Case No. 18-6102/ 18-6165

In the United States Court of Appeals for the Tenth Circuit

DR. RACHEL TUDOR,
Plaintiff-Appellant/Cross-Appellee

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
AND
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,
Defendants-Appellees/Cross-Appellants

On Appeal from the United States District Court for the Western District of Oklahoma, Case No. 5:15-cv-324-C, Hon. Robin Cauthron

OPENING BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE DR. RACHEL TUDOR

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ORAL ARGUMENT REQUESTED

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Dr. Tudor hereby makes the following disclosure: She is a natural person and thus not a subsidiary or affiliate of a publicly owned corporation. Moreover, no publicly owned corporation has a financial interest in the outcome of this case.

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GLOSSARY OF TERMS

AAUP	American Association of University Professors
DOJ	U.S. Department of Justice
Southeastern	Southeastern Oklahoma State University
RUSO	Regional University System of Oklahoma

STATEMENT OF RELATED CASES

Dr. Tudor's case was initially filed by DOJ in 2015. It was the first enforcement action by the United States to redress sex discrimination experienced by a transgender person. As such, this case is related to *State of Texas et al. v. United States et al. and Dr. Rachel Jona Tudor*, 16-1534 (5th Cir.), an appeal of *State of Texas et al. v. United States et al.*, 7:16-cv-54-O (N.D. Tex.). Filed in May 2016, the *Texas* litigation was a collateral attack brought by the State of Oklahoma and others on the Western District of Oklahoma's July 2015 opinion in the instant case which held Dr. Tudor's sex discrimination claims are cognizable under *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007).

In *Texas*, Oklahoma sought a declaratory judgment against the United States deeming Title VII and other federal laws to not reach sex discrimination experienced by transgender persons, in contravention of *Etsitty* and sister circuits' similar precedents. Dr. Tudor attempted intervention in *Texas* after Oklahoma won a nationwide injunction from the Northern District of Texas enjoining her merits case in Oklahoma. Dr. Tudor resisted the injunction in the Northern District of Texas and at the Fifth Circuit. Eventually, Oklahoma and the others dropped their

suit, triggering dissolution of the nationwide injunction and allowing Dr. Tudor to resume her merits case.

This case is also related to *In re Subpoena of Feleshia Porter*, 3:16-mc-00067-K (N.D. Tex.) and a case by the same name and involving a substantially similar subpoena, docketed as 6:16-mc-00009-RAW (E.D. Okla.). Both involved Dr. Tudor's ultimately successful attempts to quash subpoenas of her former therapist.

JURISDICTIONAL STATEMENT

Dr. Rachel Tudor's claims against Southeastern and RUSO were brought pursuant to Title VII of the Civil Rights Act of 1964.[1] The United States District Court for the Western District of Oklahoma had subject matter jurisdiction over this matter.[2]

The District Court entered final judgment on June 6, 2018. Later that same day Dr. Tudor filed a Notice of Appeal seeking relief from final orders resolving all claims, including the equitable issues of reinstatement and front pay, as well as remittitur of the jury's award.[3] A motion panel of this Court ruled on August 7, 2018 that pursuant to Fed. R. App. P. 4(a)(4), Dr. Tudor's notice of appeal would become effective once the District Court disposed of post-judgment motions,[4] the last of which was resolved on September 25, 2018[5]. This Court has jurisdiction of Dr. Tudor's appeal.[6]

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[1] 42 U.S.C. § 2000e-5.
[2] 28 U.S.C. § 1331.
[3] *See* Tudor App. Vol. 5 at 85–87 (Tudor NOA) appealing A-1 (Op. denying reinstatement), A-2 (Op. denying reconsideration of reinstatement), A-3 (Op. again denying reconsideration of reinstatement, awarding partial front pay, denying motions to supplement), A-4 (Op. remitting jury's award), and A-5 (Order of final judgment).
[4] Case No. 18-6102, Doc. 010110034018 at 3.
[5] *See* Case No. 18-6102, Doc. 010110060044 (Tudor Status Report).
[6] 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. **Reinstatement.** In light of Title VII's remedial goals of making victims of discrimination and retaliation whole and deterring future violations, reinstatement is the presumptive, preferred remedy. This Court has held that one-sided employer hostilities do not make reinstatement infeasible. The District Court deemed Southeastern's opposition to reinstatement an insurmountable hostility rendering it infeasible. Did the District Court abuse its discretion or otherwise commit an error of law?
2. **Front pay.** Where reinstatement is denied, front pay in an amount that compensates the worker for the lingering effects of discrimination and retaliation should be awarded until she is made whole. Did the District Court abuse its discretion when it applied the wrong legal standard for assessing front pay, and ignored compelling evidence that the tenured Southeastern professorship Dr. Tudor earned would have guaranteed her work for the 22 years until her planned retirement and equivalent work opportunities were not available to her?

3. **Statutory cap.** Precedent holds that federal statutory caps are waivable and that the Seventh Amendment prohibits reexamination of a jury's uncapped damages. Though Title VII allows for the recovery of both capped and uncapped damages, Southeastern and RUSO did not plead a cap and did not proffer a verdict form that allowed for a cap to be applied. At trial, the jury was given a verdict form with one line for damages; it ultimately awarded $1,165,000. Later, the District Court held the cap was unwaivable, examined evidence, and guessed $60,040.77 of the award amounted to uncapped damages and remitted the remainder from $1,104,959.23 to $300,000. Was the cap waived and, if not, was it constitutional for the District Court to reexamine the award, apply labels to those funds without any input from the jury, and remit on that basis?

STATEMENT OF THE CASE[7]

Dr. Tudor's life's work is teaching at the university level. For seven years, between 2004 and 2011, she made a home at Southeastern, a rural public university governed by RUSO. This case, at its core, concerns whether Dr. Tudor is entitled to make whole relief—the job that she earned or, at the very least, money that restores her to the economic position that she would have enjoyed absent the discrimination and retaliation committed by Southeastern and RUSO as found by a jury.

Dr. Tudor requests that this Court vacate orders denying her reinstatement to the life tenured professorship she earned at Southeastern and otherwise denying her make whole front pay for the value of that job. Dr. Tudor also requests that this Court vacate the order remitting the jury's damages award from $1,165,000 to $360,040.77.

I. DR. RACHEL TUDOR

Rachel Tudor was born in Oklahoma and is a dual citizen of the United States and the Chickasaw Nation. She grew up poor and because

[7] Dr. Tudor respectfully requests that she be awarded appropriate attorneys' fees if she prevails on any part of her appeal. *See Flitton v. Primary Residential Mortg., Inc.*, 614 F.3d 1173, 1180 (10th Cir. 2010); *Hoyt v. Robison Companies, Inc.*, 11 F.3d 983, 985 (10th Cir. 1993).

of that moved around a lot as a child and eventually grew up outside of the historic boundaries of the relocated Chickasaw Nation. However, Dr. Tudor and her family always hoped to return to their homelands in Southeastern Oklahoma.[8]

Dr. Tudor became the first in her family to attend college and eventually completed her doctorate in English at the University of Oklahoma, Oklahoma's flagship university.[9] Dr. Tudor's studies at OU and her scholarship focus on Native American literature, as well as philosophy and classical literature.[10]

Dr. Tudor is a woman who is transgender. Tudor has had a deep and profound understanding of herself as female since her earliest days. Growing up, Dr. Tudor learned from her Chickasaw family's oral traditions that her body and mind should not be regarded with shame. She is simply tasked with living a special blessing that, though sometimes difficult, must not be forsaken.[11]

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[8] Tudor App. Vol. 2 at 102–03 (Tudor Decl.).
[9] Doc. 246 at 18:10–13 (Tudor Opening Statement).
[10] *See* Tudor App. Vol. 2 at 113–22 (Tudor Dec. 2017 *curriculum vitae*).
[11] Tudor App. Vol. 1 at 75 (Tudor Compl.).

Expert Dr. George Brown, a medical doctor, scholar, and clinician based at Eastern Tennessee State University, explains that when someone is transgender, this is simply a biological fact. A small part of our population experiences a disconnect between their inner sense of sex and the one that is assigned at birth.[12] This disconnect has biological roots—brain structures and other physiological differences anchor one's sense of sex in the body itself.[13] Given that, today a consensus of scientists agree that a transgender woman's biological sex is female.[14]

Dr. Tudor struggled with accepting her blessing for much of her adult life. However, she thought, once she was on tenure track at Southeastern, her life circumstances would finally allow her to fully embrace it.[15]

II. DR. TUDOR'S EXPERIENCE AT SOUTHEASTERN

In 2004, Dr. Tudor joined Southeastern as a tenure-track professor in the English, Humanities, and Languages Department ("English Department"). This was more than just a job for Dr. Tudor. The

[12] Tudor App. Vol. 1 at 202–04 (Brown Report).
[13] *Id.* at 198.
[14] *Id.* at 204.
[15] Tudor App. Vol. 6 at 59:6–17 (Tudor testimony).

professorship promised her the opportunity that if she worked hard and followed the rules, she would earn life tenure.

Tenure is special.[16] It makes one a permanent part of the university and conveys recognition of professional success and merit.[17] It is accompanied by a significant boost to salary and guarantees income, a promise of economic stability Dr. Tudor had strived for since childhood.[18] Tenure also inheres significant professional advantages, like academic freedom to teach the classes one cares most about and to pursue scholarly projects at the forefront of one's profession.[19] Tenure also markedly increases job satisfaction.[20]

The promise of tenure at Southeastern was particularly important to Tudor in light of the Chickasaw Nation's connections to RUSO and Southeastern. The Nation, a federally recognized sovereign, ceded its

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[16] *Id.* at 235:7–25 and 236:1–11 (Parker testimony).
[17] *Id.* at 114:21–25 and 115:1–9 (Tudor testimony); Tudor App. Vol. 7 at 102:3–18 (Cotter-Lynch testimony).
[18] *See* Tudor App. Vol. 6 at 78:3–16 (Tudor testimony); Tudor App. Vol. 7 at 102:19–25 and 101:16–25 and 102:1–2 and 103:1–5 (Cotter-Lynch testimony).
[19] Tudor App. Vol. 6 at 3 (Parker Report); *id.* at 236:9–25 and 237:1–10 (Parker testimony).
[20] *See, e.g.*, Stephen A. Stumpf & Samuel Rabinowitz, *Career Stage as a Moderator of Performance Relationships with Facets of Job Satisfaction and Role Perceptions*, 18 J. VOCATIONAL BEHAV. 202 (1981) (observing strong correlation between tenure and job satisfaction).

ancestral lands in the Mississippi Valley to the United States.[21] Shortly thereafter the Chickasaw were relocated to Southeastern Oklahoma; many Chickasaw perished along what is now known as the Trail of Tears.[22] Dr. Tudor's Chickasaw ancestors were among those who came to Oklahoma.

Today, Southeastern's campus sits within the historic boundaries of the relocated Chickasaw Nation and its sister sovereign the Choctaw Nation.[23] Physical testaments to that lineage abound, including the Chickasaw and Choctaw halls, iconic residential structures on campus.[24]

For Chickasaws generally and Dr. Tudor specifically, the land Southeastern sits on is consecrated by the blood and tears of ancestors who made Southeastern Oklahoma a new homeland. The Chickasaws' connection to their land is unwavering and is central to their sense of self. Acclaimed Chickasaw poet and writer Linda Hogan well captures the strong drive to return: "This world was my foundation. I know it more

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[21] 83 Fed. Reg. 4235, 4239 (Jan. 30, 2018) (federal recognition); *Okla. Tax Com'n v. Chickasaw Nation*, 515 U.S. 450, 465 n.15 (1995) (construing Chickasaw treaties).

