintiff filed a post-trial motion requesting reinstatement. The Court denied that request, finding that the relationship between the parties was so fractured as to make reinstatement infeasible. Plaintiff then requested the Court to award front pay damages. The Court agreed an award of front pay was appropriate and calculated an appropriate amount. The Court then directed the parties to address any alteration that should be made to the jury's determination of damages prior to entry of judgment. In response to that Order, Plaintiff has filed a Motion to Reconsider the calculation of front pay. Defendants have filed a Motion requesting the Court to apply the statutory cap on damages, found at 42 U.S.C. § 1981a, to the jury's verdict. With these filings, the time has come to finalize the matters in this case and enter judgment.

Initially, the Court will address the issues raised by Plaintiff in her request for reconsideration. Plaintiff argues the Court improperly calculated front pay by awarding lost wages for the period between the end of her employment with Defendant and the start of her employment with Collin College. Perhaps the Court's language was not as clear as it could have been. But the Court is aware that front pay is an award for future damages, not compensation for the period between the end of employment and the trial. However, as the Court noted in its Order, the 4th and 5th factors outlined by the Tenth Circuit in Whittington v. Nordam Group, Inc., 429 F.3d 986, 1002, 1001 (10th Cir. 2005), are determinative in this case. Those factors direct the Court to consider the reasonable availability of other work opportunities and the period within which the Plaintiff may become re-employed with reasonable efforts. The Court's determination was that Plaintiff's subsequent employment at Collin College provided a clear factual basis to answer those two questions. Thus, a 14-month time period of front pay represented a reasonable period to make Plaintiff whole. See Carter v. Sedgewick County, Kan., 929 F.2d 1501, 1505 (10th Cir. 1991). Contrary to Plaintiff's current arguments, the Court relied on her subsequent employment at Collin College solely to provide a bright line point at which the Court finds the effects of Defendant's discriminatory acts ended. Because those effects ended at that point, any future economic loss was the result of something other than Defendants' wrongful conduct. For these reasons, Plaintiff's arguments regarding the purported inconsistency of the use of the Collin College information and the decision that Defendants could not rely on after-acquired evidence is without merit.

Plaintiff also argues that the Court miscalculated the amount of damages that should have been awarded. According to Plaintiff, the amount listed on Dkt. No. 279, Ex. 8 reflected only a partial year salary. However, Plaintiff's affidavit stated: "During the last year of my employment at Southeastern, I was paid approximately $51,279 in salary." (Dkt. No. 279, Ex. 3, ¶ 6.) The Court elected to use the slightly higher salary listed on Ex. 8 given Plaintiff's use of the term "approximately." Thus, the evidence presented to the Court does not support Plaintiff's current argument.

Finally, Plaintiff misstates the Court's determination regarding Plaintiff's qualification to teach. The Court found that reinstating Plaintiff at Southeastern was not feasible because of ongoing hostility between the parties. One example of that ongoing hostility was evidenced by Defendants' argument that Plaintiff was not qualified to be a tenured professor. The Court's decision on that issue was limited to recognizing that placing Plaintiff back into that environment would likely foster future conflict between the parties and that fact supported the Court's determination that reinstatement was not feasible. The Court's rulings are not irreconcilable.

For the reasons outlined herein, Plaintiff's request for reconsideration will be denied.

Defendants request the jury award be capped at $300,000 pursuant to 42 U.S.C. § 1981a. Plaintiff raises several arguments, none of which merit much discussion. First, it is clear from not only Defendants' filings in this matter but the statements of Plaintiff's counsel that there was no question about Defendants' intent to raise the statutory cap. Thus, Plaintiff's arguments of waiver are without merit. As for Plaintiff's argument related to

the general nature of the verdict form, the Court finds that position disingenuous. Plaintiff also agreed to the form of verdict as it was submitted to the jury. Thus, those grounds raised by Plaintiff to not apply the cap are rejected by the Court.

The parties agree that the cap applies to compensatory damages but not to back pay. Defendants argue the jury could not have intended its verdict to include back pay damages because there was no evidence to support such an award. Alternatively, Defendants argue that in the event some back pay is awarded it must be limited to the period between the end of Plaintiff's employment with Defendant and the start of her employment at Collin College. Defendants assert that if the Court determines a back pay award is warranted, the amount is properly reflected by the Court's previous calculation of wages lost during this period.

Plaintiff argues any application of the cap will result in a Seventh Amendment violation because the jury rendered a general verdict. On this point, Plaintiff is mistaken. Statutory damage caps do not violate the Seventh Amendment as they are not a reexamination of the verdict but implementation of legislative policy about the amount of damages that should be recoverable. Estate of Sisk v. Manzanares, 270 F.Supp. 2d 1265, 1278 (D. Kan. 2003) (gathering cases at note 45). Here, the evidence before the jury related to damages that are not subject to the statutory cap was very limited. At most, the jury could have awarded some measure of back pay damages. The remaining evidence presented on the issue of damages sought recovery for items subject to the cap. While the Court is not persuaded that the jury had sufficient evidence from which to award back pay damages, that doubt is not sufficient to set aside the verdict on that issue. Accordingly, the

Court will award Plaintiff $60,040.77 in back pay, apply the cap to the remainder of the verdict, resulting in an award of $360,040.77. Defendants' arguments for further reduction are rejected, as they lack sufficient evidentiary or legal support.

For the reasons set forth more fully herein, Plaintiff Dr. Rachel Tudor's Motion Seeking Reconsideration of Front Pay (Dkt. No. 288) is DENIED. Defendants' request for application of the 42 U.S.C. § 1981a cap is granted. Plaintiff is awarded $360,040.77 in back pay and compensatory damages and $60,040.77 in front pay. A separate Judgment will issue.

IT IS SO ORDERED this 6th day of June, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

JUDGMENT

Upon consideration of the Jury's Verdict, and the Court's subsequent Orders,

IT IS ORDERED, ADJUDGED, AND DECREED that Judgment be entered in favor of Plaintiff and against Defendants in the amount of $360,040.77 in back pay and compensatory damages, and $60,040.77 in front pay damages.

DATED this 6th day of June, 2018.

ROBIN J. CAUTHRON
United States District Judge

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

for the

Western District of Oklahoma

Dr. Rachel Tudor	)	
	)	
v.	)	Case No.: 5:15-cv-324
Southeastern Oklahoma State University and Regional University System of Oklahoma	)	

BILL OF COSTS

Judgment having been entered in the above entitled action on 06/06/2018 (*Date*) against Defendants ,

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$
Fees for service of summons and subpoena	1,807.40
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	8,757.00
Fees and disbursements for printing	3,673.62
Fees for witnesses *(itemize on page two)*	1,183.74
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case.	0.00
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs *(please itemize)*	633.33
TOTAL	$ 16,055.09

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

❒ Electronic service ❒ First class mail, postage prepaid

❒ Other:

s/ Attorney: Ezra Young

Name of Attorney: Ezra Young

For: Dr. Rachel Tudor (*Name of Claiming Party*) Date: 06/20/2018

Taxation of Costs

Costs are taxed in the amount of _____ and included in the judgment.

Carmelita Reeder Shinn (*Clerk of Court*) By: _____ (*Deputy Clerk*) 6/6/2018 (*Date*)

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME , CITY AND STATE OF RESIDENCE	ATTENDANCE Days	ATTENDANCE Total Cost	SUBSISTENCE Days	SUBSISTENCE Total Cost	MILEAGE Miles	MILEAGE Total Cost	Total Cost Each Witness
Dr. Charles Weiner, Durant, OK	1	40.00	1	40	294	157.29	$197.29
Dr. James Knapp, Durant, OK	1	40.00	1	40	294	157.29	$197.29
Dr. Mark Spencer, Durant, OK	1	40.00	1	40	294	157.29	$197.29
Dr. Meg Cotter-Lynch, Durant, OK	1	40.00	1	40	294	157.29	$197.29
Ms. Mindy House, Durant, OK	1	40.00	1	40	294	157.29	$197.29
Dr. John Mischo, Durant, OK	1	40.00	1	40	294	157.29	$197.29
					TOTAL		$1,183.74

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28, which reads in part as follows:
"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:
RULE 54(d)(1)

Costs Other than Attorneys' Fees.

Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 day's notice. On motion served within the next 7 days, the court may review the clerk's action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Print Save As... Reset

EXHIBIT 1

ADDENDUM TO DR. TUDOR'S BILL OF COSTS

Dr. Tudor subpoenaed more witnesses for trial than there are spaces on form A0 133. She thus noted that there was an additional cost of $633.33 on that form and submits this addendum in support thereof.

Name, City, and State of Residence	Attendance	Subsistence	Millage	Total
Dr. Dan Althoff (Durant, OK)	1 day ($40)	NA	294 ($157.29)	$197.29
Dr. Randy Prus (Durant, OK)	1 day ($40)	NA	294 ($157.29)	$197.29
Dr. William Fridley (Durant, OK)	1 day ($40)	NA	294 ($157.29)	$197.29
Judge Richard Ogden (OKC, OK)	1 day ($40)	NA	3 ($1.61)	$41.61

Total: $633.33

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

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

AFFIDAVIT OF EZRA YOUNG, ESQ.
IN SUPPORT OF MOTION FOR TAXING OF COSTS

I hereby swear or affirm that:

1. I am an attorney for Plaintiff Dr. Rachel Tudor in this matter and have personal knowledge of the facts states in this affidavit.
2. Dr. Tudor requests as taxable costs $16,055.09. The amount of costs is calculated as follows:

Deposition Transcripts ($615.15)	
Chris Roessler Dep. (8/23/17)	$149.80
Austin Harmon Dep. (8/23/17)	$266.80
Charles Babb Dep. (8/24/17)	$198.55
Printing of Documents ($3,673.62)	
Binders, marked dividers, and printing of copies of deposition exhibits.	$155.66

Binding Tudor motion and exhibits in response in opposition to SJ (10/14/17)	$53.49
Printing of Joint Pretrial Report	$33.41
Printing of trial exhibits and marked dividers and 1 set of binders for Defendants' courtesy copies	$2,784.84
Additional binders for Tudor trial exhibits and Court's courtesy copies of the same	$370.23
Custom self-inking stamps with case number (Defendants demanded courtesy copies be reprinted or individually stamped with case number)	$68.12
Printing of Tudor motion for reinstatement and supporting exhibits (12/12/17)	$61.83
Printing of Tudor reply to opposition to reinstatement and supporting exhibits (1/2/18)	$75.79
Printing of Tudor front pay and reinstatement brief and exhibits (2/28/18)	$70.25
Court Transcripts ($8,141.85)	
Docket call hearing (11/1/17)	$121.00
Voir Dire (11/8/17)	$186.15
Trial (11/13/17–11/20/17)	$7,834.70
Service of Subpoenas ($1,807.40)	
Printing of Subpoenas by process server	$10.50
Attempted service of trial subpoena to Dr. Charles Weiner	$139.99
Service of trial subpoena to Dr. Dan Althoff	$139.99
Service of trial subpoena to Ms. Mindy House	$139.99
Service of trial subpoena to Judge Richard Ogden	$139.99
Service of trial subpoena to Dr. James Knapp	$89.99
Service of trial subpoena to Dr. Mark Spencer	$89.99
Service of trial subpoena to Dr. Meg Cotter-Lynch	$89.99
Service of trial subpoena to Dr. John Mischo	$89.99
Service of trial subpoena to Dr. Randy Prus	$89.99
Service of trial subpoena to Dr. William Fridley	$89.99
Re-attempted service of trial subpoena to Dr. Charles Weiner (2 addresses)	$499.00
Skip tracing on Dr. Charles Weiner and partner to identify proper address for service	$198.00
Statutory Witness Fees ($1,817.07)	
Dr. Charles Weiner	$197.29
Dr. Dan Althoff	$197.29
Dr. James Knapp	$197.29
Dr. Mark Spencer	$197.29
Dr. Meg Cotter-Lynch	$197.29
Ms. Mindy House	$197.29