[22] *Removal*, Chickawsaw.net, tinyurl.com/yc6k4926.

[23] *See* Chickasaw Const. preamble, *available at* tinyurl.com/y78o6h7m (describing boundaries); Choctaw Const. art. 1 § 2, *available at* tinyurl.com/y7g6luvc (describing boundaries).

[24] *Choctaw & Chickasaw Halls*, SE.edu, tinyurl.com/yarmytke.

solidly as I age. It became my life, my identity as a woman."[25] Tudor's connection to this land is similarly firm. Dr. Tudor explains, "the promise of a new chapter in our Nation's history makes Southeastern Oklahoma a special place for us for which there is no equivalent."[26]

Southeastern and its sister university East Central Oklahoma—both in the RUSO system—are the only public four-year teaching universities in the Chickasaw's territory and thus the only universities at which Dr. Tudor could serve the Chickasaw directly. Today, as in years past, Southeastern and East Central serve as a springboard, elevating Chickasaw citizens to the highest echelons of public and professional success. They matriculate some of the largest numbers of Chickasaw students in the country. Counted among their alumni are current Chickasaw Governor Bill Anoatubby and Lieutenant Governor Jefferson Keel, late Chickasaw Governor Overton "Itoahtubbi" James, Chickasaw Supreme Court Justice Cheri Bellefeuille-Gordon, late Chickasaw

[25] LINDA HOGAN, THE WOMAN WHO WATCHES OVER THE WORLD 21 (2001).
[26] Tudor App. Vol. 2 at 102–03 (Tudor Decl.).

diplomat Charles W. Blackwell, and scholars like Dr. Amanda Cobb-Greetham.[27]

Gender transition. In late Spring 2007, Dr. Tudor told the Southeastern administration that she planned to transition from male to female and desired to begin the Fall 2007 term as her true self—Rachel Tudor. Dr. Tudor informed Human Resources of her intent and provided medical and legal documents supporting her request.[28] Dr. Tudor returned in Fall 2007 as Rachel. Dr. Tudor's Southeastern colleague Dr. Meg Cotter-Lynch attests this period was the happiest she has ever seen Tudor.[29]

2009-10 tenure application. Dr. Tudor applied for tenure in the 2009-10 application cycle. Prior to the 2009-10 tenure cycle, in all of Southeastern's hundred plus year history the faculty's tenure votes had never been vetoed by the administration.[30] Dr. Tudor's tenure application

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[27] *Bill Anoatubby*, Chickasaw.net, tinyurl.com/y7onmwjs; *Jefferson Keel*, Chickasaw.net, tinyurl.com/ybac5bcu; *'Visionary leader, irreplaceable friend' Governor Emeritus Overton James dies at 90*, CHICKASAW TIMES (2015), tinyurl.com/yaje4lcb; Press Release, Chickasaw Nation, Charles W. Blackwell (Jan. 4, 2013), tinyurl.com/y8q86br5; *Cheri Bellefeuille-Gordon*, Chickasaw.net, tinyurl.com/ybz482e2; *Amanda Cobb-Greetham*, OU.edu, tinyurl.com/ybb34qgk.

[28] *See, e.g.*, Tudor App. Vol. 8 at 161:15–19 (Conway testimony).

[29] Tudor App. Vol. 7 at 108:4–15 (Cotter-Lynch testimony).

[30] Tudor App. Vol. 6 at 78:21–25 and 79:1 (Tudor testimony).

was approved by the Department's tenure committee as well as Department Chair Dr. John Mischo.[31] However, three administrators—Dean Dr. Lucretia Scoufos, Vice President for Academic Affairs Dr. Douglas McMillan, and President Dr. Larry Minks—vetoed tenure. Below, the jury found Southeastern withheld tenure from Dr. Tudor because of her sex.[32]

2010-11 tenure application. Dr. Tudor reapplied for tenure in the 2010-11 cycle. This time, Dr. McMillan barred Dr. Tudor from reapplying for tenure eventually leading to her termination from Southeastern for failure to obtain tenure in May 2011.[33] Below, the jury found Southeastern liable for both sex discrimination and retaliation in connection with Tudor's 2010-11 tenure application.[34]

III. DR. TUDOR'S PLIGHT SINCE LEAVING SOUTHEASTERN

Dr. Tudor's career has spiraled downward since the tenure denial and her ejection from Southeastern. Once someone is denied tenure for discriminatory reasons, there is no quick fix and often no fix at all. The

[31] *Id.* at 78:2–25 and 79:1 (Tudor testimony); Tudor App. Vol. 7 at 158:4–14 (Mischo testimony).
[32] *See* Tudor App. Vol. 2 at 71–72 (Verdict Form).
[33] *See* Tudor App. Vol. 5 at 229 (McMillan letter barring reapplication).
[34] *See* Tudor App. Vol. 2 at 71–72 (Verdict Form).

fact that Dr. Tudor merited tenure at Southeastern counted for nothing on the job market. To have a shot at tenure again she would have to obtain a tenure-track job, a precursor job, work it for upwards of 7 years, and apply for tenure under a new university's rules.[35] None of the work that Dr. Tudor did at Southeastern would count; Tudor would have to start all over again and work for tenure anew.

But starting anew in the academe is near impossible. Tenure denial makes a professor uniquely vulnerable. Most universities do not hire someone who has previously been denied tenure elsewhere for a tenure-track job.[36] For the few universities willing to overlook tenure denial, tenure expert Dr. Parker attests that Dr. Tudor would likely be considered too experienced for a tenure-track job, locking her totally out of the market.[37] On top of that, someone of Dr. Tudor's age, now 55 years old, with Native American heritage, her sex, and who is publicly known to have brought a complaint of discrimination is even less likely to be hired for a tenure-track job.[38] Dr. Tudor's earnings power is also

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[35] Tudor App. Vol. 7 at 104:12–25 and 333:1–16 (Cotter-Lynch testimony).
[36] *Id.*
[37] *Id.* at 277:2–18 (Parker testimony).
[38] *See EEOC v. Tufts Inst. Of Learning*, 421 F.Supp. 152, 165 (D. Mass. 1975) (observing that tenure denial coupled with age is career death sentence for female professor in her 30's); *Almanac of Higher Education 2018–19*, 64

substantially diminished.[39] The declining number of tenure-track and tenured professorships also make it unlikely Dr. Tudor will get her career back on track.[40] Additionally, since Southeastern and RUSO totally control the pertinent job market—public teaching universities in Oklahoma—it is unlikely Dr. Tudor will ever get an equivalent job.[41]

Since leaving Southeastern, Dr. Tudor has applied to hundreds of tenure-track and non-tenure track jobs at universities and colleges around the nation.[42] Tudor has not received a single interview for a tenure-track job.[43] She only received one job offer—a year-to-year contract instructorship at Collin College, a two-year public community

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CHRONICLE HIGHER EDUC., no. 41, Aug. 24, 2018 at 20 (compiling data reflecting that female Native Americans account for only .2% of tenure track professors, .2% of tenured associate professors, and .1% of tenured professors nationwide); Mary Bonawitz & Nicole Andel, *The Glass Ceiling is Made of Concrete: The Barriers to Promotion and Tenure of Women in American Academia*, 2009 FORUM PUB. POLICY no. 2 (SPECIAL ISSUE) (2009), tinyurl.com/ybma7gj6 (survey and analysis of gender disparities in academic hiring and promotions).

[39] *See, e.g.*, Debra Barbezat and James W. Hughes, *The Effect of Job Mobility on Academic Salaries*, 19 CONTEMPORY ECON. POLICY 409 (2001) (female faculty incur salary penalty for each successive job move).

[40] *See, e.g.*, Colleen Flaherty, *A Non-Tenure-Track Profession*, INSIDE HIGHER ED, Oct. 12, 2018, tinyurl.com/y8lcuc8x (reporting 73% of faculty positions today are off tenure track).

[41] Tudor App. Vol. 4 at 192–93 (Tudor Decl.).

[42] *Id.* at 191.

[43] Tudor App. Vol. 6 at 143:20–25 and 144:1–6 (Tudor testimony).

college, which is a dramatic step down from the tenured professorship she would have had at Southeastern but for the discrimination and retaliation against her. Dr. Tudor held the Collin job between Fall 2012 and Spring 2016. Like all positions at Collin, the job was untenured. It was also less lucrative, stable, prestigious, and rewarding than the job Dr. Tudor earned at Southeastern and it could be terminated without cause each year.[44] Dr. Tudor lost the Collin job in May 2016 and has been unemployed ever since despite looking for work and taking great efforts to improve her credentials.[45]

The wrongful denial of tenure by Southeastern robbed Dr. Tudor of not just a job, but part of herself. Some things can never be fixed, like the fact that her two older sisters died before ever seeing her get justice.[46] However, the closest Dr. Tudor can get to justice at this point is to have her rightfully earned tenured professorship at Southeastern.

The 7 years Dr. Tudor worked at Southeastern coupled with the near decade since that she has spent trying to return make it impossible for her to heal absent reinstatement. Dr. Tudor has "a deep and strong

[44] Tudor App. Vol. 4 at 191 n.1 (Tudor Decl.).
[45] *Id.* at 188–93.
[46] Tudor App. Vol. 6 at 115–16 (Tudor testimony).

connection to Southeastern that has not wavered after all these years."[47] For Dr. Tudor, this suit was and always has been about getting her job back.[48] She has no vengeance in her heart. She does not hate Southeastern.[49] The injustice of being deprived tenure has, in equal parts, rattled Dr. Tudor's psyche and fortified her resolve to return. For her, reinstatement "is essential to me regaining my confidence and self-esteem" and the only means by which she can fully heal.[50] There, and only there can Dr. Tudor get back the classroom she's mourned for so long—her "clean, well-lighted place" where she "excel[s]" and "feel[s] comfortable [and] alive."[51]

Dr. Tudor also attests that the tenure denial cannot be cured short of returning to Southeastern given her special connection to it as a Chickasaw. Dr. Tudor yearns to be part of Southeastern to ensure the continued success of the Nation's students. For Dr. Tudor, teaching Chickasaw students is "a great honor and privilege" and the opportunity to "help mold the minds of young Chickasaw citizens and helping guide

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[47] Tudor App. Vol. 2 at 101–03 (Tudor Decl.).
[48] *Id.* at 100–01; *id.* at 107–09; Tudor App. Vol. 6 at 58:4–8 (Tudor testimony).
[49] *Id.* at 57:14–25 and 58:1–3.
[50] Tudor App. Vol. 2 at 108–09 (Tudor Decl.).
[51] *Id.* at 100–01.

them through college" is irreplaceable. Being a professor at Southeastern, unlike other places, gives Dr. Tudor the unique platform to serve her Nation's students as a "resource and possibility model."[52]

IV. IMPROVED CLIMATE AT SOUTHEASTERN

Southeastern since Dr. Tudor's departure. Things have changed considerably at Southeastern. Every single administrator responsible for Dr. Tudor's mistreatment or who simply failed to protect her in the past has retired.[53]

Additionally, in mid-2017, Southeastern adopted a robust nondiscrimination policy specially ensuring transgender persons, like Dr. Tudor, are protected from sex discrimination.[54] More impressive still, in 2016, Southeastern eliminated a fringe benefit health plan exclusion that once targeted transgender persons because of sex, a past source of tension identified by Dr. Tudor in this suit.[55]

There is also considerable evidence that despite this litigation, Southeastern is ready for reunion. As recently as November 2017,

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[52] *Id.* at 102–03.
[53] *Id.* at 104.
[54] *Id.* at 142–90 (Southeastern's new nondiscrimination policy).
[55] *Id.* at 215–18 (changes to RUSO health plan).

Southeastern President Sean Burrage and English Department Chair Dr. Prus agreed to a tentative plan to welcome Dr. Tudor back on a contract basis.[56] Emails show that Burrage and Prus thoughtfully considered needs and concluded reintegration possible.[57] President Burrage also publicly proclaimed support for the jury's verdict below, striking evidence that these proceedings have not irreparably damaged relations.[58]

There is strong evidence that the persons Dr. Tudor would work with most—colleagues in the English Department—do not oppose reunion. As recently as November 2017, President Burrage and Dr. Prus agreed that if Southeastern were to consider Dr. Tudor's return with tenure that the English Department faculty would be polled ahead of time to guard against mass opposition.[59] Dr. Cotter-Lynch reports that no such poll was conducted.[60] Absent a poll, the best evidence available are the sworn statements of rank and file members of the Department,

[56] Tudor App. Vol. 3 at 118–19 (Cotter-Lynch Decl.).
[57] *Id.* at 130–31.
[58] Tudor App. Vol. 2 at 140 (Burrage press statement).
[59] Tudor App. Vol. 3 at 118–19 (Cotter-Lynch Decl.).
[60] *Id.* at 118.

all of which are either enthusiastic or neutral about Dr. Tudor's reinstatement.[61]

Scholarship. There is also evidence showing that Dr. Tudor is ready to return to Southeastern. On the merits, Dr. Tudor continues to be a strong scholar. Dr. Cotter-Lynch, now a senior tenured member of the English Department and head of Southeastern's Honors Program, an administrative position, is intimately familiar with the publications of Department professors. In December 2017, Dr. Cotter-Lynch compared Dr. Tudor's publication record to that of other Department professors, ultimately concluding that, Tudor's record of 11 peer review articles produced at Southeastern alone far exceed any bar for scholarship in the Department. At that time, Dr. Prus had just 4 publications, only 2 of which could be peer reviewed (it's unclear if any are) published during his decades of service at Southeastern.[62]

Assuming Dr. Prus' body of work sets an acceptable bar for scholarship in the Department—reasonable, given he is the Chair—Dr.

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[61] Tudor App. Vol. 2 at 127–28 (Cotter-Lynch Decl.); Tudor App. Vol. 7 at 197:18–20 (Mischo testimony); *id.* at 218:3–6 (Spencer testimony); Tudor App. Vol. 1 at 222 (Althoff Decl.); Tudor App. Vol. 3 at 154 (Fridley Decl.).
[62] Tudor. App. Vol. 3 at 124–27 (Cotter-Lynch's analysis); *id.* at 142–43 (Prus' publication record).

Tudor easily meets it. Dr. Tudor even further exceeds that bar now given that, between December 2017 and present, she published another peer review article and secured, through a competitive process, a chapter in a forthcoming anthology published by the Utah State University Press (an imprint of Colorado University Press).[63]

Teaching. Dr. Tudor's return to Southeastern would not harm the students. When Tudor endured actual Title VII violations the students were just fine. Student evaluations and correspondence, classroom peer reviews, and award nominations show that Dr. Tudor's students thrived during her most difficult days at Southeastern.[64] Tenure expert Dr. Parker also attests that Tudor's teaching record at Southeastern was particularly strong.[65]

Other evidence from Dr. Tudor's time at Collin reflects her strength as a teacher. Peer recommendations from Dr. Tudor's Collin colleagues laud her teaching.[66] A representative syllabus and essay assignment

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[63] Tudor App. Vol. 5 at 2–23 (recently published article); *id.* at 43–44 (chapter acceptance).
[64] *See, e.g.*, Tudor App. Vol. 3 at 28–71 (student correspondence); *id.* at 73–75 (Southeastern teaching award nominations); Tudor App. Vol. 4 at 94–106 (classroom observations); *id.* at 108–25 (Southeastern peer recommendations)..
[65] Tudor App. Vol. 6 at 5–7 (Parker report); Tudor App. Vol. 7 at 24–28 (Parker testimony).
[66] Tudor App. Vol. 3 at 77–79 (Collin peer recommendations).

from her time at Collin evidence her keen talent for crafting courses and facilitating learning.[67]

Additionally, former Collin student Mrs. Jonelle Weier attests that Dr. Tudor's teaching is superb.[68] Weier's opinion is well-informed—she took multiple classes with Dr. Tudor, her husband took a class with Tudor, and she credits Tudor's teaching as playing a vital role in her own academic successes which includes her transfer to Harvard University.[69] Mrs. Weier's testimony is compelling—she thoughtfully recounts Dr. Tudor's teaching pedagogy, describes her classroom management skills, and relates that Tudor was warm with all students, even those like Weier and her husband who have different politics.[70] Mrs. Weier's observations are corroborated by other evidence of student communications, student reflection essays lauding Dr. Tudor, and hundreds of anonymous student evaluations submitted to the website RateMyProfessor.com, 94.6% of which are positive.[71]

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[67] *Id.* at 85–96 (syllabus); *id.* at 98–99 (assignment).
[68] *Id.* at 157 (Weier Decl.); *id.* at 159–60.
[69] *Id.* at 157–58.
[70] *Id.* at 156–57.
[71] *Id.* at 28–71 (student feedback); Tudor App. Vol. 4 at 2–92 (collecting RateMyProfessor.com reviews).

Dr. Tudor is prepared to return. Dr. Tudor has deeply and thoughtfully considered any and all potential issues she might encounter upon return, ultimately concluding reinstatement is both possible and desirable. Dr. Tudor is certain she can work well with Dr. Prus, and has devised a plan to ensure collegial relations.[72] She is also confident she is prepared to reenter the classroom, a sentiment echoed by Dr. Cotter-Lynch.[73] Tudor has also taken care to speak with other members of the English Department, exploring how things have shifted since her departure and made plans, with their input, for a smooth reintegration.[74] Dr. Tudor is indisputably approaching reinstatement soberly, appreciating challenges, and proactively planning to navigate them to ensure success.

Dr. Tudor has also had a trial-run return that bodes well for a reunion. After the verdict but prior to this appeal, Tudor applied for and was selected to give an academic presentation on fairness in tenure decisions—a topic which she is obviously well-versed—at a state-level conference convened by the Oklahoma chapter of the AAUP in March

[72] Tudor App. Vol. 3 at 23–25 (Tudor Decl.).
[73] Tudor App. Vol. 2 at 106 (Tudor Decl.); *id.* at 132–33 (Cotter-Lynch Decl.).
[74] *See, e.g.*, Tudor App. Vol. 4 at 234–35 (Tudor. Decl.).

2018. The AAUP conference was hosted by Southeastern's local chapter and convened on the Southeastern campus.

Everything about Dr. Tudor's Southeastern homecoming evidences reinstatement can and should happen. Dr. Tudor carpooled to and from the event with other Southeastern professors, including current tenured English Department faculty, and had pleasant discussions with all.[75] Tudor also had cordial exchanges with administrators past and present.[76] She used the women's restroom without issue.[77]

Critically, Dr. Tudor's presentation was well-received by all in attendance despite ample opportunity for discord to arise.[78] As one example, during her presentation Dr. Tudor fielded questions and comments from persons who testified on opposing sides at trial and, markedly, all exchanges were collegial.[79] Dr. Tudor found the experience to be pleasant and rewarding.[80] Pictures of the event speak volumes. One photo in particular, taken by Southeastern professor Dr. Stanley Alluisi, Chair of the Department of Aviation Management and a friend of Dr.

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[75] *Id.* at 230–34.
[76] *Id.* at 231–32; *id.* at 233–34.
[77] *Id.* at 234.
[78] *Id.* at 233–234.
[79] *Id.* at 233.
[80] *Id.* at 235.

Prus, shows Dr. Tudor beaming as she gave her lecture, enthused and elated by her return.[81]

V. PRIOR LEGAL PROCEEDINGS

Pleadings. In March 2015, DOJ filed this Title VII enforcement action in the Western District of Oklahoma. DOJ brought three claims—two alleging sex discrimination in connection with Dr. Tudor's 2009-10 and 2010-11 tenure applications, and one retaliation claim related to Tudor's 2010-11 application. Thereafter, Dr. Tudor moved to intervene, bringing three mirror claims and adding a fourth hostile work environment claim premised mostly on particulars of the other claims.

Motion to Dismiss. In May 2015, Southeastern and RUSO narrowly moved to dismiss Dr. Tudor's environmental claim, contending this Court's decision in *Etsitty* precludes transgender persons from bringing sex discrimination claims. In July 2015, the District Court denied the motion, finding *Etsitty* permitted Dr. Tudor to challenge sex discrimination she endured, observing Tudor is "female, yet Defendants

[81] *Id.* at 238.

regarded her as male."[82] Thereafter the parties engaged in extensive discovery.

Texas v. U.S. ***litigation.*** Between late August 2016 and early March 2017, the proceedings were stayed pending resolution of a collateral litigation involving the parties. *See supra* Statement of Related Cases.

Compromise Settlement. In August 2017, DOJ settled its claims on the merits. The Compromise Settlement protects Dr. Tudor from retaliation and secures substantial changes to the Southeastern policies and practices at the heart of this litigation.[83] The Settlement also puts an end to courtroom quarrels between Southeastern and the United States which Southeastern admits was a source of discord.[84]

Summary judgment. In late September 2017, Southeastern and RUSO filed for summary judgment on three of Dr. Tudor's four claims. The main thrust of Southeastern and RUSO's motion was that Dr. Tudor could not pursue Title VII claims because she is transgender. The District

[82] Doc. 34 at 5 (Op.).
[83] Tudor App. Vol. 2 at 195–207 (Compromise Settlement).
[84] Doc. 270 at 14.

Court decided again that *Etsitty* does not bar sex discrimination claims brought by women who are transgender.[85]

Key stipulations. On the eve of trial, Southeastern and RUSO made several stipulations pertinent to this appeal. First, they decided in exchange for Dr. Tudor's expert on sex, Dr. Brown, not testifying at trial that they would cease raising challenges concerning the meaning of the term "sex."[86] Second, Southeastern and RUSO stipulated that they did not have after-acquired evidence and thus a host of issues such as Tudor's employment at Collin College were not pertinent to liability or remedies in this case.[87]

Trial. Dr. Tudor testified on her own behalf. She also called tenure expert Dr. Parker, Department colleague and current Southeastern administrator Dr. Cotter-Lynch, former Department Chair Dr. Mischo, current Department Chair Dr. Prus, Department colleague Dr. Spencer, three-time Faculty Appellate Committee veteran Dr. Knapp, and former Southeastern secretary Ms. House. Defendants called former Dean Dr. Scoufos, former Human Resources director Ms. Conway, former

[85] Doc. 219 at 4–5, 6.
[86] Tudor App. Vol. 6 at 45:9–23 (Hr'g Trans.).
[87] A-3 at 4 (Op. acknowledging stipulation).