Dr. John Mischo	$197.29
Dr. Randy Prus	$197.29
Dr. William Fridley	$197.29
Judge Richard Ogden	$41.46

Total: $16,055.09

3. **Additional information.**

a. **Deposition transcripts necessary.** Transcripts of the depositions of Mr. Chris Roessler and Mr. Austin Harman were necessary in this case. Both Roessler and Harman were 30(b)(6) designees of Defendants and testified under oath at deposition to critical matters related to key evidence in this case, including authentication of an April 2010 email between high-level administrators at Southeastern which served as a key piece of evidence in Tudor's defense against Defendants' motion for summary judgment and at trial. Though Dr. Tudor's counsel did not ask questions of either Roessler or Harman directly at deposition, Mr. Young did attend those depositions and coordinated efforts and questions with counsel for the Department of Justice so as to make those depositions efficient. Similarly, deposition transcripts from the re-deposition of Mr. Charles Babb was also necessary to the prosecution of this matter. Mr. Babb's deposition served as one piece of evidence in Tudor's opposition to summary judgment and information garnered from that deposition meaningfully informed Tudor's counsel's strategy at trial. If Defendants had called Babb as a witness at trial (he was named as a witness and

Defendants represented that they might call him as a witness), the deposition transcript would have potentially been used to impeach him.

b. ***Printing.*** Printing of documents for use in depositions, to prepare courtesy copies of lengthy filings for the Court, and of trial exhibits was necessary to the prosecution of this case. As to documents for use in depositions conducted in August 2017—Tudor's counsel was forced to reprint all exhibits previously entered as exhibits at other depositions because TLDEF did not immediately transfer all hard copy client files, including the deposition binders, to Mr. Young upon change in representation and, after reasonable attempts were made to secure documents from TLDEF proved fruitless, the deposition exhibits had to be reprinted and placed in larger binders. Printing of lengthy court courtesy copies was also necessary to the prosecution of this case as providing such documents to the court is required by the local rules. Finally, printing of courtesy copies of trial exhibits and copies of exhibits Tudor's counsel used at trial was absolutely necessary to the prosecution of this case. Because Defendants declined to withdraw unviable defenses and would not apprise Tudor's counsel of witnesses they actually planned to call at trial in advance, Tudor was forced to print thousands of pages of exhibits, many hundreds of pages of which were not actually used but which would have been used if Defendants had called witnesses disclosed in the Joint Pretrial Report. Tudor's counsel attempted to

defray costs by requesting Defendants accept electronic copies of exhibits in lieu of printed copies—but Defendants demanded printed copies. Additionally, after Tudor's counsel had already paid for and exhibits were professionally printed (due to the high volume of pages traditional in-house printing was impossible) and delivered to Defendants, Defendants demanded that Tudor's counsel provide them with another set of exhibits wherein each page was marked with the case number. Even though Tudor's counsel explained to Defendants that a printer error occurred and that was the cause of the missing case number, Defendants demanded they be provided with a totally new set of exhibits marked with the case number. Indeed, Defendants represented to Tudor's counsel that if they were not provided with new exhibits they would stonewall any attempts to admit Tudor's exhibits at trial. Because rush reprinting of a new set of exhibits would be costly, Tudor's counsel purchased custom stamps with the case number on it and hand stamped each and every page of a backup set of exhibits acquired by Tudor's trial team in case of an emergency, placed those new exhibits in binders, and provided that new set of exhibits to Defendants. The cost for the custom stamp was thus both forced by Defendants and necessary to the prosecution of this case.

c. ***Court transcripts.*** Transcripts of the docket call hearing (11/1/17), voir dire (11/8/17), and trial (11/13/17–11/20/17) were also necessarily

obtained in this case and ultimately utilized by both counsel and the Court. As to the 11/1/17 hearing, critical motions were decided at that hearing and Tudor's counsel relied upon that transcript and other instructions regarding trial to prepare for the same. As to voir dire, the that transcript substantially aided Tudor's counsel in preparation for trial insofar as jurors actual responses to substantive questions that lent insights to their familiarity with key issues and concepts in the case and helped guide counsel prepare opening and closing statements, fine-tune direct and cross examinations of key witnesses. As to the trial transcripts, they were absolutely necessary and actually relied upon by both the Court and counsel for all parties. For example, during the course of trial Tudor's counsel relied upon the transcripts to ensure that appropriate evidence supporting Tudor's claims had been introduced, witnesses actually hit their target issues, and otherwise assisted counsel's analysis and adjustment of strategy as issues surfaced at trial. Post-trial, the trial transcripts were also utilized in post-trial motions related to reinstatement and front pay.

d. ***Service of subpoenas, witness fees, and millage.*** Tudor arranged for service of trial subpoenas on 10 witnesses, 6 of whom testified in Tudor's case in chief and 1 of whom testified as a rebuttal witness at trial. All witnesses whom testified at trial were absolutely necessary to the successful prosecution of Tudor's case. Because those witnesses were

entitled to service of a subpoena, witness fees, and millage those costs were necessarily incurred. As to Dan Althoff and William Fridley, both of whom appeared at Court but did not ultimately testify—Althoff and Fridley were subpoenaed as potential rebuttal witnesses in this case. Because Defendants refused to disclose the witnesses they would actually call at trial, Tudor's counsel were forced to identify rebuttal witnesses that could testify to myriad issues blindly—Althoff and Fridley fit that need. Though Althoff and Fridley appeared in the courthouse on the designated days, Defendants actual choice of witnesses at trial that day did not necessitate their testimony. However, because it was probable that Althoff and/or Fridley would be needed, costs incurred in securing their attendance were necessary. As to Judge Ogden, whom also did not appear at trial—the costs incurred with subpoenaing him were absolutely necessary and the fact that he could not attend trial due to an apparent scheduling issue was not known to Tudor's counsel prior to Defendants' counsel's revelation of the same mid-trial. Indeed, on a call between the undersigned and Defendants' counsel on October 31, 2017, Defendants counsel had advised that all witnesses named in the Joint Pretrial Report (on which Judge Ogden was named) were, to their knowledge, available to testify at trial. Though Judge Ogden was ultimately unable to testify, proper service

and statutory fees paid to him were necessary to the ultimate prosecution of this case.

4. The costs included in the Bill of Costs are allowed by law, are correctly stated, and were necessarily incurred in the case and the services for which fees have been charged were actually and necessarily performed.

5. I make this Affidavit in support of Tudor's Motion for Taxing of Costs.

Ezra Young, Esq.

SUBSCRIBED AND SWORN TO before me this 20th day of June, 2018.

Notary

NADIL R. RAMUSEVIC
Notary Public, State of New York
No. 01RA6019423
Qualified in Queens County
Commission Expires March 22, 2019

My Commission Expires: March 22nd, 2019

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
BRIEF IN SUPPORT OF
BILL OF COSTS

Pursuant Fed. R. Civ. P. 54 and to Local Rule 54.1, Dr. Tudor files the foregoing brief in support of her Bill of Costs. In support, Tudor states the following:

I. INTRODUCTION

This is a case brought by Tudor pursuant to Title VII of the Civil Rights Acts of 1964 to redress employment discrimination and retaliation she endured at the hands of her former employers, Southeastern Oklahoma State University ("Southeastern") and the Regional University System of Oklahoma

("RUSO"). Tudor prevailed at trial and, after the resolution of other post-trial motions, judgment was entered for Dr. Tudor's by the Court on June 6, 2018 (ECF No. 293).

II. ARGUMENT AND AUTHORITIES

A. As Prevailing Party, Tudor is Entitled to Recover Her Costs

Through June 20, 2018, Tudor incurred taxable costs in the amount of $16,055.09 prosecuting her case against Defendants. (*See* Bill of Costs filed concurrently herewith.) Tudor is the prevailing party in this action and therefore is entitled to have her costs paid by Defendants. Federal Rule of Civil Procedure 54(d)(1) states:

> Except when express provision therefor is made either in statute of the United States or in these rules, costs other than attorneys fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . . Such costs may be taxed by the clerk on one day's notice.

Rule 54 thus "creates a presumption that the district court will award costs to the prevailing party." *Zeran v. Diamond Broadcasting, Inc.*, 203 F.3d 714, 722 (10th Cir. 2000). Further, Local Rule 54.1 states:

> A prevailing party who seeks to recover costs against an unsuccessful party pursuant to 28 U.S.C. § 1920 shall file a bill of costs on the form provided by the Clerk and support the same with a brief.

Because the Court entered judgment in Tudor's favor (ECF No. 293), she should be considered the prevailing party for the purposes of taxing costs.

Additionally, Tudor is deemed the prevailing party in this matter because she prevailed at a jury trial on three of her four claims, and the only claim on which she did not prevail was a hostile work environment claim with particulars substantially subsumed within successful claims and the overall "results obtained are excellent." *Roberts v. Roadway Exp., Inc.*, 149 F.3d 1098, 1111 (10th Cir. 1998) (*citing Ramos v. Lamm*, 713 F.2d 546, 556 (10th Cir. 1983)).

B. COSTS SOUGHT BY TUDOR ARE PROPERLY TAXABLE

The types of costs that may be recovered as taxable costs by the prevailing party are set forth in 28 U.S.C. § 1920. Those costs include: (1) fees for a court reporter for all or any part of the stenographic transcript necessarily obtained for the use in the case; (2) fees and disbursements for printing; (3) fees for witnesses; (4) fees for exemplification and copies of papers necessarily obtained for use in the case; (5) docket fees under 28 U.S.C. § 1923. As such, Tudor requests costs for the following items:

Deposition transcripts: Tudor seeks to recover costs of $615.15 for transcripts of depositions taken of Mr. Chris Roessler on August 23, 2017, Mr. Austin Harman on August 23, 2017, and of Mr. Charles Babb on August 24, 2017. The costs of the transcripts of those depositions and necessity of which are attested to in a declaration of counsel, attached hereto (Exhibit 2 ¶ 2).

In *Ramos v. Lamb*, 713 F.2d 546 (10th Cir. 1983), the Tenth Circuit held that the costs of taking and transcribing depositions are set within the scope

of 28 U.S.C. § 1920 where the depositions are reasonably necessary for the litigation. Depositions of Roessler, Harmon, and Babb were critical to the prosecution of this case. Roessler and Harmon were 30(b)(6) designees of Defendants, and testified to key facts and issues pertinent to the authentication of emails and other issues which were key to defending against Defendants' motion for summary judgment and documents that were key exhibits at trial (Exhibit 2 ¶ 3(a)). The re-deposition of Charles Babb, ordered by this Court,[1] was also necessary to gather critical information and authenticate key documents relied upon in later stages of these proceedings (Exhibit 2 ¶ 3(a)).

Printing: Tudor also seeks to recover in this case the amount of $3,673.62 for printing costs necessarily obtained. Exhibit 2 ¶ 2 lists printing costs for which Tudor seeks recovery and the amount sought.

Fees for printing of papers necessarily obtained for use in the case are taxable as costs under § 1920(4). These fees include costs for copies of trial exhibits, summary judgment exhibits, deposition exhibits, third party documents, discovery documents, and other types of documents. *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471, 1475–76 (10th Cir. 1997).