Affirmative Action Officer Dr. Stubblefield, former Vice President Dr. McMillan, and former Interim-President Dr. Snowden. Dr. Tudor presented one rebuttal witness—former academic affairs officer Dr. Weiner.

At the close of evidence both sides moved for judgment as a matter of law orally; neither party filed briefs in support. Southeastern and RUSO moved solely on the grounds that they "believe the facts in evidence support a motion for directed verdict on each of plaintiffs claims."[88] The District Court denied all motions. Before sending the case to the jury, the District Court provided instructions, including Instruction No. 6, which advised that Dr. Tudor must prove gender discrimination and that her transgender status is itself not dispositive.[89] The District Court also provided a verdict form, uncontested by Southeastern and RUSO, with only a single line for damages, not permitting delineation by kind as is necessary for the cap to be applied.

The jury ultimately returned a verdict for Dr. Tudor on her two sex discrimination claims and one retaliation claim, awarding omnibus

[88] Tudor App. Vol. 9 at 4:18–25 (Hr'g Trans.).
[89] Tudor App. Vol. 2 at 47–48.

damages of $1,165,000.[90] Southeastern and RUSO did not move to *voir dire* the jury to ascertain which portions, if any, were subject to Title VII's statutory cap.

Post-trial briefing. The District Court set a schedule for post-trial briefing at the request of the parties. Any challenges to the jury's verdict were to be filed by December 11, 2017 with Dr. Tudor's motion for reinstatement due the same day.[91] Dr. Tudor filed her motion on December 11[92]; Southeastern and RUSO did not file any motion within the deadline and did not seek leave of Court for an extension of time.

Southeastern and RUSO opposed reinstatement. They variously argued that Dr. Tudor did not merit tenure in the past, does not merit tenure today, that her present publication record is too poor to hold tenure, that students would be harmed by reunion, that Tudor is a bad teacher, and otherwise that testimony by Dr. Cotter-Lynch rebutting their assertions is inapposite because they claimed she never reviewed Tudor's tenure application let alone saw her teach in class.[93]

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[90] *Id.* at 71–72 (Verdict Form).
[91] Tudor App. Vol. 9 at 119–21 (Hr'g Trans.).
[92] Doc. 268.
[93] A-1 at 4 (Op. describing Southeastern's opposition).

Southeastern failed to proffer proof supporting its points of opposition. Indeed, record evidence shows most of the opposition points have been proven false and are otherwise not grounds on which reinstatement may be withheld.

The District Court denied Dr. Tudor reinstatement on January 29, 2018, premising its decision on Southeastern's supposed one-sided hostilities.[94] Dr. Tudor moved for reconsideration twice bringing to light factual and legal errors as well as pointing to new facts, like her successes in publishing new scholarship and her lecture at the Southeastern hosted academic conference, which undermined premises in earlier decisions.[95] The District Court clarified its reasons for denial in a June 6, 2018 order, there stating that the sole reason for denial is Southeastern's hostilities towards Dr. Tudor, not her merit.[96]

After reinstatement was denied the first time, Dr. Tudor moved for front pay for her remaining work life expectancy. Dr. Tudor requested $2,032,789.51, the sum of her estimated salary and benefits accounting

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[94] *Id.*

[95] Tudor App. Vol. 4 at 130–59 (Tudor Mot. for Recons. of Reinstatement); *id.* at 161–85 (Tudor Mot. for Recons. of Reinstatement and Alternatively, Front Pay); *id.* at 222–27 (Tudor Mot. to Supp.); *id.* at 239–45 (Tudor Mot. to Supp.).

[96] A-4 at 3.

for anticipated pay raises and promotions, reduced to present day value, through the date of her planned retirement at Southeastern at age 75 I 2039.[97]

All evidence reflects the remainder of the tenured professorship Tudor earned at Southeastern is valued in the millions. Dr. Tudor estimates, at the low end the remainder of the tenured professorship she earned is worth $1,730,369.12 but, if potential internal promotions and opportunities for teaching extra classes are accounted for, it is worth $2,032,789.51.[98] Dr. Cotter-Lynch estimates the job is valued between $3.5M and $4M, given the extra work opportunities tenured professors at Southeastern are afforded both in and outside of the university to boost their income.[99] Dr. Cotter-Lynch's estimates are grounded in her own experience—she went up for tenure the same year Dr. Tudor did and believes Tudor's career would have traveled a parallel path if tenure had not been withheld.[100] Drs. McMillan and Snowden estimated the tenured job is worth between $1 and $5 million.[101] Southeastern and RUSO did

[97] Doc. 279 at 4.
[98] Tudor App. Vol. 4 at 217–21 (Tudor's front pay calculation tables).
[99] *Id.* at 208 (Cotter-Lynch Decl.).
[100] *Id.* at 206–08.
[101] Tudor App. Vol. 8 at 198–99 (McMillian testimony: $1M to $2M range); Tudor App. Vol. 9 at 47–48 (Snowden testimony: $3M to $5M range).

not contest Dr. Tudor's evidence or calculations, they simply argued that she should not get front pay resuscitating failed defenses from the merits stage. Southeastern and RUSO also admitted that if Dr. Tudor were presently tenured at Southeastern they could not and would not strip her of tenure.[102]

On April 13, 2018, the District Court awarded Dr. Tudor $60,040.77 in front pay.[103] The District Court's front pay award was premised on a 14-month period of front pay based on apparent guesswork by the court.

As to the period, the court reasoned that Dr. Tudor's nonequivalent mitigation job at Collin College cut off front pay and otherwise that Tudor should simply seek a job like the Collin one (an indisputably nonequivalent position) and that 14 months would be sufficient time to do so.[104]

As to the rate, the court inexplicably discounted the pay. It appears that the rate's genesis is a misreading of Dr. Tudor's front pay calculation table. The court mistook the 2017-18 term pro-rated figures to be full year earnings and ignored the fact that each successive year of work salary

[102] Tudor App. Vol. 5 at 38.
[103] A-3 at 4.
[104] *Id.* at 4; A-4 at 2.

and benefits increased due to seniority. Thinking the 2017-18 figure to be a constant and whole compensation, the court divided the figure by 12 (to supposedly capture the monthly rate) and multiplied that sum by 14.[105] However, Dr. Tudor's front pay table makes clear she would have actually earned no less than $90,080.58 if reinstated for 14 months (253 days of pay under the 2017-18 rate and 173 days of pay under the 2018-19 rate).[106]

Dr. Tudor moved for reconsideration of the front pay award, pointing out the mathematical and factual errors noted above; that request was denied.[107]

Thereafter, the District Court invited the parties to brief remittitur.[108] Southeastern and RUSO argued the jury's award must be remitted to an unidentified figure under $300,000.[109] The crux of their argument is that because Title VII's statutory cap exists, it must be applied to the whole award and damages should be remitted below the cap's threshold because they claim Dr. Tudor did not prove liability. Not

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[105] A-3 at 4–5.
[106] Tudor App. Vol. 5 at 53–54 (explaining mathematical error).
[107] *Id.*; A-4 at 2–3 (Op. denying reconsideration).
[108] Doc. 287 (Op.).
[109] Doc. 289 at 15 (Southeastern and RUSO Br.).

knowing what damages, if any, were subject to the cap, Southeastern and RUSO argued the District Court should reexamine evidence and guess what the jury did and apply the cap on that basis and then lower the award below that threshold.

Dr. Tudor opposed remittitur on two grounds. First, she argued that the statutory cap should not be applied here because it was waived. In support, Dr. Tudor pointed out that Southeastern and RUSO failed to take necessary steps to invoke the cap. For instance, Southeastern and RUSO did not plead the cap in any of the six answers filed[110] and leading up and during trial, they requested verdict forms that did not ask the jury to provide any delineation of capped and uncapped damages.[111] At trial, Southeastern and RUSO chose a verdict form with only one line for damages—ensuring the jury would have no means of delineating capped and uncapped damages.[112] And after the jury returned a $1,165,000 award, Southeastern and RUSO forsook the opportunity to *voir dire* the

[110] Doc. 21 (Southeastern Answer to DOJ); Doc. 22 (RUSO Answer to DOJ); Doc. 28 (Southeastern Answer to Tudor); Doc. 29 (RUSO Answer to Tudor); Doc. 38 (Southeastern Answer to Tudor); Doc. 37 (RUSO Answer to Tudor).
[111] Doc. 196 at 32–33 (SEOSU and RUSO's proposed verdict form); Tudor App. Vol. 2 at 30 (Tudor's opp'n to proposed verdict form).
[112] Tudor App. Vol. 2 at 71–72 (Verdict Form).

jury to inquire as to how damages were allocated since that was another way to obtain information about whether a cap should be applied.

Second, Dr. Tudor argued that the Seventh Amendment prohibited remittitur in this situation since, to apply the cap, the District Court would be forced to reexamine the jury's omnibus damages award and divine damages subject and not subject to the cap without input of the jury, which is not permitted.

On June 6, 2018, the District Court remitted the jury's award from $1,1650,000 to $360,040.77.[113] The court found as a matter of law Title VII's cap (42 U.S.C. § 1981a) could not be waived and remarkably noted that it was Dr. Tudor's responsibility, as plaintiff, to ensure the cap could be applied to the jury's award rather than the defendant employers'.[114] The court then reexamined the jury's award, claimed that its front pay award should be the measure of backpay here, implying that the jury had intended as much, and remitted on the assumption that no other damages in this case are uncapped.[115] However, the evidence the District Court looked at for front pay was not presented to the jury and thus could

[113] A-4.
[114] *Id.* at 3–4.
[115] *Id.* at 4–5.

not have informed their backpay calculations. A jury note submitted to the court during deliberation indicates discussions regarding damages were robust, fact-based, and tethered to evidence presented at trial.[116]

Later that same day, Dr. Tudor filed her notice of appeal to this Court.

On July 5, 2018, Southeastern and RUSO moved for JNOV/ New Trial, 206 days after the special due date for those motions set by the District Court. On July 18, 2018, Dr. Tudor moved to strike Southeastern and RUSO's motion arguing it was inexcusably untimely.[117]

On July 23, 2018, Dr. Tudor moved for scheduling relief—requesting that the District Court decide her motion to strike before requiring her to respond to the JNOV/New Trial motion on the merits.[118] Because Southeastern and RUSO opposed Dr. Tudor's extension motion, she was forced to file an opposition response on July 26, 2018.[119] On August 8, 2018, the District Court granted Dr. Tudor's extension motion

[116] Tudor App. Vol. 2 at 70 (Jury Note No. 1).
[117] Doc. 318 (Tudor Mot.); Doc. 333 at 1 n.1 (calculating days late).
[118] Doc. 326 (Tudor Mot.).
[119] *See* Doc. 324 at 1 n.1 (explaining predicament).

and struck Tudor's response and Southeastern and RUSO's reply to the JNOV/New Trial motion.[120]

On September 18, 2018, the District Court struck Southeastern and RUSO's JNOV/New Trial motion finding that it was untimely and otherwise lacked merit.[121] On September 28, 2018, Southeastern and RUSO filed a notice of appeal to this Court.

SUMMARY OF ARGUMENT

Dr. Tudor should have been reinstated to the tenured professorship she earned at Southeastern. Reinstatement is Title VII's presumptive, preferred make-whole remedy. Though reinstatement can be withheld in rare circumstances where there is extreme hostility, there is no evidence of that here and other special circumstances otherwise tip the scales in favor of reinstatement. Moreover, the District Court erred in placing the burden on Dr. Tudor to prove reinstatement is feasible and otherwise improperly overlooked evidence showing reunion is feasible.

If reinstatement is deemed infeasible, the District Court's front pay award should be vacated because it fails to make Dr. Tudor whole in light

[120] Doc. 332 (Op.).
[121] Doc. 337 (Op.).

of the lingering effects of the discrimination and retaliation she endured at Southeastern and fails to deter future violations. The District Court not only misunderstood the legal standard for awarding front pay, but also ignored critical evidence that comparable work opportunities are not available and that Dr. Tudor faces considerable obstacles in finding a new job.

Lastly, the District Court fundamentally erred in remitting the jury's award. This Court's precedents make plain that defendants must plead and otherwise take steps to ensure a cap can be applied to the jury's award. Southeastern and RUSO failed to carry that hefty burden and thus waived the cap. Even if not waived, applying the cap to the jury's omnibus award is unconstitutional since doing so requires reexamining mixed damages and applying labels without the input of the jury, in contravention of the Seventh Amendment's Reexamination Clause.

STANDARD OF REVIEW

A district court's decision to withhold reinstatement and the amount of front pay it awards are reviewed for abuse of discretion.[122] However, the district court's statutory interpretation and legal analysis are reviewed *de novo*,[123] as is its decision to remit a jury award premised on construction of a statutory cap,[124] and analysis of the constitutionality of applying a statutory cap[125].

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[122] *Abuan v. Level 3 Commc'ns, Inc.*, 353 F.3d 1153, 1176–77 (10th Cir. 2003); *McInnis v. Fairfield Communities, Inc.*, 458 F.3d. 1129, 1145 (10th Cir. 2006).
[123] *Carter v. Sedgwick Cnty., Kan.* (*Carter III*), 36 F.3d 952, 956 (10th Cir. 1994).
[124] *Id.*
[125] *In re Motor Fuel Temperature Sales Practices Ltg.*, 872 F.3d 1094, 1113 (10th Cir. 2017).

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING DR. TUDOR HER PRESUMPTIVE, PREFERRED REMEDY OF REINSTATEMENT.

A. This District Court failed to give proper weight to Title VII's clear preference for reinstatement.

Make whole relief and deterring future violations are Title VII's touchstones.[126] In keeping with the remedial goals of Title VII, this Court has recognized (along with every other sister Circuit) that reinstatement is the preferred, presumptive remedy for victims of employment discrimination and retaliation.[127]

Although the District Court acknowledged in passing that reinstatement is Title VII's presumptive remedy,[128] it failed to assign proper weight to that presumption in assessing Dr. Tudor's specific circumstances. Contrary to the District Court's finding, the simple fact that reinstatement is not "pleasing and free of irritation" does not justify withholding relief.[129] Absent "unusual" facts, denying an equitable

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[126] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Carter v. Sedgwick Cnty., Kan.* (*Carter II*), 929 F.2d 1501, 1505 (10th Cir. 1991).
[127] *Ford Motor Co. v. EEOC*, 458 U.S. 219, 241 (1982); *Jackson v. City of Albuquerque*, 890 F.2d 225, 234 (10th Cir. 1989).
[128] A-1 at 2.
[129] *Jackson*, 890 F.2d at 234.

remedy to a victim worker like Dr. Tudor perpetuates the effects of discrimination and retaliation and rewards the employer for its illicit conduct, undermining Title VII's goals.[130]

B. The District Court improperly considered limited, one-sided hostility arising from this Title VII litigation and on that basis withheld reinstatement.

This Court has repeatedly held that the presumption of reinstatement can only be overcome by a showing of "extreme hostility."[131] This Court explains in *EEOC v. Prudential Fed. Sav. and Loan Ass'n* that evidence supports "extreme hostility" only where it demonstrates a total breakdown in relations for which there is no possibility of repair.[132] That high bar is not met here and conversely, all relevant parties appear amenable to welcoming Dr. Tudor back to campus. Accordingly, the District Court abused its discretion in withholding reinstatement.

The District Court identified scant evidence reflecting a possibility of tension in the future. Specifically, the District Court worried that if

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[130] *Bingman v. Natkin & Co.*, 937 F.2d 553, 558 (10th Cir. 1991).
[131] *See, e.g.*, *EEOC v. Prudential Fed. Sav. and Loan Ass'n*, 763 F.2d 1166, 1172–73 (10th Cir. 1985).
[132] *Id.*

reinstated, Dr. Tudor *might* encounter individuals who view her as unqualified for tenure. The District Court appears to believe that, as a result of any prejudice Dr. Tudor could face, students would suffer—however, the cause-and-effect reasoning behind that concern remains unclear.[133] The court did not find this likely, just possible—in other words, there was "some evidence" that it could happen.[134]

However, reinstatement cannot be denied simply as a measure to inoculate against all risk of ill-feeling and discord. Indeed, in *Jackson v. City of Albuquerque*, this Court recognized that, "[u]nless we are willing to withhold full relief from all or most successful plaintiffs in discharge cases, and we are not, we cannot allow actual or expected ill-feeling alone to justify nonreinstatement."[135]

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[133] A-1 at 3–4.

[134] *Id.* at 3.

[135] *Jackson*, 890 F.2d at 235 (*quoting Allen v. Autauga Cnty. Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982)). *See also Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 43 (1st Cir. 2003) ("[G]overnment operations can be burdened because of the hostility that results from reinstatement[. B]ut we have repeatedly said that such burdens and hostility are not enough to justify a denial of reinstatement, absent special circumstances."); *EEOC v. Century Broad. Corp.*, 957 F.2d 1446, 1463 (7th Cir. 1992) ("If hostility common to litigation would justify a denial of reinstatement, reinstatement would cease to be a remedy except in cases where the defendant felt like reinstating the plaintiff."); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1139 (8th Cir. 1981) ("Antagonism between parties occurs as the natural bi-product of any litigation.").

Comparing this case to others where this Court found extreme hostility elucidates the District Court's abuse of discretion. Unlike *Spulak v. K Mart Corp.*,[136] Dr. Tudor wishes to return to Southeastern and believes herself able to perform her job duties, a good sign that relations are not irreconcilably broken. Distinguishable from *Starrett v. Wadley*,[137] there are not hostilities so great that a medical provider advises against reunion. Quite different from *Acrey v. Am. Sheep Indus. Ass'n*,[138] if reinstated, Dr. Tudor will not work alongside the administrators who discriminated and retaliated against her since they have all left the university and thus past tensions are unlikely to reignite.

Distinguishable from *Abuan v. Level 3 Commc'ns, Inc.*,[139] if reinstated it is unlikely that there will be discord since the main source of past tension—unjustly withholding tenure—is obviated. Distinct from *Fitzgerald v. Sirloin Stockade, Inc.*,[140] Dr. Tudor's jury found there to be no past hostile work environment making it all the more likely that a fresh start is possible. Different from *Cooper v. Asplundh Tree Expert*

[136] 894 F.2d 1150, 1157–58 (10th Cir. 1990).
[137] 876 F.2d 808, 824 (10th Cir. 1989).
[138] 981 F.2d 1569, 1576 (10th Cir. 1992).
[139] 353 F.3d at 1177–78.
[140] 624 F.2d 945, 956–57 (10th Cir. 1980).

Co.,[141] Dr. Tudor's job does not require frequent interactions with coworkers—scholarship is a solitary endeavor and teaching involves students—thus, even if some coworkers were less than warm, there is no likelihood tensions would flare.

Ultimately, the kinds of evidence the District Court claimed to rely upon do not, as a matter of law, meet the bar of "extreme hostility." For instance, supposed litigation tensions, even if proved, are simply fruits of the adversarial process. The bar on withholding reinstatement due to litigation tensions is absolute. For example, in *Medlock v. Ortho-Biotech, Inc.* this Court held that even violent brawls between employer and employee at a hearing cannot support withholding reinstatement.[142] Most certainly, the supposed litigation tensions that the District Court claimed to find here—unidentified filings touching on "character or credibility" that the court found "unnecessary,"[143] which are nowhere near as extreme as the issues in *Medlock*—cannot sustain a "extreme hostility" finding.

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[141] 836 F.2d 1544, 1553 (10th Cir. 1988).
[142] 164 F.3d 545, 555 (10th Cir. 1999).
[143] A-1 at 3.

Otherwise, the District Court improperly relied on a set of claims—not evidence—that Southeastern lodged in opposition to reinstatement. Those points are variously uncorroborated and simply false.[144] At most they reflect Southeastern's recalcitrance in opposing reinstatement. Importantly, in *Jackson* this Court unequivocally barred one-sided employer hostilities as a ground to withhold reinstatement. For good reason. If one-sided employer hostilities were enough to overcome the presumption of reinstatement, virtually all employers would be rewarded for their violative behavior, undermining Title VII's twin aims of affording make-whole relief and deterring future violations.[145] Put another way, as the Eleventh Circuit observes in *Farley v. Nationwide Mut. Ins. Co.*, acquiescing to the employer's hostilities cannot be countenanced because it would "assist a defendant in obtaining his discriminatory goals."[146]

The District Court essentially inverted Title VII's remedial analysis by making Dr. Tudor, the victim worker, prove the feasibility of

[144] *See* discussion *infra* Arg. Part I.C.
[145] *Jackson*, 890 F.2d at 235.
[146] 197 F.3d 1322, 1340 (11th Cir. 1999) (*citing Jackson*, 890 F.2d at 235).

reinstatement, rather than making Southeastern and RUSO meet their burden of showing reinstatement is truly infeasible.[147]

C. The District Court's finding that reinstatement is infeasible is contradicted by the record.

Reinstatement should be awarded because, *inter alia*, Southeastern and RUSO failed to present sufficient evidence that overcomes Title VII's presumption of reinstatement. Indeed, the record evidence points to the opposite conclusion—that reinstatement is appropriate here. First and foremost, Dr. Tudor wants to return to Southeastern, a sign that this Court's precedents recognize defeats an extreme hostility finding.[148]

Moreover, Southeastern's own actions show that work relations are not beyond repair. The significant changes to Southeastern's staffing and policies made after Dr. Tudor's departure show reunion is both possible and likely to succeed.[149] Additionally, the Compromise Settlement provides additional security of a kind unique from every other case this Court has heard on reinstatement—Dr. Tudor is protected, all policies that led to tensions in the past have been changed, and litigation tensions

[147] *See* A-1 at 2–5; A-3 at 1–2.
[148] *See, e.g.*, *Jackson*, 890 F.2d at 235.
[149] *See* discussion and evidence cited *supra* page 16–18.

between Southeastern and the United States are ended.[150] Under *Bingman v. Natkin & Co.*, the fact that Southeastern has willingly taken proactive steps to remedy past problems is strong evidence of the feasibility of reinstatement.[151] Additionally, Dr. Tudor's trial-run return to Southeastern in March 2018 dispels any lingering doubt that reunion is infeasible.[152]

Southeastern made a number of arguments against reinstatement—none of which were supported by evidence and some of which were contradicted by record evidence. Even if Southeastern's points were proven (which they were not), this Court's precedent forbids withholding reinstatement on such grounds.