[1] ECF No. 96 at 4 (sanctioning Defendants and ordering Defendants to "pay the costs associated with the continuation of Mr. Bab's deposition, including the reasonable travel costs of counsel for the United States and Dr. Tudor").

Whether copying fees are taxable as costs is not determined by the type of document copied, but by the necessity of obtaining the document for use in the case. *Id.* at 1476. Actual use of material in the case by an attorney or the court demonstrates necessity, but actual use is not required to demonstrate necessity. *See Reazin v. Blue Cross & Blue Shield of Kansas, Inc.*, 663 F.Supp. 1360, 1459 (D.Kan. 1986), *aff'd and remanded*, 899 F.2d 951 (10th Cir. 1990) (taxing costs of copies of trial exhibits provided to court and to opposing counsel).

Tudor seeks costs in the amount of $3,673.62 for printing, as set forth in her Bill of Costs and Exhibit 2 ¶ 2. Tudor's counsel has made a good faith effort to identify with a sufficient degree of specificity the expenses incurred and the use to which the copies were put. Among other things, Tudor seeks reimbursement for printing courtesy copies delivered to the Court and trial exhibits. Obtaining copies of documents for these uses was necessary for the successful prosecution of this case, and the corresponding fees are therefore taxable.

Court transcripts: Tudor also seeks to recover the amount of $8,141.85 for transcripts of court hearings, voir dire, and the trial. Exhibit 2 ¶ 2 lists the transcript costs for which Tudor seeks recovery and the amount sought.

Transcripts are "necessarily obtained" where they are used in the case by counsel or by the court. *Case v. Unified Sch. Dist. No. 233, Johnson Cnty.,*

Kan., 157 F.3d 1243, 1259 (10th Cir. 1998). *See also Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991) (transcripts obtained for use during trial or trial preparation may be included in taxable costs); *Farmer v. Arabian Am. Oil Co.*, 324 F.2d 359, 364–65 (2d Cir. 1963) (transcripts of pretrial hearings and depositions properly taxable), *judgment rev'd on other grounds*, 370 U.S. 227 (1964).

Transcripts—of depositions, pre-trial hearings, and at trial—were necessary and utilized by counsel for the prosecution of this case and are thus taxable. As set forth in Exhibit 2 ¶ 3(c), transcripts for court hearings, voir dire, and the trial were absolutely critical to the prosecution of this case. Critical motions were decided at the November 1, 2017 docket call and the transcript of that hearing substantively informed and instructed counsel of later proceedings. The voir dire transcript substantially aided counsel in preparing for trial. Additionally, the trial transcripts were necessary both to aid counsel during the course of trial as well as were relied upon by all parties and the Court in post-trial briefing on injunctive relief.

Service of subpoenas, witness fees, and millage: Tudor also seeks to recover in this case the amount of $3,624.47 for expenses incurred in the service of subpoenas to witnesses called to testify at trial. Exhibit 2 ¶ 2 lists in detail the costs of service of subpoenas, witness fees, and millage for which Tudor seeks recovery and the amount sought. Additionally, Exhibit 2 ¶ 3(d)

sets for in detail the reasons why such costs were necessarily incurred.

Service of trial subpoenas on multiple witnesses whom either requested service via subpoena or who had to be compelled to testify via subpoena is recoverable. *See, e.g.*, *Czarniak v. 20/20 Institute, LLC*, 2013 WL 3728805 at *1 (D.Colo.) (process server fees to locate and serve subpoenas for trial attendance recoverable). Moreover, even though not all of the witnesses Tudor subpoenaed actually testified at trial, costs associated with securing their attendance is taxable because Defendants' strategy both required Tudor to secure their attendance and later obviated the need for their testimony (Exhibit 2 ¶ 3(d)). *Wehr v. Burroughs Corp.*, 477 F.Supp. 1012 (E.D.Pa. 1979), *aff'd on other grounds*, 619 F.2d 276 (3d Cir. 1980) (non-testifying witness fees taxable where testimony rendered unnecessary by occurrence of extrinsic circumstances); *Vorburger v. Central Ga. Ry. Co.*, 47 F.R.D. 571, 572 (M.D.Ala. 1969) (taxing as costs non-testifying witness attendance fees where opposing side's testimony at trial obviated need for non-testifying witnesses).

III. CONCLUSION

For the foregoing reasons, Tudor requests that the Court grant her Motion for Costs and direct Defendants to pay such costs as set forth in the Bill of Costs filed concurrently herewith.

Dated: June 20, 2018

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
Law Office of Ezra Young
30 Devoe, 1a
Brooklyn, NY 11211
P: 949-291-3185
F: 917-398-1849
ezraiyoung@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on June 20, 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)

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

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

MEMORANDUM IN SUPPORT OF MOTION OF LAW OFFICE OF JILLIAN T. WEISS FOR ATTORNEYS' FEES AND COSTS

Pursuant to Fed. R. Civ. P. 54(d), Plaintiff's former attorney, Law Office of Jillian T. Weiss, P.C., and its Principal, Jillian T. Weiss, hereby request an award of attorneys' fees and costs as authorized by 42 U.S.C. § 1981a. The amounts requested are as follows:

For the Law Office of Jillian T. Weiss, P.C., attorney fees in the amount of $211,325.00 and costs totaling $10,219.52, as supported by the declarations and time/expense records attached as Exhibits A, B and C;

I. PROCEDURAL HISTORY

Plaintiff Rachel Tudor approached attorney Dr. Jillian T. Weiss in 2014 to request representation in prosecuting an action against Defendants Southeastern Oklahoma State University (SEOSU) after she had successfully pursued a claim through the United States Equal Opportunity Commission against Defendant SEOSU. Weiss was, at that time, a tenured Full Professor of Law and Society at Ramapo College of New Jersey. She had been a lawyer since 1986, although she ceased the active practice of law as full-time profession in 1998. She had resumed the active practice of law in

2011, while still employed at Ramapo College. By 2014, she had represented several transgender and gender non-conforming persons who had experienced employment discrimination in cases around the country. Dr. Weiss agreed to represent Dr. Tudor. As part of the representation, Dr. Weiss negotiated with the United States Department of Justice (DOJ) on behalf of Dr. Tudor to advocate that DOJ litigate this matter on behalf of Dr. Tudor. At that time, DOJ had never before litigated an employment case on behalf of a transgender person. In addition, DOJ had previously taken the position that Title VII did not provide protection against sex discrimination to transgender people. Due in part to Dr. Weiss' advocacy of Dr. Tudor's case to DOJ, as well as the advocacy of many others within and without DOJ committed to transgender civil rights, DOJ reversed its long-standing position, and put in place a new policy position that Title VII did provide protection against sex discrimination to transgender people. DOJ brought this action on behalf of the United States of America to vindicate Dr. Tudor's rights, a milestone in transgender civil rights advocacy.

Dr. Weiss filed a Complaint in Intervention on behalf of Dr. Tudor against the Defendants. The Complaint in Intervention reflected both different language and additional claims that protected important rights and interests of Dr. Tudor. Defendants filed a motion to dismiss the additional count of the Complaint in Intervention, the count addressing the hostile work environment experienced by Dr. Tudor. In ruling on the motion, the Court made a ruling that was unprecedented and key to the success of Plaintiff, that she was protected from sex discrimination by Title VII, despite the Tenth Circuit precedent that Defendants argued precluded protection of Dr. Tudor from sex discrimination.

After the Motion to Dismiss was denied, Plaintiff engaged in discovery, including X pages of documentary discovery and Y depositions. In July 2016, the case was transferred to the Transgender Legal Defense and Education Fund, Inc. (TLDEF), a New York City-based nonprofit organization, which Dr. Weiss had joined as Executive Director, and where she hired attorney Ezra Young, formerly an associate with the Law Office of Jillian T. Weiss, P.C., to be Director of Litigation. The case was

then transferred to Mr. Young's law office after he departed TLDEF. Mr. Young's brilliant advocacy defeated Defendants' motion for summary judgment and resulted in a $1.165 million verdict in favor of Plaintiff. While the amount awarded was reduced on motion, this verdict stands as a shining example of Oklahoma justice in service of the liberty and civil rights for which Americans have fought and died.

II. APPLICABLE STANDARD

The Civil Rights Act of 1964 provides for attorney fees to a prevailing plaintiff, as follows:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000e-5(k). Congress enacted this section to encourage private litigation of civil rights claims. "When a plaintiff succeeds in remedying a civil rights violation . . . he serves 'as a "private attorney general," vindicating a policy that Congress considered of the highest priority.'" *Fox v. Vice*, 131 S. Ct. 2205, 2213 (2011) (quoting *Newman v. Piggie Park Ent.*, *Inc.*, 390 U.S. 400, 402 (1968) (per curiam)). Because such litigation advances important civil rights, a prevailing plaintiff "'should ordinarily recover an attorney's fee' from the defendant." *Id.* (citation omitted). Awarding attorney's fees to prevailing civil rights plaintiffs "at once reimburses a plaintiff for 'what it cos[t] [him] to vindicate [civil] rights,' and holds to account 'a violator of federal law.'" *Id.* (citations omitted).

III. PLAINTIFFS ARE THE PREVAILING PARTY

A prevailing party is one that succeeds "on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Farrar v. Hobby*, 506 U.S. 103, 109 (1992) (citation omitted). It should be noted that Plaintiffs did not have to prevail on *all* of their claims to be entitled to an award of attorney's fees. *See Berger v. City of Mayfield Heights*, 265 F.3d 399 (6th Cir. 2001) (plaintiff held to be the prevailing party even though 12 of his 14 claims were dismissed); *Owner-Operator Indep. Driver Assn, Inc. v. Vissell*, 210 F.3d 595, 597 (6th Cir. 2000) (holding that

"[a]ny enforceable judgment of comparable type of relief or settlement . . . will generally make a plaintiff a 'prevailing party.'"). But, "[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee." *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).

In this case, Plaintiff prevailed on her claim for sex discrimination, and received relief for her lost backpay, front pay and noneconomic damages. This case will also have a profound effect on the rights of transgender people to be free of sex discrimination in the Western District of Oklahoma and others jurisdictions well into the future.

IV. THE FEES REQUESTED BY PLAINTIFFS ARE REASONABLE

The lodestar approach is the approved method for to determining reasonable attorneys' fees. *See Hensley,* 461 U.S. at 433-37. The lodestar is calculated by multiplying the number of hours the prevailing party reasonably expended on the litigation by a reasonable hourly rate. *Morales v. City of San Rafael,* 96 F.3d 359, 363 (9th Cir. 1996). A fee determined by this "lodestar method" is entitled to a "strong presumption" that it "represents the 'reasonable' fee." *City of Burlington v. Dague,* 505 U.S. 557, 562 (1992); *see also Perdue v. Kenny A.*, 559 U.S. 542, 552 (2010).

A summary of the hours expended and claimed here for the Law Office of Jillian T. Weiss, by attorney, is represented in the table below.

Attorney	**Hours**	**Rate**	**Total**
Jillian T. Weiss	436.50	$300	$130,950.00
Ezra I. Young	321.5	$250	$80,375.00

In addition to the basic lodestar calculation, courts consider the following factors in awarding fees: the novelty and complexity of the issues; the special skill and experience of counsel; the quality of representation; the results obtained; and the contingent nature of the fee agreement. *Morales,* 96 F.3d at

364. The hours and requested rates are reasonable and should be awarded by the Court.

A. The Total Number of Hours is Reasonable

Taking all appropriate factors into consideration, the time expended to achieve the results in this case was reasonable. Work was clearly divided between the attorneys, each taking specific responsibilities for the tasks at hand. The attorneys carefully edited all briefs, resulting in high-quality legal memoranda that clearly and succinctly identified the novel issues to be decided by the Court, and managed a group of twelve clients and their children who were originally split into two different cases. In addition, the coordination of effort among the four legal teams before the Supreme Court was both unusual and necessary to effective representation on an issue of national importance. To be sure, a lot of time was required, but the numbers reflected in this Motion are not unreasonable.

The complexity of the case and the sheer amount of work required to properly litigate it necessitated multiple attorneys. Using multiple lawyers in a case "is a common practice, primarily because it results in a more efficient distribution of work. It allows more experienced, accomplished, and expensive attorneys to handle more complicated matters and less experienced, accomplished, and expensive counsel to handle less complicated ones." *Gautreaux v. Chicago Hsg. Auth.*, 491 F.3d 649, 661 (7th Cir. 2007). The method contemplated by *Gautreaux* is precisely the method by which Plaintiffs have litigated this case all along, as reflected by the billing records attached hereto.

To the extent that there is overlap in the hours expended by counsel, it was only as absolutely necessary. Courts have approved so-called "duplicative" billing, where two attorneys are billing for the same telephone conversation or meeting. The practice of law often (indeed usually) involves significant periods of consultation among counsel. In this case, those efforts were critical in creating cohesive arguments, strategizing novel legal theories, and assessing the implications of various positions. Talking through a set of authorities or seeking advice on a vexing problem is often significantly more

efficient than one attorney's attempt to wade through the issue alone. *Tchemkou v. Mukasey*, 517 F.3d 506, 511-12 (7th Cir. 2008). It is significant to note that the Oklahoma Attorney General had than several attorneys who worked on this matter. Each deposition was attended by two or more attorneys on behalf of the Oklahoma Attorney General. It is not unreasonable to permit the plaintiff to bring two attorneys to a deposition when the Oklahoma Attorney General routinely did so as well.

B. The Requested Rates Are Reasonable

1. Local Counsel's Rates

As set forth in the attached declarations, the rates charged by lawyers of the Law Office of Jillian T. Weiss are reasonable for attorneys in the Oklahoma market. The Supreme Court has repeatedly noted the Congressional intent that "the amount of fees awarded under [§ 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . ." *Blum v. Stenson,* 465 U.S. 886, 893 (1984) (quoting S.Rep't No. 94-1011 at 6, 1976 U.S.C.C.A.N. 5908, 5913); *see also Blanchard v. Bergeron*, 489 U.S. 87, 95 (1989).

The rates, which top out at $300 per hour, are more than reasonable within the Western District of Oklahoma, which has validated these rates in previous cases. CONCLUSION

In conclusion, Plaintiffs respectfully request a fee award in the amount of $211,325.00.

Respectfully submitted,

s/Jillian T. Weiss
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Former Counsel for Plaintiff-Intervenor Dr. Rachel Tudor

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was this 20th day of June, 2018, delivered via the CM/ECF system to all parties of record.

s/Jillian T. Weiss
JILLIAN T. WEISS

CASE NO. 15-cv-324-C

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.

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

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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' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND, IN THE ALTERNATIVE, FOR A NEW TRIAL

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; and (3) even with the Title VII statutory cap applied, Plaintiff's award was wrongly based on emotional distress and otherwise unsupported by the evidence.

I. RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

A federal district court may consider a motion for judgment as a matter of law on an issue at any time before a case is submitted to a jury. Fed. R. Civ. P. 50(a). Such

a motion "must specify the judgment sought and the law and facts that entitle the movant to the judgment." *Id.* Judgment as a matter of law is appropriate where "the evidence points one way and is not susceptible to reasonable, contrary inferences supporting the non-movant." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1255 (10th Cir. 2017); *see also* Fed. R. Civ. P. 50(a) (court may grant judgment if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue"). After trial, and no later than 28 days after judgment has been entered, a court may consider a renewed motion for judgment as a matter of law. Fed. R. Civ. P. 50(b). "Arguments presented in a Rule 50(b) motion cannot be considered if not initially asserted in a Rule 50(a) motion." *Perez,* 847 F.3d at 1255.

During trial, Defendants move d for judgment as a matter of law on all four of Plaintiff's Title VII claims—which consist of two discrimination claims, a hostile work environment claim, and a retaliation claim—arguing that each was unsupported by sufficient evidence to be submitted to a jury. The Court denied Defendants' motion. With the hostile work environment claim having been resolved in Defendants' favor, Defendants now renew their motion on the retaliation and discrimination claims only.

No direct evidence of discrimination or retaliation has been produced, thus the U.S. Supreme Court's *McDonnell Douglas* framework applies, through which this Court must "evaluate whether circumstantial evidence of discrimination presents a triable issue." *Fassbender v. Correct Care Solutions, LLC*, 890 F.3d 875, 884 (10th Cir. 2018). This well-known framework requires Plaintiff first to establish a *prima facie* case of discrimination. *Id.* If accomplished, the burden of production shifts to

Defendants to articulate legitimate, non-discriminatory reasons for their actions. *Id.* When Defendants do so, the burden shifts to Plaintiff to "show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Id.* (quoting *Plotke v. White*, 405 F.3d 1092, 1099 (10th Cir. 2005)). In the end, Plaintiff "bears the ultimate burden of persuasion to show discrimination." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017).

A. Plaintiff produced insufficient evidence that Defendants discriminated in denying Plaintiff tenure in 2009-10.

1. Plaintiff forsook a prima facie case by relying on transgender identity

To make a *prima facie* case of discrimination or retaliation, Plaintiff must demonstrate membership in a protected class. *See Fassbender*, 890 F.3d 875 at 885. Before trial, Defendants filed both a motion to dismiss and a motion for summary judgment arguing that this case should be disposed of because it was improperly relying on Plaintiff's transgender identity, which is not a protected class under Title VII. [Docs. 30 and 177]; *see also Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) ("[T]ranssexuals are not a protected class under Title VII and Etsitty cannot satisfy her prima facie burden on the basis of her status as a transsexual."). The Court denied both of those motions on the ground that Plaintiff was *not*, according to the Court, "complaining that transgender persons were treated different," but rather was contending "that Dr. Tudor, once she was a woman, was treated differently." Trial Transcript Vol. I, p. 8; *see also Etsitty*, 502 F.3d 1215 (distinguishing an impermissible transgender identity claim from a sex-stereotyping claim).

At trial, however, Plaintiff repeatedly abandoned this posture and painted the proceedings for the jury as being about transgender identity, as well as about bathrooms, religious objections, and pronouns, etc.—all of which have little to do with sex stereotyping and everything to do with the current cultural controversies on transgenderism. (The bathroom issue, in particular, was explicitly *foreclosed* by *Etsitty* as being part of a sex-stereotype claim.[1]) Here are just a select few of the most egregious examples, from various stages of trial:

- *Opening Statements*:
    - Plaintiff's attorney: "My client … is transgender. That fact right there is why we're all here today." Trial Transcript Vol. 1, p. 17.
    - Plaintiff's attorney: "Doug McMillan wanted Rachel gone because she's transgender." *Id.* at 20.
    - Plaintiff's attorney: Defendants are "counting on you to not like transgender people." *Id.* at 27.
- *Plaintiff Testimony*:
    - Plaintiff's attorney: "Now, Rachel, we're obviously all here today because you went through a gender transition." *Id.* at 40.
    - Plaintiff: Cathy Conway "told me that Doug McMillan, when he discovered that I'm transgender, that he wanted to summarily fire me." *Id.* at 42.
- *Cotter-Lynch Testimony*:
    - Plaintiff's attorney: "Today, [Cotter-Lynch,] would you recommend Southeastern as a good place for transgender students to attend? …

[1] The entire *Etsitty* case revolved around bathrooms: "However far *Price Waterhouse* reaches," the *Etsitty* panel wrote, referencing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), "this court cannot conclude it requires employers to allow biological males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Id.* at 1224.

> [W]ould you recommend that transgender professors apply for positions at Southeastern?" Trial Transcript Vol. 2, pp. 351-52.

- *Scoufos Testimony*:
  - Plaintiff's attorney: "So you right away, right out the gate, started classifying Dr. Tudor's portfolio in the transgender stack, is that correct?" Trial Transcript Vol. 4, p. 604.
  - Plaintiff's attorney: "And you understand that the allegations of discrimination is that – it's because Dr. Tudor's transgender; correct? You understand that?" *Id.* at 623-24.
- *McMillan Testimony*:
  - Plaintiff's attorney: "Do you recall, when your deposition was taken, that you indicated you didn't know which restroom transgender people should use?" *Id.* at 698.
- *Closing Argument*:
  - Plaintiff's attorney: "[I]f Rachel Tudor were not a transgender woman, we would not all be here today." Trial Transcript Vol. 5, p. 828.
  - Plaintiff's attorney: "Professors who are transgender women are still scared to apply there, to go there. Things can't ever be right down at Southeastern if Rachel Tudor doesn't get justice." *Id.* at 833-34.
  - Plaintiff's attorney: "Conway projected her own animus of transgender women onto other folks at Southeastern." *Id.* at 840.

It is difficult to look at all of these statements, accompanying testimony, and the record as a whole, and not conclude that Plaintiff put on a transgender identity case. Whether or not one agrees with the current state of the law, this is impermissible under Title VII. If allowed to stand, this case would make a mockery of the *Etsitty* distinction; indeed, it is hard to imagine, with this verdict as precedent, how anyone could ever be barred from putting on a transgender identity case by *Etsitty*, even though the decision plainly said transgender identity is not included in

Title VII and in fact kept the plaintiff in that case from bringing such a claim. In other words, if not corrected, this case would be a radical expansion of *Etsitty*, and the Tenth Circuit has explicitly stated its "reluctance to expand the traditional definition of sex in the Title VII context." *Etsitty*, 502 F.3d at 1222.

The Court gave Plaintiff every chance to put on a sex-stereotyping case that complied with *Etsitty*, and Plaintiff repeatedly refused to do so. In *Etsitty*, the Tenth Circuit stated that "an individual's status as a transsexual should be *irrelevant* to the availability of Title VII protection." *Id.* (emphasis added). But rather than treat Plaintiff's transgender identity as irrelevant, Plaintiff made it the centerpiece of trial. This is out of line with Title VII, it nullifies Plaintiff's attempt at making a *prima facie* case, and the Court should grant judgment to Defendants. *See id.* at 1220-21 (Title VII "should not be treated as a 'general civility code' and should be 'directed only at discrimination because of sex.'"); *id.* at 1222 n.2 ("If transsexuals are to receive legal protection apart from their status as male or female … such protection must come from Congress and not the courts.").[2]

[2] This is all assuming, of course, that the Court is indeed correct that Plaintiff—a biological male—could legitimately claim to be a member of the protected class of women under Title VII, as the Court held in its motion to dismiss and summary judgment orders. *See* [Doc. 34, at 5]. Although Defendants grant this foundational point for purposes of the above argument, they still contest it as a matter of law.