As the Supreme Court held in *Texas Dep't of Comm. Affs. v. Burdine*, employers cannot rebut a presumption through bare argument of counsel.[153] In line with *Burdine*, this Court recognized in *Jackson* that an employer's disproved merits defense cannot be given weight at the remedies stage because "credence cannot be given to deception."[154] Given

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[150] *See* discussion and evidence cited *supra* page 24.
[151] 937 F.2d 553, 558 (10th Cir. 1991).
[152] *See* discussion *supra* pages 21–23.
[153] 450 U.S. 248, 255 n.9 (1981).
[154] 890 F.2d at 233 (*citing Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1106 (5th Cir. 1987)).

these bright-line rules and other precedents, none of Southeastern's points are grounds to withhold reinstatement.

One of Southeastern's claims against reinstatement, that Dr. Tudor did not merit tenure in the past, was conclusively rejected by the jury, which found that Tudor was denied tenure because of her sex rather than her merit. As the First Circuit explained in *Fields v. Clark Univ.*, a professor who has already proved to the jury she merited tenure cannot be forced to prove her merit again to win reinstatement.[155] This Court's decision in *Smith v. Diffee Ford-Lincoln-Mercury, Inc.,* which bars trial courts from displacing a jury's finding of fact made at the liability stage with its own contrary one at the equitable remedies stage, commands the same conclusion.[156]

Similarly, Southeastern's contention that Dr. Tudor's current publication record falls short of meriting tenure today is not supported by any evidence—and actually is demonstrably false. At the threshold, Southeastern did not proffer evidence showing that tenured

[155] 817 F.2d 931, 937 (1st Cir. 1987).
[156] 298 F.3d 955, 965 (10th Cir. 2002) (facts decided by jury at liability stage cannot be reexamined or displaced by court at remedies stage). *See also Brinkman v. Dep't of Corr.*, 21 F.3d 370, 372–73 (10th Cir. 1994) (similar holding on Seventh Amendment grounds).

Southeastern English professors are held to a particular publication requirement, let alone that they are terminated if that bar is not met. As the District of Colorado recognized in *Blangsted v. Snowmass-Wildcat Fire Prot. Dist.*,[157] this is fatal to Southeastern's opposition. Simply claiming the victim employee is presently unqualified is not enough to defeat reinstatement; rather, such an argument must be proven by evidence of objective measures. Here, not only did Southeastern fail to point to an objective bar, but there is compelling evidence that Dr. Tudor's publication record passes muster since she has far more peer review publications than her colleagues including Department Chair Dr. Prus.[158]

Even if Southeastern had proved Dr. Tudor does not meet a new publication bar that is still no reason to deny reinstatement. *Franks v. Bowman Transp. Co., Inc.*, recognizes that Title VII is designed to restore a worker to the position she should have held absent violations.[159] Thus, it is not relevant if Dr. Tudor meets new qualifications for the job she

[157] 642 F.Supp.2d 1250, 1266–67 (D.Colo. 2009).
[158] *See* discussion and evidence cited *supra* pages 18–19.
[159] 424 U.S. 747, 764–66 (1976).

previously earned—the injury to cure is the fact she would have been in the job today but for the past violation.[160]

Southeastern's claim that students could be harmed by Dr. Tudor's reinstatement is likewise entirely unsubstantiated and, as a result, cannot overcome the presumption of reinstatement. There is simply no evidence proving students will be harmed if Dr. Tudor returns to Southeastern. (Southeastern's assertion that Dr. Tudor is a bad teacher is simply untrue and otherwise disproved.[161])

Unsubstantiated concerns about student welfare are no reason to withhold reinstatement since Title VII's mandates cannot bend to accommodate fears of ill-feeling.[162] This is especially so where the employer claims that it fears ill-feelings of third-parties with absolutely no evidence to back that up since, as the Eleventh Circuit explains in *Haynes v. W.C. Caye & Co., Inc.*, many discriminators cast their biases onto others as subterfuge.[163]

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[160] *See, e.g., Hopkins v. Price Waterhouse*, 920 F.2d 967, 981 (D.C. Cir. 1990).
[161] *See* discussion and evidence cited *supra* pages 19–20.
[162] *Jackson*, 890 F.2d at 235.
[163] 52 F.3d 928, 930–31 (11th Cir. 1995).

Even if Southeastern proffered evidence showing students would be biased against Dr. Tudor, Title VII would not permit withholding reinstatement. The Supreme Court holds in *Franks* that make whole remedies cannot be withheld to accommodate third parties that are "unhappy about it."[164] And ultimately, as this Court held in *Estate of Pitre v. Western Elec. Co., Inc.*, the hardship of ensuring that the workplace is free of problems caused by the employers' past violations rests on Southeastern's shoulders and cannot be shifted to Dr. Tudor.[165] Thus, to the extent that stigma poses an impediment to reinstatement's success, it is Southeastern's obligation to guard against that.

If Southeastern instead thinks it better that students not see the consequences of Title VII violations up close, it is mistaken. In *Albemarle Paper Co. v. Moody*, the Supreme Court unequivocally held that "equity's scales cannot depress in the employer's favor,"[166] thus hiding the fruits of violations is no reason to deny a remedy. Moreover, there is nothing untoward about a victim worker being made whole by reinstatement.

[164] 424 U.S. at 775.
[165] 975 F.2d 700, 704 (10th Cir. 1992).
[166] 422 U.S. 405, 422 (1975).

Quite the opposite—reunion is the exact remedy that Congress envisioned and that this Court prefers.

Lastly, Southeastern's assertion that Dr. Cotter-Lynch's testimony on the viability of reinstatement cannot be afforded weight because she never read Dr. Tudor's tenure application nor saw her teach in class is simply false.[167]

D. The District Court failed to consider special circumstances favoring reinstatement.

Following this Court's decision in *Jackson v. City of Albuquerque*, three special circumstances exist in this case that warrant reinstatement even if Southeastern and RUSO demonstrate the remedy is potentially infeasible.[168]

First, Dr. Tudor attests that being deprived of tenure and ejected from Southeastern profoundly wounded her in ways money cannot cure.[169] Because Dr. Tudor's injuries cannot be salved short of returning to Southeastern reinstatement is necessary.[170]

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[167] Tudor App. Vol. 7 at 131:10–13 (reviewed Tudor's 2010-11 application); *id.* at 108:12–15 (saw Tudor teach).
[168] *Jackson*, 890 F.2d at 235.
[169] *See, e.g.*, Tudor App. Vol. 2 at 107 (Tudor Decl.).
[170] *Jackson*, 890 F.2d at 234.

Second, Dr. Tudor's Chickasaw heritage, her desire to work at a university serving Chickasaw citizens directly, and RUSO's control over all public teaching universities in the Nation's historic boundaries favor reinstatement. Tudor was uniquely wounded by the tenure denial and ejectment. Today, she has no chance of teaching at a university within the Nation's boundaries that directly serves its citizens absent reinstatement.[171] Make whole remedies must salve the injury incurred.[172] Because there are no comparable positions available to Dr. Tudor and she has always sought her job back, *Jackson* mandates reinstatement.[173]

Third, given the fact that tenured professorships are not "quickly or easily found" and virtually impossible to obtain with the mark of tenure denial, *Jackson* mandates reinstatement.[174]

Ultimately, Dr. Tudor need not affirmatively prove that reinstatement is warranted under these circumstances. Indeed, Title VII's presumption puts the burden on Southeastern and RUSO to demonstrate reinstatement is infeasible—a burden they failed to even

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[171] *See* discussion and evidence cited *supra* pages 7–10 and 15–16.
[172] *See Albemarle*, 422 U.S. at 418–19 (*citing Wicker v. Hoppock*, 6 Wall. 94, 99 (1867)).
[173] 890 F.2d at 234.
[174] *Id.*

remotely satisfy. Nevertheless, the special circumstances enumerated here further highlight the importance of reinstatement as the remedy for Dr. Tudor's injuries.

II. ALTERNATIVELY, THE FRONT PAY AWARD SHOULD BE VACATED BECAUSE THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD AND IGNORED EVIDENCE THAT COMPARABLE JOBS ARE UNAVAILABLE TO DR. TUDOR.

It is well-established in this Court that to meet Title VII's underlying make-whole and deterrence goals, the amount of front pay awarded must "compensate a victim for the continuing future effects of discrimination until the victim can be made whole."[175]

The District Court began its front pay inquiry by applying the wrong legal standard. To wit, it relied on this Court's 1991 decision *Carter v. Sedgwick Cnty., Kan.* (*Carter II*) for the proposition that front pay awards must take into account "any amount that the plaintiff could earn using reasonable efforts."[176] The District Court failed to appreciate that this Court refined the holding of *Carter II* in its 1994 decision in *Carter III*, where it clarified that it is not enough for a front pay award

[175] *Carter III*, 36 F.3d at 957.
[176] A-4 at 2 (*citing Carter II*, 929 F.2d 1501, 1505 (10th Cir. 1991)).

to "simply attempt to compensate for future loss during which the plaintiff will find commensurate employment."[177] Instead, front pay must be awarded "[i]n keeping with the 'make whole' nature of the remedies required under Title VII."[178]

Furthermore, this Court held in *Davoll v. Webb*, that a district court must consider the "individualized circumstances of both the employee and employer."[179] Moreover, *Metz v. Merrill Lynch* commands that doubt as to discounts be resolved in the employee's favor.[180] The District Court failed to apply these standards in awarding front pay.

Dr. Tudor sought, and should have been awarded, front pay for her remaining work-life expectancy because the Southeastern English Department professorship is life tenured and comparable jobs are not reasonably available. If Dr. Tudor had been reinstated she would have held that job until her planned retirement at age 75 in 2039 because Southeastern admits it cannot take away her tenure once obtained.[181] Thus, the value of Dr. Tudor's Southeastern job—if there is no other

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[177] *Carter III*, 36 F.3d at 957.
[178] *Id.*
[179] 194 F.3d 1116, 1144 (10th Cir. 1999).
[180] 39 F.3d 1482, 1494 (10th Cir. 1994).
[181] Tudor App. Vol. 4 at 194 (Tudor Decl.); Tudor App. Vol. 5 at 38 (Southeastern admission).

equivalent life tenured professorship on the immediate horizon—must be compensated with front pay accounting for that full period without discount.[182]

Though lengthy, front pay awards for a period of roughly 22 years, like that requested by Dr. Tudor, are appropriate in analogous situations. For example, in *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, the Ninth Circuit approved 22 years of front pay for a female manager who was fired after she complained that her advancement within the company was being limited by sex discrimination.[183] The Ninth Circuit reasoned that because Passantino could not continue to work for Johnson & Johnson due to extreme hostilities between them, she was entitled to front pay for her remaining work life expectancy at the pay level due her, accounting for anticipated promotions and raises, but for her employer's statutory violations.[184]

Rather than compensate Dr. Tudor for the true value of the tenured professorship, the District Court abused its discretion in cutting back the award to her in three ways.

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[182] *Cox v. Shelby State Comm. Coll.*, 194 Fed.Appx. 267, 276–77 (6th Cir. 2006).
[183] 212 F.3d 493 499–503 (9th Cir. 2000).
[184] *Id.* at 511–12.