To allow such a claim, the Court's earlier order misreads *Etsitty* and its footnote 2 citation of *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004). Most tellingly, the Tenth Circuit in that very same footnote favorably quoted the Seventh Circuit for the proposition that if "the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, *the new definition must come from Congress*." *Etsitty*, 502 F.3d at 1222 (emphasis added) (quoting *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984)). This is the official position of the United States

2. Plaintiff did not make a prima facie case that Plaintiff was qualified

To make a *prima facie* case that Defendants unlawfully discriminated when not awarding tenure during the 2009-10 school year, it must be demonstrated—by Plaintiff, by a preponderance of the evidence—that Plaintiff was truly qualified for the position being sought at the specific time in question. *See DePaula*, 859 F.3d at 969–70. This means Plaintiff must introduce "credible evidence" of meeting Defendants' "objective requirements necessary to perform the job." *Kilcrease v. Domenico Transportation Co.*, 828 F.3d 1214, 1220–21 (10th Cir. 2016).

Here, Plaintiff failed to do so. It is undisputed that Plaintiff was unable to produce the actual tenure portfolio submitted in 2009. Plaintiff's most favorable witnesses openly acknowledged this absence. Robert Parker, for example, admitted the portfolio he was given to analyze as an expert was "partial" and incomplete. Trial Transcript Vol. 2, p. 229. Meg Cotter-Lynch admitted she never reviewed the 2009 portfolio at all nor saw a complete copy of it. *Id.* at 358-59. And so on. Without the original portfolio, it is nearly impossible to know the extent of Plaintiff's qualifications (or lack thereof) as they appeared to Defendants in 2009-10. Thus, it can hardly be

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government, as well. *See* Brief for United States as Amicus Curiae at 4, *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2nd Cir. 2018) (No. 15-3775), 2017 WL 3277292 ("[T]he word 'sex' means biologically male or female." (citation omitted)). And, importantly, it does not contradict *Smith*. There, Smith was a biological male who the Sixth Circuit ruled could bring a claim *as a male* who faced discrimination because of his increasingly feminine behavior. *See Smith*, 378 F.3d at 570 ("Smith is a member of a protected class. His complaint asserts that he is a male with Gender Identity Disorder" who was treated differently "on account of his non-masculine behavior and GID."). Plaintiff did not bring this claim as a biological man, and thus did not fall within Title VII's strictures.

said Plaintiff has produced substantial evidence, much less a preponderance of the evidence, of meeting Defendants' basic requirements for a tenured professorship.

Several factors from trial further cement this reality. First, Plaintiff could have theoretically attempted to address this glaring deficiency on the stand, and yet did not do so. That is to say, Plaintiff made little effort to testify comprehensively as to the precise contents of the 2009 portfolio. A *prima facie* case was Plaintiff's burden to meet, by a preponderance of the evidence, and Plaintiff chose to ignore a gaping hole in the case. Second, Plaintiff's failure to preserve the critical portfolio was made even worse by Cotter-Lynch's admission that she preserved her own tenure portfolio from 2008. *See* Trial Transcript Vol. 2, p. 314 ("I've, to this day, kept it in my home."). If Cotter-Lynch could preserve her portfolio, why could Plaintiff not? Plaintiff never enlightened us as to the reason for her spoliation. Third, Parker testified that it is improper for a university to consider documents that are *not* in a portfolio when making a tenure decision because doing so would "open the door to bias, to misinformation, to personal whim, to all sorts of inappropriate things." *Id.* at 240. In other words, Plaintiff's own expert—the sole expert in the case—emphasized that the portfolio *is all that matters* for tenure qualification. Yet despite this, and despite Plaintiff bearing the burden of production, we still do not know precisely what was in Plaintiff's portfolio in question, how it was arranged, or how it was presented. Fourth, there was uncontested testimony from at least one other witness in the case that the contents of the trial portfolio were in question. Specifically, Lucretia Scoufos testified that she believed original documents were missing from the portfolio shown at trial,

and she testified that there were documents in the trial version that were *not* in the original portfolio. Trial Transcript Vol. 4, pp. 583-84. This testimony went unrebutted. For all these reasons, judgment should be entered in favor of Defendants.

Even if Plaintiff had produced the 2009 portfolio, it still would not be enough to establish a *prima facie* case. That is because there was undisputed testimony—from Plaintiff's own witnesses—that: (1) one of Defendants' objective qualifications for tenure was that candidates have multiple peer-reviewed publications; and (2) Plaintiff did not have multiple peer-reviewed publications in 2009.

As to the first point, Plaintiff testified that a tenure candidate must publish "articles"—plural—"to demonstrate good scholarship." Trial Transcript Vol. 1, p. 51. John Mischo, who testified for Plaintiff, agreed that more than one peer-reviewed publication was necessary: "Typically, I would say you would need one and a half publications." Trial Transcript Vol. 3, p. 418. Another of Plaintiff's witnesses, Mark Spencer, testified that it became "clear" to him during his tenure process three years earlier that multiple peer-reviewed articles were needed. *Id.* at 452. And, significantly, Spencer testified that he told this directly to Plaintiff: "[T]he advice I gave was immediately after my experience in 2006-2007 … [I advised Plaintiff that] I wouldn't go up for tenure without two articles." *Id.* at 451.

Spencer, for obvious reasons, was "surprised" that Plaintiff failed to take his advice. *Id.* at 452. Plaintiff's 2009 application, he testified, "wasn't a strong application because there was just the one article." *Id.* at 443. (Remember, Spencer was *Plaintiff's* witness.) And although Mischo (also Plaintiff's witness) could not

remember on the stand how many articles Plaintiff's original portfolio contained, he acknowledged that his contemporaneous evaluation mentioned a "Published article"—singular—and nothing more. *Id.* at 402, 421. Furthermore, Mischo testified that if Tudor only submitted one article at the time, it would not meet his criteria of "one and a half publications," and he admitted that he had advised Plaintiff at one point that Plaintiff was not doing enough in the areas of research and scholarship to qualify for tenure. *Id.* at 421-23. Finally, Department Chair, Randy Prus—another one of Plaintiff's witnesses—testified that Plaintiff "had one" publication in the 2009 application. *Id.* at 466.

These are Plaintiff's words and Plaintiff's own witnesses, testifying together that Plaintiff's 2009 tenure portfolio failed to meet Defendants' objective standard for tenure.[3] Defendants' witnesses back this up. *See, e.g.,* Trial Transcript Vol. 4, p. 581 (Scoufos: "She had only one publication [in 2009] and – by a peer review, and so her scholarship was lacking."). Regardless of what Defendants' witnesses have to say, however, Plaintiff own case-in-chief clearly failed to produce a preponderance of the evidence indicating that Plaintiff's 2009 portfolio met this basic qualification for tenure.

[3] To be sure, Parker's expert report was based around the idea that Plaintiff had two published, peer-reviewed articles. This has no relevance, however, given that Parker did not claim any foundation on which he could know how many articles were in the original portfolio; to the contrary, he openly admitted the version he was given years later was not the original. In short, Parker's report was erroneous on this point.

3. Plaintiff failed to provide sufficient evidence of pretext

Even assuming Plaintiff somehow made a prima facie case without producing the 2009 portfolio, Defendants clearly put forth legitimate, non-discriminatory reasons for the denial of tenure: a lack of scholarship and service. *See, e.g.*, Trial Transcript Vol. 4, pp. 581-82, 591 (Scoufos testimony); *see also DePaula*, 859 F.3d at 970 ("The defendant's burden is 'exceedingly light,' as its stated reasons need only be legitimate and non-discriminatory 'on their face.'" (citations omitted)). Thus, the burden would return to Plaintiff to provide legitimate evidence that Defendants' articulated reasons were pretextual. *See id*. Plaintiff may do so by attacking Defendants' proffered reasons or by providing evidence that unlawful discrimination was a primary factor in the decision. *Id.* Here, taking a bit of a sawed-off shotgun approach, Plaintiff has attempted both in various ways, and failed.

We will start with accusations of unlawful discrimination. During trial, it was repeatedly emphasized that Plaintiff faced hostility due to the 2007 gender transition. There are several problems with viewing this as sufficient to establish pretext, however. First, the jury declined to find a hostile work environment. Second, as was discussed thoroughly above, the vast majority of the evidence presented went to transgender identity—which is not protected under Title VII—rather than to any kind of a sex-stereotyping claim. Third, the only testimony that could even arguably be construed as pertaining to sex stereotyping was provided by Mindy House, and it concerned Dean Scoufos only. *See* Trial Transcript Vol. 3, pp. 520-21 (House: Scoufos criticized Plaintiff's clothing and other efforts to appear feminine and mocked

Plaintiff's voice). But even if we accept House's testimony as true, "isolated and tangential comments about [Plaintiff's] appearance are insufficient to alone permit an inference of pretext." *Etsitty*, 502 F.3d at 1226. And regardless, it is undisputed that Scoufos was not the decision maker here, or even second-in-command. *See, e.g.*, Trial Transcript Vol. 4, p. 690 (McMillan: Plaintiff "wasn't turned down at that level [by Scoufos]. … [I]t was a recommendation. … [A]ll levels of the review process are independent of one another."); Trial Transcript Vol. 5, pp. 788-89 (former President Jesse Snowden: A tenure application "goes through all levels. And it can be changed at any succeeding level going up. For example, if the dean—and this happened to me as dean a couple of times—did not recommend promotion and tenure, the vice president could recommend it or the president could. … It's important to state that these are only recommendations until it gets to the president."). Indeed, Plaintiff admitted that each level of review "has an *independent* obligation … to thoroughly review the portfolio and determine if it is sufficient for tenure." Trial Transcript Vol. 1, p. 187 (emphasis added).

President Larry Minks was the ultimate decision maker here, and there was zero evidence presented of sex stereotyping on his part. Moreover, even if Dr. McMillan was the force behind the tenure denial, as Plaintiff asserted,[4] House did

[4] During closing, Plaintiff's attorney claimed that "All of this, it all went back to Doug McMillan" and that "McMillan pulled the puppet strings to push Rachel out of that university." Trial Transcript Vol. 5, pp. 837, 841. The only mention of Scoufos was to use her as a battering ram against McMillan: "Scoufos told you it was all Doug McMillan's fault." *Id.* at 840. Wholly absent was any mention of the actual final decision maker, Dr. Larry Minks, and his recommendation to the Board of Regents.

not testify to sex-stereotyping on his part, either. Indeed, she explicitly declined to accuse him of the same statements and actions as she did Scoufos. *See* Trial Transcript Vol. 3, p. 522 (House: I never heard Doug McMillan make fun of Dr. Tudor.). Thus, one of Plaintiff's biggest hooks for pretext—House's testimony—is gone.

Plaintiff also attempts to undermine Defendants' non-discriminatory reasons by repeatedly asserting that Defendants failed to provide an explanation for negative recommendations during the tenure evaluation process. This, according to Plaintiff, could have allowed improvements to the application. Plaintiff produced no evidence, however, that any explanation was required *before* the end of the process. Rather, the Academic Policies and Procedures Manual provision Plaintiff points to (Policy 3.7.4) states that the governing board and president should provide in detail their compelling reasons in the rare instance that they disagree with a faculty judgment on faculty status such as tenure. This policy requires nothing of a dean or a vice president, rendering irrelevant Plaintiff's red-herring complaint that "I never received an explanation from Lucretia Scoufos or Doug McMillan for their reasons for denying me tenure [in 2009]." Trial Transcript Vol. 1, p. 71. Moreover, to the extent the policy requires an explanation,[5] it can only apply *after* a president has actually made the decision to grant or deny tenure—meaning, logically, that a reason does *not*

[5] Several witnesses denied that the policy required any explanation at all—before or after the decision. For purposes of judgment as a matter of law, this brief assumes that these witnesses were incorrect.

have to be given during the process. Thus, this entire line of argument does little to demonstrate pretext.

Nevertheless, Plaintiff points to Spencer in an attempt to bolster the assertion that an earlier explanation would have allowed for improvements. Spencer testified that, during his evaluation, he was able to proactively track down the dean, vice president, and president to discuss his portfolio, and that their advice helped him to fix flaws in his application. Trial Transcript Vol. 3, p. 435. But Spencer's tenure process took place three years earlier—which is hardly close enough in time to be a legitimate comparator—and there were different officials serving at that time. *Id.* at 432-35 (testifying that Snowden was the acting president and C.W. Mangrum the dean). Moreover, Spencer admitted his own experience—not Plaintiff's—was viewed as the outlier. *See id.* at 447 (Spencer: Claire Stubblefield "was definitely of the opinion that you shouldn't be allowed to intervene" like happened with me, and she told me my situation was "unusual."). Regardless, this all ignores the fact that it is undisputed that before denying tenure, Defendants *did* offer Plaintiff the chance to improve. *See, e.g.*, Trial Transcript Vol. 1, p. 68 (Plaintiff: Scoufos "said, in return for withdrawing my application, that, in the following year, I could … [re]apply for tenure, and then the year after that, for promotion."). In other words, the end result for Spencer and Plaintiff was essentially the same—if Plaintiff had accepted Defendants' offer, that is.

Plaintiff also cites the fact that the faculty committee recommended tenure to attack Defendants' reasons for denying tenure. But a disagreement between faculty

and the administration, no matter how fierce, simply cannot be the basis to discredit the administration's legitimate non-discriminatory reasons for denying tenure. *Cf. DePaula*, 859 F.3d at 970–71 ("Evidence that the employer 'should not have made the termination decision—for example, that the employer was mistaken or used poor business judgment—is not sufficient to show that the employer's explanation is unworthy of credibility." (citation omitted)). That is especially the case here, where two of Plaintiff's own witnesses testified that a positive view of Plaintiff's transgender identity—rather than a purely objective look at Plaintiff's qualifications—potentially led the faculty committee to recommend tenure in the first place. *See* Trial Transcript Vol. 3, p. 454 (Spencer: "Lisa Coleman did raise the transgender issue. … [I]t was going … against her [Plaintiff], and then … this [issue] gets thrown out there and people talk about it …. Then, finally … a vote is taken and it was the majority to approve."); *Id.* at 476-77 (Prus: "The transgender issue was there [during the discussion]."). Right or wrong, the administration certainly wasn't required to take the same view.

Finally, Plaintiff relies on Parker's expert report comparing the qualifications of various tenure candidates to demonstrate pretext. *See Etsitty*, 502 F.3d at 1227 ("[P]laintiff may show pretext 'by providing evidence that he was treated differently from other similarly-situated, nonprotected employees.'" (citation omitted)). But this fails for the same reason mentioned above. That is, Plaintiff has not produced the 2009 portfolio, Parker admitted as such, and thus his testimony as to the relative merits between Plaintiff's original portfolio and other tenure candidates has no

foundation and cannot be used to demonstrate pretext. Indeed, for these and other reasons discussed below, Defendants believe Parker's testimony should have been excluded altogether. Defendants incorporate those arguments here.

B. Plaintiff produced insufficient evidence that Defendants discriminated by denying Plaintiff the opportunity to reapply for tenure in 2010-11.

Assuming Plaintiff made out a *prima facie* case of discrimination in Defendants' denial of the opportunity to reapply for tenure, Defendants provided at least two legitimate, non-discriminatory reasons for doing so: (1) Defendants' rules and practices do not allow for multiple applications; and (2) Plaintiff was nevertheless offered the opportunity to reapply for tenure and turned it down. The burden thus shifts back to Plaintiff, who has not provided sufficient evidence of pretext.

First, the relevant rule states—as various witnesses acknowledged at trial—that a tenure-track candidate can apply for tenure in their "fifth, sixth, *or* seventh" year. (*See Excerpt from Plaintiff's Trial Exhibit 4 (Rule 4.6.3)*, at Bates EEOC000331-32, attached as Exhibit 1). The use of the word "or" (rather than "and") makes it plain that tenure-track professors must pick one of those years to see their application all the way through. Certainly, various witnesses testified at trial that it was their understanding that multiple applications were allowed, and the faculty appellate committee held so, as well. *See, e.g.*, Trial Transcript Vol. 3, p. 501 (Knapp); Trial Transcript Vol. 5, p. 811 (Charles Weiner). But this cannot be sufficient to dispute the plain text of the rule when none of these witnesses, including Plaintiff, was able to point to a single person in school history who was allowed to reapply for tenure

after being denied by the President.[6] *See, e.g.*, Trial Transcript Vol. 3, p. 506 (Knapp). In other words, their opinion on the rule appears to have no actual foundation in reality; at minimum, none was provided, and it was Plaintiff's burden to have done so.

The plain text view, on the other hand, is buttressed by other evidence. Former President Snowden, for example, testified that "[a]t the seven universities where I've worked, I don't know of any case where someone has been able to reapply for tenure after they've been denied." Trial Transcript Vol. 5, pp. 787-88. This view was further supported by at least one of Plaintiff's own witnesses, Prus, who agreed that a candidate could only apply in one year and not three. Trial Transcript Vol. 3, p. 487. It was also supported by the actions of Plaintiff and Plaintiff's supporters. If Rule 4.6.3 allowed for multiple re-applications, as Plaintiff alleges, then Plaintiff's withdrawing of a tenure application in 2008 makes zero sense. Why not see it through, just in case, and then reapply later? We were never told. And why did the faculty need to rewrite the policy afterward, as Cotter-Lynch testified, to allow for multiple reapplications? Trial Transcript Vol. 2, p. 370. Again, this action makes little sense if the rule already allowed for successive reapplications. In the end, the burden was on Plaintiff to provide enough evidence to show that Defendant's reliance on the plain language of the policy was pretextual, and Plaintiff failed to do so. *See DePaula*, 859 F.3d at 970-71 ("In determining whether the proffered reason for a decision was

[6] When asked at trial, Plaintiff refused to even attempt to address this glaring deficiency. Trial Transcript Vol. 1, p. 185.

pretextual, we examine the facts as they appear to the person making the decision, and do not look to the plaintiff's subjective evaluation of the situation. … [T]he relevant inquiry is whether the employer honestly believed those reasons and acted in good faith upon those beliefs." (citation and internal marks omitted)).

Second, it is undisputed that Defendants actually *did* offer to let Plaintiff reapply for tenure, *if* Plaintiff would withdraw the 2009 application (as Plaintiff had done in 2008). *See, e.g.,* Trial Transcript Vol. 1, pp. 133-34 (Plaintiff); Vol. 3, p. 403 (Mischo); Vol. 4, pp. 590-91 (Scoufos). Plaintiff refused to do so. Plaintiff claims that this offer was an illegitimate ultimatum, but there was precious little evidence of illegitimacy introduced, and certainly not enough to allow a reasonable jury to find pretext on the part of Defendants. Most prominently, of course, Plaintiff alleges that the offer wasn't legitimate because it wasn't in writing. But, despite claiming to have documented the entire situation thoroughly, Trial Transcript Vol. 1, p. 119, Plaintiff never complained about that fact at the time of the offer, nor indicated that Plaintiff had ever even *asked* for the offer to be in writing. *Id.* at 133-34. And regardless, even if Defendants had refused to put it in writing, Plaintiff has pointed to no requirement that an offer be put in writing before it can become legitimate. In the end, Plaintiff was given an opportunity to reapply, and declined to do so. Plaintiff has not produced sufficient evidence to dispute these facts in the least.

Finally, the same point made for the previous claim—that no sex-stereotyping evidence against the actual decision maker has been produced—applies here but even more so. Plaintiff makes it perfectly clear, as does other evidence, that Scoufos had

nothing to do with denying Plaintiff the ability to reapply for tenure. *See, e.g., id.* at Trial Transcript Vol. 1, p. 92 (Plaintiff: "Doug McMillan had made the decision that I was not to be allowed to reapply for tenure promotion in 2010-11."); *id.* at 111 (Plaintiff: President Minks was the deciding vote on appeal); Vol. 4, pp. 593, 617 (Scoufos: I was not involved with the decision to deny Plaintiff the opportunity to reapply for tenure.); *id.* at 678 (McMillan: I had President Minks' permission to extend offer to Plaintiff giving an extra year for tenure.). Thus, any evidence of sex stereotyping on Scoufos's part is irrelevant.

C. Plaintiff failed to produce any evidence that Defendants retaliated because of Plaintiff's complaints.

Plaintiff claims that it is virtually self-evident that Defendants' declining to allow Plaintiff to reapply for tenure in 2010-11 was retaliation for Plaintiff complaining about Defendants' allegedly discriminatory behavior in denying tenure in 2009-10. Trial Transcript Vol. 1, p. 95. Plaintiff, however, did not produce actual evidence sufficient to send a retaliation claim to the jury.

1. Plaintiff failed to make a prima facie case of retaliation by demonstrating a causal connection between the reapplication denial and Plaintiff's complaints.

To make a Title VII retaliation claim, a plaintiff must establish a *prima facie* case, meaning she must show: "(1) she engaged in protected opposition to discrimination; (2) she suffered an adverse action that a reasonable employee would have found material; and (3) there is a causal nexus between her opposition and the employer's adverse action." *Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086 (10th Cir. 2007) (citation omitted). Here, Plaintiff failed to establish the third prong—

a causal connection—which requires "evidence of circumstances that justify an inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Stover v. Martinez*, 382 F.3d 1064, 1071 (10th Cir. 2004).

Most significantly, Plaintiff has provided no evidence showing that, when Plaintiff engaged in protected conduct, Defendants even considered it a possibility that Plaintiff could reapply for tenure. Rather, all the evidence points the other way, toward the rather obvious conclusion that Defendants believed themselves bound by the rules and situation to deny Plaintiff the opportunity to reapply for tenure from the moment they denied tenure in the first place. Indeed, this is "self-evident"—to borrow Plaintiff's term—from the undisputed offer made to Plaintiff: Withdraw now in order to reapply later. Logically, this indicates that the moment Plaintiff refused the offer, Defendants—rightly or wrongly—felt they had no grounds on which to allow Plaintiff to reapply, and that any subsequent protected conduct was irrelevant to the equation. Plaintiff has produced no evidence indicating otherwise. Nor has Plaintiff produced evidence that Defendants' allegedly retaliatory actions "closely followed" the protected conduct, although even if Plaintiff had, it wouldn't nullify the first point.

2. Plaintiff failed to demonstrate that Defendants' non-discriminatory reasons for declining to allow Plaintiff to reapply for tenure were pretextual.

Even assuming Plaintiff established a prima facie case that Defendants retaliated by declining to let Plaintiff reapply for tenure, Plaintiff's claim would still fail as a matter of law for the same reason as Plaintiff's second discrimination claim fails above. In short, Defendants have provided legitimate, non-discriminatory reasons—the rules do not allow it, and Defendants *did* offer Plaintiff a chance to

reapply—and Plaintiff failed to show those reasons are pretextual. Thus, the Court should grant Defendants judgment as a matter of law on retaliation.