First, the District Court reasoned that Dr. Tudor seeks an excessive award of front pay.[185] This is contrary to precedent. Front pay must make up the gap between what the worker would have earned if reinstated or until the victim finds equivalent employment.[186] If the amount sought is substantiated by evidence showing it is what the employee would have earned—as it was here—it is reasonable.[187] Though the front pay Dr. Tudor seeks is sizable, she is forced to seek it because Southeastern opposes her reinstatement. As now Justice Gorsuch recognizes in *Barrett v. Salt Lake Cnty.*, employers bear responsibility for remedying their violations even where doing so is, as is the situation here, made costly due to their own misconduct.[188]

Second, the District Court improperly cut off the time period for calculating front pay, concluding that Dr. Tudor was not injured by withholding reinstatement because she held, for a period of 6 years, a nonequivalent mitigation job at Collin College.[189] This is an error of law. "[F]ront pay as a substitute for reinstatement is a necessary part of the

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[185] A-3 at 2.
[186] *See, e.g.*, *Estate of Pitre*, 975 F.2d at 704.
[187] *Carter III*, 36 F.3d at 957.
[188] 754 F.3d 864, 869 (10th Cir. 2014).
[189] A-3 at 3.

make whole relief mandated by Congress."[190] Thus, as the First Circuit held in *Johnson v. Spencer Press of Maine, Inc.*, relying on this Court's precedent in *Medlock*, intervening mitigation jobs cannot cut off entitlement to front pay if the worker is not at the time of the remedies stage truly whole.[191] Moreover, under *McInnis v. Fairfield Communities, Inc.*, where the mitigation job is a non-equivalent in pay or prestige, front pay must be awarded up to the point at which the employee gets an equivalent job.[192] *McInnis* is dispositive here because the Collin job is not equivalent to the tenured Southeastern professorship.[193]

As the Supreme Court cautioned in *Ford Motor Co. v. EEOC*, victims of employment discrimination "need not go into another line of work, accept a demotion, or take a demeaning position" as doing so would create perverse incentives.[194] In *Carter III*, this Court recognized that front pay awards must be "[i]n keeping with the 'make whole' nature of the remedies required under Title VII."[195] Here, the District Court should

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[190] *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 846 (2001) (cleaned up).
[191] 364 F.3d 368, 382–83 (1st Cir. 2004) (*citing Medlock*, 164 F.3d at 555).
[192] 458 F.3d at 1146.
[193] *See* discussion and evidence cited *supra* page 13–14.
[194] 458 U.S. at 231.
[195] 36 F.3d at 957.

have taken into account the immediate unavailability of tenured English Department professorships at institutions comparable to Southeastern in Dr. Tudor's geographic area, not to mention the unavailability of positions offering comparable job security, salary, benefits, job satisfaction, and prestige. Put bluntly, as this Court held in *Barrett,* the comparison point must be the job withheld[196]—in this case, the tenured professorship Tudor earned but which Southeastern illicitly deprived her.

Additionally, the District Court's finding of no injury is contradicted by the record showing that Dr. Tudor is presently unemployed and has not been able to secure an equivalent tenured job let alone a tenure-track job, despite her best efforts, and likely cannot absent reinstatement.[197] Southeastern must bear full financial responsibility for the lingering effects of its Title VII violations.[198]

The District Court also fully ignored the particular challenges Dr. Tudor faces based on her age, Native American heritage, sex, and the

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[196] 754 F.3d at 869.
[197] Tudor App. Vol. 4 at 191 n.1 (Tudor Decl.).
[198] *Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 445 (1986); *Carter III*, 36 F.3d at 957; *Estate of Pitre*, 975 F.2d at 704.

stigma that she carries because it is publicly known she brought a complaint of discrimination.[199] These factors are all relevant to the front pay determination and should have been taken into account.[200]

Third, the District Court also impermissibly discounted the front pay rate. Below, the District Court resorted to guesswork and arrived at a rate which is simply wrong and contradicted by Dr. Tudor's calculations of salary and benefits if reinstated. Even if Dr. Tudor were only entitled to 14 months of front pay, uncontroverted evidence shows that the award should have been no less than $90,080.58, not $60,040.77.[201]

Thus, there is ample evidence demonstrating that the District Court abused its discretion in awarding Dr. Tudor only $60,040.77 in front pay and overlooked a number of critical factors in performing its analysis.

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[199] *See* discussion and evidence cited *supra* pages 12–13.
[200] *See Whittington v. Nordam Grp. Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005); *see also Davoll*, 194 F.3d at 1144.
[201] *See* discussion and evidence cited *supra* pages 30–31.

III. STATUTORY CAP

A. The remittitur order should be vacated because Southeastern and RUSO waived the statutory cap.

The District Court should not have applied the cap to the jury's award. Southeastern and RUSO failed to plead the cap and they did not ensure the verdict form given to the jury allowed for the cap's application.[202] As the parties seeking the benefit of the cap, it was Southeastern and RUSO's burden to invoke it and ensure it could be applied properly. Their failures constitute waiver of the cap.

This Court's precedents recognize that defendants who seek the benefit of a statutory cap must invoke it early and take all necessary steps to ensure it can be applied as the legislature intended. For instance, in *Rancher v. Westlake Nursing Home Ltd. P'ship*, this Court recognized that federal statutory caps like the one at issue here are affirmative defenses, "placing the burden on defendants to assert it."[203] Similarly, in *Bentley v. Cleveland Cnty. Comm'rs* this Court found that the defendant's failure to plead a cap constituted forfeiture and left a jury's

[202] *See* discussion and evidence cited *supra* pages 26–27 and 31–33.
[203] 871 F.3d 1152, 1166 (10th Cir. 2017).

award uncapped.[204] And in *Okland Oil Co. v. Conoco, Inc.*, this Court held that a defendant's failure to request a verdict with delineated lines for distinct kinds of damages bars it from benefiting from ambiguities inherent to an omnibus award.[205]

The result mandated by this Court's precedents is well-captured by a Seventh Circuit case that is eerily similar to the instant case. In *Pals v. Schepel Buick & GMC Truck, Inc.*,[206] another federal employment discrimination case, Judge Easterbrook had to decide whether the same cap at issue here (42 U.S.C. § 1981a) could be applied to a $1,050,000 omnibus jury award. As in this case, there the defendant-employer failed to plead the cap and failed to ensure the verdict form delineated capped and uncapped damages but still desired to apply the cap. There the defendant-employer also sought to use the ambiguity of the omnibus award to its advantage—seeking remittitur of the whole award or inviting the trial court to step into the shoes of the jury and make up allocations and apply the cap on that basis.

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[204] 41 F.3d 600, 604–05 (10th Cir. 1994).
[205] 144 F.3d 1308, 1319 (10th Cir. 1998).
[206] 220 F.3d 495, 499–501 (7th Cir. 2000).

As this Court should here, Judge Easterbrook concluded the cap was waived. In line with the logic of *Rancher*, *Bentley*, and *Conoco* Easterbrook reasoned that the only means of reconciling the hefty burden defendants bear to maintain a cap as an affirmative defense is to require that defendants, not plaintiffs, ensure the verdict form allows the jury to delineate capped and uncapped damages. Any problems that arise from the employer's failure to do this are of its own making since it is the employer alone who desires to seek advantage by limiting its liability. As with other issues, "[w]hen lawyers fail to draw the court's attention to a preventable problem, they must bear the consequences of forfeiture."[207]

B. Alternatively, the steps the District Court took to apply the cap in this case violate the Seventh Amendment's Reexamination Clause.

Even if not waived, the District Court was wrong to apply the cap here. The Seventh Amendment's Reexamination Clause states that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rule of the common law."[208]

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[207] *Id.* at 500.
[208] U.S. Const. amend. VII.

Under *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, uncapped statutory damages are considered facts resolved by a jury for Seventh Amendment purposes and thus cannot be reexamined.[209] Capped damages are different. As the Fourth Circuit explains in *Boyd v. Bulala*, capped damages can be remitted by a court because, in creating a statutory cap, Congress removed those damages from the strictures of the Seventh Amendment.[210]

If a damages award is mixed—some damages capped and others uncapped—the Seventh Amendment still mandates that uncapped damages not be reexamined. Where the damages are clearly labeled there is no problem since the jury's labels mark the limits of the court's power.

Here, because there is no way of knowing which damages the jury intended to compensate for capped versus uncapped injuries, the District Court was without authority to apply the cap. The Seventh Amendment simply does not permit a court to usurp the jury's factfinding role.

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[209] 532 U.S. 424, 437 (2001) ("measure of actual damages suffered . . . presents question of historical or predictive fact" within ambit of Reexamination Clause).

[210] 877 F.2d 1191, 1196 (4th Cir. 1989).

If Southeastern and RUSO desired for the cap to be applied, it was their duty to ensure the jury determined the allocation of damages. As the Eighth Circuit observed in a different posture in *Schmidt v. Ramsey*, the mere fact a reduction statute exists "does not unconditionally mandate allocation" of damages by the court where allocation was not properly put to the jury in the first instance.[211] Southeastern and RUSO's distaste for this result is inapposite. Tudor's Seventh Amendment rights are inviable whereas Southeastern and RUSO have no "vested right in limiting the remedies recoverable by plaintiffs harmed by discrimination."[212]

CONCLUSION

For all of the foregoing reasons, Dr. Tudor urges that the orders denying reinstatement be vacated in their entirety and the District Court be directed to order Dr. Tudor's immediate reinstatement as an Associate Professor with tenure at Southeastern with front pay awarded as measured between the date of the jury's verdict and the effective date of reinstatement. In the alternative and without waiving the foregoing, Dr.

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[211] 860 F.3d 1038, 1052 (8th Cir. 2017).
[212] *Bland v. Burlington N.R. Co.*, 811 F.Supp. 571, 576 (D.Colo. 1992).

Tudor urges that the case be remanded with instructions that the court below award Tudor the full measure of front pay for her remaining work life expectancy. Additionally, Dr. Tudor urges that the District Court's order remitting the jury's award be vacated in its entirety and that the case be remanded with instructions that judgment be entered in the full measure of the jury's award plus front pay.

ORAL ARGUMENT STATEMENT

Dr. Tudor respectfully requests oral argument. Oral argument in this case of national importance will illuminate the position of the parties and aid the Court in reaching a decision.

Respectfully submitted this 19th day of November, 2018.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(5)(A) for a brief produced with a proportional font. This brief contains 12,584 words and is 1,353 lines, not including the Cover, Corporate Disclosure Statement, Table of Contents, Table of Authorities, Glossary, Statement Regarding Oral Argument, Certificates of Counsel, Signature Blocks, and Addenda, as permitted by Fed. R. App. P. 32(a)(7)(B)(iii) and 10th Cir. R. 32(b).

I additionally certify pursuant to 10th Cir. R. 25.5 all required privacy redactions have been made.

I further certify that pursuant to 10th Cir. CM/ECF User Manual, Sec. II, Part I(c), that this ECF submission has been scanned for viruses with the most recent version of a commercial virus scanning program and, according to the program, is free of viruses.

/s/ Ezra Young
EZRA ISHMAEL YOUNG

Attorney for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2018, I electronically filed the Plaintiff-Appellant's/Cross-Appellee's Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

I further certify that pursuant to 10th Cir. R. 31.5 and 10th Cir. CM/ECF User Manual, Sec. III, Part 5, that 7 hard copies of the foregoing Brief will be dispatched via commercial carrier to the Clerk's office within 2 business days of the above date. Those hard copies are exact copies of the ECF filing.