II. MOTION FOR A NEW TRIAL

Under Rule 59 of the Federal Rules of Civil Procedure, the Court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(1)(A). This encompasses a variety of issues, and as a result trial courts have wide discretion in deciding whether to grant a new trial. *See Snyder v. City of Moab*, 354 F.3d 1179, 1187–88 (10th Cir. 2003). Here, Defendants move for a new trial on three different grounds: (1) Plaintiff produced insufficient and tainted evidence of discrimination and retaliation; (2) the Court should not have allowed Parker to testify as an expert, and (3) a clearly excessive amount of damages was awarded by the jury.

A. Plaintiff's evidence of discrimination and retaliation was insufficient and illegitimately tainted by religious bigotry.

"Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence." *Id.* (citation omitted). Here, the verdicts were clearly against the weight of the evidence in this case, for reasons thoroughly detailed above. Most significantly, Plaintiff insisted on putting on an impermissible transgender identity case rather than a sex stereotyping case. Several additional and important points should be mentioned, however, even if they do not fit neatly into one of the aforementioned categories discussed above (*e.g.*, *prima facie* case, pretext, etc.).

For starters, it is not insignificant that Plaintiff's cover letter for the 2009-10 tenure application was undisputedly poor and ill-conceived, as acknowledged by Plaintiff's own witnesses. *See, e.g.*, Trial Transcript Vol. 2, p. 285 (Parker: Plaintiff's 2009-10 cover letter contained a grammatical error); Trial Transcript Vol. 3, p. 441 (Spencer: Plaintiff's "letter of application was unprofessionally written. I mean … my heart sort of sank when I first read it."); *Id.* at 464-65 (Prus: "[T]he cover letter lacked professional competence. … It didn't make sense."). Anyone who screens job applicants—a judge screening for law clerks, to give one familiar example—knows well that first impressions really do matter. And despite some testimony that Plaintiff was comparable to others who were awarded tenure, nary a soul testified that these other candidates submitted as poor a cover letter as did Plaintiff.

Far more disturbingly, the evidence in this case was tainted by Plaintiff's repeated (and unproven) insinuation that McMillan's religion and religious beliefs caused him to discriminate against a transgender person. This anti-religious animus first became apparent during House's testimony, where Plaintiff asked if McMillan "frequently" brought "up his religion at work"—heaven forbid!—whether that made House feel "uncomfortable," and whether McMillan ever made "an employment decision … on the basis of his religion[.]" *Id.* at 511. What Plaintiff's attorney omitted—and what Defendants were forced to spend precious time revealing—was that the employment decision referenced was when McMillan found House a new job, rather than let her go, in part because "the Bible says that we take care of our widows." *Id.* at 541. That this gracious example was used underhandedly to insinuate

wrongdoing by McMillan is disgusting, and is itself a form of religious bigotry that should have no place on our legal system.

Things would only get worse from there, however, when Plaintiff's attorney had the temerity to attack McMillan on cross-examination for having "felt the need to discuss [his] faith here today" when it was Plaintiff who had raised religion in the first place, forcing Defendants to rebut. Trial Transcript Vol. 4, p. 697. Finally, in the closing, Plaintiff's attorney made the following astounding statement: "Frankly, 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. But we all saw it. As Knapp told us, it all went back to McMillan." Trial Transcript Vol. 5, p. 841 (emphasis added). In other words, Plaintiff's closing argument was anchored by the scurrilous accusation that McMillan wasn't the sincere religious adherent he supposedly claimed to be because he wouldn't admit his guilt.[7] As the Supreme Court's recent *Masterpiece Cakeshop* opinion made clear, there is no place in our court system for this kind of religious hostility and animus. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018) ("The neutral and respectful consideration to which Phillips was entitled was compromised here … [by] a clear and impermissible hostility toward [his] sincere religious beliefs …. [T]hese

[7] Plaintiff never actually asked McMillan to describe his religious beliefs or respond to House, nor did Plaintiff ever offer any evidence at all that McMillan's religious beliefs somehow compelled him to take issue with Plaintiff's gender identity, all of which indicates that Plaintiff's bringing up the religion issue in the first place was less about getting to the truth and more about perniciously insinuating, without proof, that McMillan was bigoted simply because he was religious.

disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs . . . ."). The Court could grant a new trial on this issue alone.

Finally, Defendants were handicapped throughout trial by Plaintiff's procedural follies and bizarre actions. Examples abound: (1) Plaintiff's attorneys waited until the literal last second to provide and label exhibits and subpoena witnesses, *see, e.g.*, Trial Transcript Vol. 1, p. 6 (Court to Plaintiff's attorneys: "Do you have sticker numbers on each exhibit? . . . That should have been done days if not weeks ago."); *Id.* at 190 (Court to Plaintiff's attorneys: "I understand that defendants have *been at a disadvantage* without having marked exhibits. . . . This is just not acceptable." (emphasis added)), (2) Plaintiff's attorneys released expedited transcripts of the trial on the Internet as soon as they were received, Trial Transcript Vol. 4, p. 557 (Court: "I've never had this come up before . . . . It makes me very uncomfortable."), and (3) Plaintiff essentially refused to answer questions on the stand, *see, e.g.*, Trial Transcript Vol. 1, p. 172 (Court: "If this witness would only answer a question, I would stand up and cheer. This is painful. … You do have to let her answer the question even if she's never going to answer a question."). True, in the Tenth Circuit a motion for a new trial probably does not include credibility determinations, *see Snyder*, 354 F.3d at 1187–88,[8] but it is still widely accepted that motions for a new trial give courts more flexibility and discretion than motions for

[8] "[T]he Tenth Circuit's position regarding the standard for viewing the evidence when determining a rule 59 motion for new trial is in tension with the weight of modern authority." *Sec. & Exch. Comm'n v. Goldstone*, 233 F.Supp.3d 1169, 1198 n.15 (D.N.M. 2017) (collecting cases). The Tenth Circuit should reverse this wayward line of cases, which would allow this Court to take credibility into account.

judgment as a matter of law, in part because the remedy (a new trial, rather than judgment) is less harsh for the opposing party. *Cf. Tidewater Oil Co. v. Waller*, 302 F.2d 638, 643 (10th Cir. 1962) (Murrah, C.J., authoring) ("[T]he granting of a new trial involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself."). Here, due to the lack of evidence produced, the religious hostility evinced, and the procedural shenanigans undertaken, the Court should grant a new trial.

B. Parker's expert testimony should have been excluded.

Before trial, Defendants moved to exclude Plaintiff's proposed expert, Parker, from testifying, arguing (among other things) that tenure decisions are inherently subjective and that Parker's analysis was flawed and unreliable. [Doc. 98]. The Court denied this motion, holding that Parker would be allowed to testify as to his "consideration of Dr. Tudor's work, and his comparison of that work to other applications who were offered tenure" because it would "be helpful to the jury," which "has no experience or knowledge of how the tenure process works" and "what methodology is used to evaluate their qualifications or scholarship." [Doc. 163, at 3-4]. Defendants now incorporate their earlier arguments, *see* [Docs. 98 and 155], and emphasize the following additional points—based on Parker's actual testimony—for why Parker should have been excluded and why Defendants were unfairly prejudiced by his testimony, and therefore the Court should grant a new trial.

First, Parker admitted that his testimony lacked foundation. Specifically, as referenced above, Parker admitted that the version of Plaintiff's portfolio he was given to analyze as an expert was partial and incomplete. Trial Transcript Vol. 2, pp. 229, 250; *see also Id.* at 278 (Parker: "I don't know what was submitted [in 2009].") This alone means he should not have been allowed to testify. For, even assuming his expertise was otherwise reliable, how could he accurately compare different portfolios if he did not have the complete versions or know what was in them?

Second, Parker's trial testimony turned out to be remarkably subjective. On the stand, he emphasized that a "good syllabus . . . tells a story." *Id.* at 249. He noted that he "really enjoyed" Plaintiff's "wonderful" course descriptions, which were "fun to me." *Id.* at 250. In commenting on Plaintiff's articles, he talked about how "serious" they were, how "strong" they were, and how much they "advance[d] a discussion." *Id.* at 263-64. None of this is the language of an objective analysis, and it certainly didn't merit an explicit label of "expert." This is especially the case when every other witness who testified, with the exception of House, also had a level of expertise on tenure applications and yet did not get the label "expert" bestowed on them. *Compare, e.g., id.* at 224 (Parker: I have reviewed 25 portfolios outside my own university), *with* Trial Transcript Vol. 5, pp. 765-66 (Snowden: I have reviewed maybe a "thousand" tenure and promotion portfolios at multiple universities.). Furthermore, it is worth noting that Plaintiff's own witness and tenured professor, Mischo, backed up Defendants' arguments about the subjective nature of a tenure decision. On the stand, Mischo agreed that the process of evaluating tenure and promotion portfolios

is "inherently subjective," and that two professionals can look at the same tenure portfolio and come to completely different conclusions. Trial Transcript Vol. 3, pp. 415-16.

Third, even if Parker had Plaintiff's full and original 2009 portfolio (which he did not), his testimony did not take into account key local factors, which makes it utterly unreliable. It was undisputed at trial that then-Dean Scoufos had very strict formatting and procedural requirements for tenure portfolios, and no one has challenged the legitimacy of these requirements. Cotter-Lynch, for example, testified that Scoufos "told me what font to use. She told me what store to go to [in order] to buy which shade of blue binder that would match the school colors. It was really detailed." Trial Transcript Vol. 2, p. 311; *see also* Trial Transcript Vol. 3, p. 513 (House: "[Scoufos] adopted how she wanted each portfolio to look, you know, the same. And so she had them put them in sleeves, certain sleeves, books, binders, and in a certain category order."). And Spencer, another of Plaintiff's witnesses, testified that Plaintiff's application strayed from this formatting: "There were three binders, so it seemed, if anything, there was too much. I was under the impression that we had a set format we were supposed to submit …. So that was a bit unusual, as well." *Id.* at 442-43. Parker, however, openly admitted that he had not seen Scoufos's technical and formatting requirements, "so I can't comment on that." Trial Transcript Vol. 2, p. 280. But these requirements were undisputedly a critical part of Defendants' tenure process at the time. For Parker not to even know what they are, much less

how they affected the portfolios he reviewed, renders his testimony highly unreliable and an unhelpful and misleading influence for a jury.

Parker's lack of knowledge likely helps explain why his testimony was so different from the testimony of Plaintiff's own witnesses. While Parker repeatedly testified that all of the candidates he reviewed were "impressive" and "strong," *id.* at 254, and indeed, "stronger than I'm accustomed to seeing," *id.* at 255,[9] Spencer testified that Plaintiff's application "was *not* a strong application … I would even say it was weak." Trial Transcript Vol. 3, pp. 444-45 (emphasis added). But even though Parker didn't have foundation, or knowledge of the original portfolio or the local procedures—like Spencer did—Parker received the label of "expert." *See, e.g.*, Trial Transcript Vol. 2, p. 218 (Plaintiff's attorney: "I think it would be very helpful for our jury to sort of understand these concepts better coming from an expert."). This is unfair, and it was unfairly prejudicial. A new trial should be granted.

C. Plaintiff failed to provide sufficient evidence to support the award, therefore a new trial or remittitur is appropriate.