/s/ Ezra Young
EZRA ISHMAEL YOUNG

Attorney for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee

ADDENDA

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 has now filed a post-trial motion requesting the Court reinstate her to her position as associate professor at Southeastern and grant her tenure. Plaintiff's request comes pursuant to 42 U.S.C. § 2000e-5(g). Plaintiff also requests the Court award front pay from the date of the jury's verdict to the date of her reinstatement. Plaintiff notes that in the event the Court denies her request for reinstatement she may request additional front pay damages. Defendant objects to Plaintiff's request for reinstatement, arguing that the relationship between Plaintiff and Southeastern is such that reinstatement is impractical and that even if the Court were to consider reinstatement that granting Plaintiff tenure

would be inappropriate, as that is a decision that should be made by Southeastern, rather than by the Court.

It is clear that reinstatement is the preferred remedy. See Jackson v. City of Albuquerque, 890 F.2d 225, 231 (10th Cir. 1989) (quoting EEOC v. Prudential Assoc., 763 F.2d 1166 (10th Cir. 1985)). Plaintiff has the burden of establishing her entitlement to reinstatement; however, this burden is met where she demonstrates that she has prevailed on her discrimination claim. See Donnellon v. Fruehauf Corp., 794 F.2d 598, 602 (11th Cir. 1986). Where Plaintiff has met her burden, the Court must determine if "reinstatement or front pay is the appropriate remedy." Abuan v. Level 3 Commc'ns, Inc., 353 F.3d 1158, 1176 (10th Cir. 2003). Reinstatement is not feasible where there is continuing hostility between Plaintiff and the employer or its workers. Prudential, 763 F.2d at 1172.

In support of her request for reinstatement, Plaintiff states that she desires to return to Southeastern and believes that she can be successful teaching in that environment. Plaintiff argues that she did well while she was teaching there and has continued to develop her skills as a professor and stay current in her line of expertise. Plaintiff then offers a number of other personal reasons which reinstatement to Southeastern would satisfy. Plaintiff also notes that all of the former members of administration with whom she had problems while teaching at Southeastern have now left and that she feels positive the new administration will support her role as an associate professor.

In response, Defendants offer testimony from Dr. Randy Prus, who is currently the Chair of Southeastern's Department of English, Humanities, and Languages, the Department to which Plaintiff wishes to be reinstated. Dr. Prus argues that Plaintiff should

not be reinstated, as neither her tenure packet nor her teaching style merit appointment as an associate professor or promotion to tenure. Indeed, Dr. Prus voted against granting her tenure during the 2009-10 process. Defendants point to Dr. Prus's testimony at trial where he noted that he did not believe Plaintiff's return to Southeastern would be a positive thing, for the university or the students. Defendants also note that Plaintiff's work since leaving Southeastern demonstrates that her work performance is insufficient to merit reinstatement.

To determine whether reinstatement is appropriate, the courts must conduct a fact-based assessment of feasibility. Greenbaum v. Svenska Handelsbanken, NY, 979 F. Supp. 979, 986 (S.D.N.Y. 1997). Further, "reinstatement may not be an appropriate remedy where hostility or animosity between the parties, as a practical matter, makes a productive and amicable working situation [im]possible." Thornton v. Kaplan, 961 F.Supp. 1433, 1437 (D. Colo. 1966). After considering the evidence offered by the parties, the Court finds that reinstatement is simply not feasible in this case. As has been the case throughout this litigation, there is clear evidence of ongoing hostility between the parties apparent in the briefs and the evidence. Whether as a result of counsel or the parties, there are repeated unnecessary attacks on individuals and their character or credibility. Neither side is blameless in this matter. However, the Court finds that the repeated occurrences offer at least some evidence that reinstating Plaintiff to Southeastern would only create an ongoing environment of hostility. Such an environment would be patently unfair to the students at that school. Next, Defendants have offered substantial competent evidence demonstrating that they are convinced that Plaintiff's teaching abilities and academic pursuits do not rise to the level which would warrant a tenured professorship at Southeastern. According to

Defendants, Plaintiff does not appear to have published anything in the last six years and her work at Collin College ended based on that university's determination that she was not a good teacher. Dr. Prus noted during his trial testimony that Plaintiff's lack of scholarly activity was one of the reasons he voted against granting her tenure in the 2009-10 process. Placing Plaintiff back into an environment where she is considered unworthy would lead to renewed litigation between the parties and again, that result is unacceptable.

Other than her own testimony, Plaintiff's only evidence in favor of reinstatement was the testimony of Dr. Meg Cotter-Lynch; however, Dr. Cotter-Lynch was not privy to Plaintiff's tenure application packet and has admittedly never seen her teach in class. Thus, her testimony in favor of granting Plaintiff reinstatement and tenure must be measured against these facts.

Accordingly, for the reasons set forth herein, Plaintiff Dr. Rachel Tudor's Motion for Reinstatement (Dkt. No. 268) is DENIED. Plaintiff shall file any request for front pay within 15 days of the date of this Order.

IT IS SO ORDERED this 29th day of January, 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 seeks reconsideration of the Court's Order denying her request for reinstatement. Every issue raised by Plaintiff's Motion was considered and rejected by the Court in its Order denying her request for reinstatement. Accordingly, her request will be denied.

Plaintiff also seeks additional time to address the issue of front pay. Plaintiff requests an additional 30 days from any Order resolving her Motion to Reconsider. Plaintiff will be granted additional time, but not 30 days.

Plaintiff's Motion for Reconsideration (Dkt. No. 276) is DENIED. Plaintiff's Motion to Extend Briefing Deadline (Dkt. No. 277) is GRANTED in part. Plaintiff shall file any request for front pay within 15 days of the date of this Order.

IT IS SO ORDERED this 12th day of February, 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

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 filed a motion to reconsider, re-urging many of the same arguments raised in her original motion. The Court denied that request as well. Plaintiff has now filed yet another motion requesting reconsideration of the Court's denial of her request for reinstatement. Plaintiff has also filed several motions to supplement her request. Finally, Plaintiff requests in the event reinstatement is denied that she be awarded front pay.

Defendants object to each of Plaintiff's requests and argue that none of the evidence presented by Plaintiff provides a basis to alter the Court's previous determination that reinstatement is infeasible and that Plaintiff's request for back pay is extreme.

The primary basis for Plaintiff's latest request for reconsideration of the Court's denial of reinstatement is that she has been invited to speak at Southeastern. Plaintiff argues this clearly demonstrates that the relationship between her and the university is not as fractured as found by the Court. Plaintiff's argument lacks any merit. As Defendants note, the evidence makes clear that the invitation to speak did not come from the university, but from an independent entity which was using Southeastern's facilities to present its seminar. Nothing about that event offers any evidence about the relationship between Plaintiff and Southeastern. Plaintiff again cites an affidavit from an employee at Southeastern and reiterates her same arguments about the feasibility of reinstatement. Each of these arguments, and the testimony of the witness, has been thoroughly considered and rejected by the Court on numerous occasions. Plaintiff's request for reinstatement is denied.

Plaintiff argues, in the event she is denied reinstatement, that she be awarded front pay in the sum of $2,032,789.51. While the Court finds that some award of front pay is appropriate, Plaintiff's request stretches the bounds of reasonableness beyond recognition. Plaintiff's request is premised on unrealistic and unsupportable assertions about potential future performance at Southeastern had she remained there. Indeed, much of the evidence Plaintiff relies upon to increase the amount of "lost wages" is directly contrary to the actual

evidence of her previous work while employed at Southeastern. Regardless, Plaintiff's request for a multi-million dollar award of front pay fails for a more fundamental reason.

The Tenth Circuit has set forth the factors to be considered in determining when and how much front pay should be awarded. Whittington v. Nordam Grp. Inc., 429 F.3d 986, 1002, 1001 (10th Cir. 2005). These factors are (1) work life expectancy, (2) salary and benefits at the time of termination, (3) any potential increase in salary through regular promotions and cost of living adjustment, (4) the reasonable availability of other work opportunities, (5) the period within which the plaintiff may become re-employed with reasonable efforts, and (6) methods to discount any award to net present value. In this instance, the Court finds that items (4) and (5) dictate the proper determination of the amount of front pay to be awarded to Plaintiff. In her Motion, Plaintiff argues that she should be awarded front pay until age 75, essentially asserting that because of Southeastern's actions she will be unemployable for the remainder of her work life. The evidence before the Court simply does not support this assertion. Following her separation from Southeastern, Plaintiff gained employment teaching at a different college. Her pay at that college exceeded what she had made at Southeastern. Plaintiff's employment at Collin College ended based upon that entity's determination that her teaching skills were inadequate. There is no suggestion or any evidence from which the Court could determine that the discrimination at Southeastern, as found by the jury, ultimately led to or even played a role in Collin College's determination to terminate Plaintiff. Rather, that entity determined, based on her performance there, that her teaching did not meet its requirements.

The Tenth Circuit has made clear that front pay must be calculated by "tak[ing] into account any amount that the plaintiff could earn using reasonable efforts." Carter v. Sedgwick Cnty., Kan., 929 F.2d 1501, 1505 (10th Cir. 1991). Because Plaintiff gained similar employment at Collin County, any front pay to which Plaintiff is entitled must end with the beginning of her employment there. Plaintiff argues that the Defendants' reliance upon the Collin College employment is after-acquired evidence and they should be prohibited from relying upon it because Defendants stipulated they would not rely on after-acquired evidence. Plaintiff misunderstands the doctrine of after-acquired evidence. As Defendants explain in their brief, after-acquired evidence is a doctrine that provides an employer with a basis to terminate an employee based on information learned after the termination. That is simply not the case with the Collin College employment. It is not after-acquired evidence, it is evidence of Plaintiff's mitigation of damages and evidence related to her employability following her separation from Southeastern. Nothing in Defendants' agreement not to rely on after-acquired evidence prohibits the Court from considering that information.

Plaintiff ended her employment with Southeastern in May of 2011. She then began employment with Collin College in August of 2012. Thus, she is entitled to front pay for the 14 months between those jobs. Plaintiff has provided a pay analysis in her Motion which provides information regarding her base salary, retirement benefits, and any additional income she may have received for teaching. (See Dkt. No. 279, Ex. 8.) Defendants do not object to the specifics of this document, not have they provided any evidence as to Plaintiff's pay during her tenure at Southeastern. Accordingly, the Court

will use the pay information provided in Scenario 4 as that which most closely resembles Plaintiff's typical teaching while at Southeastern. That document sets Plaintiff's compensation at $51,463.52 per year. Dividing that by 12 renders a monthly salary of $4,288.63. Multiplying that by the 14 months between the end of her employment at Southeastern and the beginning of her employment at Collin College results in compensation of $60,040.77. The Court finds this amount adequately represents the amount of front pay to which Plaintiff is entitled and judgment will be entered in her favor in that amount.

For the reasons set forth more fully herein, Plaintiff Dr. Rachel Tudor's Motion in Support of Reconsideration of Reinstatement or, Alternatively, for Front Pay (Dkt. No. 279) is GRANTED in part and DENIED in part. Plaintiff's request for reinstatement is DENIED; Plaintiff's request for front pay is GRANTED in the amount of $60,040.77. Plaintiff's Motions to Supplement (Dkt. Nos. 280, 281, and 282) are STRICKEN as moot. The Court considered the evidence presented in those Motions but found it does not warrant any alteration of her request for reinstatement. A separate Judgment will issue.

IT IS SO ORDERED this 13th day of April, 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

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