Prior to judgment being entered, Defendants argued that the Court should reduce Plaintiff's award below the Title VII statutory cap of $300,000 because of a near-total lack of evidence supporting a $300,000 award. [Docs. 289 and 291]. Defendants renew and incorporate those arguments now. In sum, Plaintiff has now affirmatively waived emotional distress damages, which were allowed at trial, and Plaintiff offered very little evidence or case law in support of a $300,000 award for

[9] This quote is yet another reason to disallow Parker as an expert. He is basically admitting that he is out of his element in analyzing these candidates.

reputational or other non-emotional distress harms only. Thus, the current award is excessive and the Court should order a new trial or remittitur to a more reasonable amount.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 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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5. An instructor, upon making official notification to the administration of the completion of a doctoral program, may receive immediate promotion to the rank of assistant professor with approval of the Regional University System of Oklahoma Board of Regents.
6. The application for promotion may be submitted during the year which completed the requirements for the rank as outlined in Section 4.5.2.1, with a successful application causing promotion effective the following academic year.
7. A faculty member must complete at least two years of employment at Southeastern before applying for promotion to the rank of Associate Professor or Professor.
8. Any exception to the policy on promotion in rank is the domain of the president of the University.

4.6 Tenure

Source: See Policy Manual of the Regional University System of Oklahoma Board of Regents (Academic Affairs, 3.3)

4.6.1 Academic Tenure

Tenure is a privilege and a distinctive honor. Tenure is defined as continuous reappointment which may be granted to a faculty member in a tenure–track position, subject to the terms and conditions of appointment. The tenure decision shall be based on a thorough evaluation of the candidate's total contribution to the mission of the University. While specific responsibilities of faculty members may vary because of special assignments or because of the particular mission of an academic unit, all evaluations for tenure shall address at a minimum whether each candidate has achieved excellence in (1) teaching, (2) research or creative achievement, (3) professional service, and (4) University service. Each University may formulate standards for this review and determine the appropriate weight to be accorded each criteria consistent with the mission of the academic unit.

Tenure is granted by the Regional University System of Oklahoma Board of Regents upon recommendation of the University president. Determination of merit and recommendation for granting tenure shall comport with the minimum criteria and policies and procedures contained in this chapter.

The terms and conditions of every appointment or reappointment shall be stated in writing and copies in the possession of both the institution and faculty member before the appointment is approved. Tenure shall be granted only by written notification after approval by the Board. Only full–time faculty members holding academic rank of assistant professor, associate professor, or professor may be granted tenure. Qualified professional librarians shall be considered faculty members if they are given academic rank.

Tenure does not apply to administrative positions, but a tenured faculty member appointed to an administrative position retains tenured status as a member of the faculty.

The Board intends to reappoint tenured personnel to the faculties of the institutions under its control within existing positions that are continued the next year. The Board reserves the right to terminate tenured faculty at the end of any fiscal year if the Legislature fails to allocate sufficient funds to meet obligations for salaries or compensation.

Exhibit 1

4.6.2 Periods of Appointment and Tenure

Faculty members holding academic rank above the level of instructor (assistant professor, associate professor, professor) may receive tenure at any time. Normally, faculty members shall be on probation for five (5) years after date of first being employed by the University in a tenure–track position. (Years of experience in a non–tenure–track position may be used for probation only if approved by the University). Seven (7) years shall be the maximum probationary period for the eligible faculty member to be granted tenure. If, at the end of seven (7) years any faculty member has not attained tenure, there will be no renewal of appointment for the faculty member unless a specific recommendation for waiver of policy from the President to the contrary is approved by the Regional University System of Oklahoma Board of Regents. This procedure applies every year thereafter.

For the purpose of determining probationary employment of faculty members for tenure consideration, sabbatical leave counts as a part of the period of probationary employment, but a leave of absence is not included as part of the probationary period.

4.6.3 Procedure for Granting Promotion and Tenure (replaces 4.5.3. Promotion Process) Rev. 9/03

The normal procedure for granting tenure is initiated by the faculty member during the fifth, sixth, or seventh year of service to the University in a tenure–track position. The normal procedure for granting promotion is initiated by the eligible faculty member. The following steps outline the normal process:

Step 1–

By October 15, the faculty member files a written request for promotion and/or tenure with the department chair. The request must be accompanied by a portfolio exhibiting documentation of effective teaching, research/scholarship, contributions to the institution and profession, and performance of non–teaching or administrative duties, if appropriate.

Step 2–

By November 15: A Promotion and Tenure Review Committee shall be formed. If there are at least five (5) tenured faculty members within the department, all serve as the Promotion and Tenure Review Committee. In Promotion cases, only tenured faculty at or above the rank sought shall serve on the committee. In the event that the number of faculty at the appropriate rank or tenured faculty members in the department is fewer than five (5), the tenured faculty within the department plus additional tenured faculty members appointed by the dean of the school and the chair of the department to form a group of at least five (5) tenured faculty members will serve as the Promotion and Tenure Review Committee. Since department chairs will independently review Promotion and Tenure Review Committee recommendations, and make an independent recommendation to the dean, they should not be members of Promotion and Tenure Review committees.

The chair/dean shall call a meeting of the Promotion and Tenure Review Committee to initiate discussion of the request. After each member of the Promotion and Tenure Review Committee critiques the portfolio and each performance criterion, the faculty member's performance shall be reviewed, discussed, and evaluated by the Promotion and Tenure Review Committee. This review shall be conducted in a manner that allows for input from non–tenured colleagues, students, alumni, and administrative information from the department chair. After completion of

Exhibit 1

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 hearing[6])—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

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> 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

/s/ Ezra Young
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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)

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

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

MEMORANDUM OPINION AND ORDER

Plaintiff has filed a Motion to Strike Defendants' Renewed Motion for Judgment as a Matter of Law and, in the Alternative, for New Trial (Dkt. No. 318). Plaintiff argues that Defendants' Motion is untimely, as it was filed well after the deadline imposed by the Court at the close of the trial. The trial in this matter concluded on November 20, 2017. After the jury returned the verdict, the Court conducted a conference with counsel at the bench. During that conference the Court set deadlines for various post-trial activities such as a schedule for briefing on the issue of reinstatement and/or front pay. Defendants' counsel inquired as to the proper time to request judgment notwithstanding the verdict on behalf of Defendants. The Court informed counsel that if they wished to file a written motion to do so within 14 days from the next Monday, mid-December of 2017. Defendants' Motion was not filed until July 5, 2018, well after the deadline imposed by the Court. Defendants argue that their Motion is timely, as they submitted it within the time period set by Fed. R. Civ. 50 and/or 59(e), as it was filed within 28 days of the judgment.

While Defendants correctly note the deadline set by the Federal Rules of Civil Procedure, they overlook the fact that, in this instance, the Court altered those deadlines by a valid oral Order and they were obligated to comply with that Order. A review of the discussions held between counsel following trial made it clear that the Court's intent was to address post-trial matters as soon as possible following the trial. As the issues of reinstatement and/or backpay would necessarily take some time to resolve, it was the Court's intent to resolve all other matters, including request for a new trial, as expeditiously as possible. This was particularly true of the motions for new trial, as a grant of any such motion would have obviated the need to consider the front pay/reinstatement issue and thereby prevent any waste of the Court's or parties' time. Because Defendants failed to file their Motion within the deadline set by the Court, Defendants' Motion is subject to being denied on that basis alone. However, even when considered on its merits, Defendants' Motion fails.

The standard for granting a Rule 50 motion is whether a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue. See Fed. R. Civ. P. 50(a)(1). The standard for considering a Rule 59 motion is whether or not the verdict "'is clearly, decidedly, or overwhelmingly against the weight of the evidence.'" See M.D. Mark, Inc. v. Kerr-McGee Corp., 565 F.3d 753, 762 (10th Cir. 2009) (quoting Anaeme v. Diagnostek, Inc., 164 F.3d 1275, 1284 (10th Cir. 1999)). The arguments raised by Defendants in their Motion fail to satisfy either of these standards. Rather than demonstrating that the verdict was clearly against the weight of the evidence or that the errors alleged in the Rule 59 Motion so tainted the verdict as to require a new trial,

Defendants' arguments simply reflect their view of how the evidence was presented or their view as to what the jury should have decided based on the evidence presented at trial. Contrary to Defendants' argument, there was sufficient evidence on which the jury could have reached the verdict issued in this case. Accordingly, even were the Court to consider Defendants' Motion for Judgment as a Matter of Law or New Trial on the merits, that Motion would fail.

For the reasons set forth herein, Plaintiff's Motion to Strike (Dkt. No. 318) is GRANTED. Defendants' Motion for Judgment as a Matter of Law (Dkt. No. 316) is DENIED as untimely and without merit.

IT IS SO ORDERED this 18th day of September, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

ORDER

Plaintiff has filed a Motion for Prejudgment Interest, Post-Judgment Interest, and Tax Penalty Offset and an Amended Motion for Post-Judgment Interest and Tax Offset. The Amended Motion states the earlier Motion was filed in error and requests it be stricken. Defendants concur that the Motion should be stricken. Plaintiff characterizes her Amended Motion as premature and notes it is brought solely to protect her right to later seek a modification of the Judgment in this matter to award post-judgment interest and a tax penalty offset. Plaintiff notes that her Notice of Appeal precludes the Court from taking action on the Judgment at this time. Defendants note they do not intend to contest Plaintiff's entitlement to post-judgment interest, only the amount of the judgment subject to interest. As for the tax penalty offset, Defendants note that Plaintiff's motion is premature, as the amount of any taxes due cannot be known at this time.

Plaintiff's Motion for Prejudgment Interest, Post-Judgment Interest, and Tax Penalty Offset (Dkt. No. 311) is STRICKEN as moot. As for the Amended Motion for Post-Judgment Interest and Tax Offset (Dkt. No. 314), the Court concurs that request is premature. Accordingly, Plaintiff's Motion will be DENIED without prejudice to refiling as set forth herein. Plaintiff shall renew her request for post-judgment interest within 14 days of the conclusion of the appellate process.

IT IS SO ORDERED this 25th day of September, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

ORDER

Following entry of judgment in favor of Plaintiff, her past and present counsel have filed Motions for Attorneys' Fees. These Motions reveal a significant dispute as to how any award of attorneys' fees should be distributed. Indeed, Defendants have recently filed a request for a 60-day extension in responding to the various Motions, noting a need to conduct discovery in an attempt to understand the competing requests. After consideration of Defendants' Motion and the various Motions seeking fees, the Court is persuaded the appropriate action is to stay resolution of the issue pending completion of the appellate process. Given the complexity of the issue, it is a waste of judicial resources and the parties' resources to parse out who is entitled to what when there is a possibility that an appellate court will render the entire issue moot. Additionally, the Court encourages the parties to use the additional time to consider their positions, seek agreement where possible, and narrow the issues so that once the appellate process has completed any needed resolution of the attorneys' fees issue can be streamlined.

For the reasons set forth herein, the Motion of Law Office of Jillian T. Weiss' for Attorneys' Fees (Dkt. No. 301) and the accompanying Declaration (Dkt. No. 302); Plaintiff Dr. Rachel Tudor's Motion for Recovery of Attorneys' Fees, Costs, and Other Reasonable Expenses (Dkt. No. 303), and the Application to Join in Plaintiff's Fee Request by Former Counsel, Transgender Legal Defense and Education Fund (Dkt. No. 306) are STAYED pending resolution of the appellate process. Plaintiff's Motion for Extension of Time to Respond to Motions for Attorney Fees Filed by Law Office of Jillian T. Weiss and Transgender Legal Defense and Education Fund (Dkt. No. 317) and Defendants' Motion for Extension of Time to Respond to Motions for Attorney Fees, Costs and Expenses (Dkt. No. 342) are STRICKEN without prejudice to refiling once the stay entered herein is lifted. The parties are to notify the Court within 10 days of the completion of the appellate process that the stay entered herein should be lifted.

IT IS SO ORDERED this 1st day of October, 2018.

ROBIN J. CAUTHRON
United States District Judge