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

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PLAINTIFF-APPELLANT/CROSS-APPELLEE DR. RACHEL TUDOR'S APPENDIX VOLUME 2 OF 9

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

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

PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S OPPOSITION TO DEFENDANTS' PROPOSED JURY INSTRUCTIONS

Plaintiff/Intervenor Dr. Tudor submits the following objections to Defendants' Proposed Instructions (ECF No. 196).

Global Objection No. 1: References to Tudor as Intervenor. Throughout their instructions, Defendants refer to Tudor both by name and as Intervenor. The technical legal term for Tudor is confusing. Dr. Tudor

respectfully requests that all of Defendants instructors refer to her consistently by name rather than as Intervenor.

Global Objection No. 2: References to protections afforded to transgender persons under Title VII. Many of Defendants' instructions obliquely attack whether Tudor, as a transgender woman, may seek protection from discrimination and hostilities. *See, e.g.,* Defs. Instruction 2 n.1 (claiming Title VII does not protect transgender persons *per se* and otherwise engrafting limits on sex discrimination protections); Defs. Instruction 3 (similar); Defs. Instruction 5 (proposing that "Gender refers to the quality of being male or female."); Defs. Instruction 6 (implying that jury must determine Tudor's gender to be female in order for her sex stereotyping theory to be cognizable). While it is appropriate to provide the jury instruction as to how they must apply the law to the facts they are presented with at trial, many of Defendants instructions inappropriately invite the jury to make determinations of law then apply the facts. These portions of Defendants' instructions should be struck.

Defendants' Proposed Jury Instruction No. 1: Objection. This instruction misstates Tudor's legal and factual positions. For example, Defendants refer to Tudor's 2008-09 application which is not at issue in this lawsuit. Defendants also refer to a supposed "4-1" vote of the tenure and promotion committee with respect to Tudor's 2009-10 application; however

testimony in the record revels that the committee had a single "vote" that was to recommend Tudor for tenure and promotion. Defendants also claim that during the 2009-10 cycle, Tudor "pushed forward with a deficient tenure application, with full knowledge she would not succeed." This is not Tudor's position and is otherwise without support in the record.

This instruction also asserts legal and factual positions raised by Defendants that are unsupported by the record. For example, Defendants claim that Tudor's 2009-10 application was reviewed independently by Dean Scoufos and Vice President McMillan—however, there is nothing in the record that supports this position. Defendants also assert that the Southeastern administration "decided to offer [Tudor] an opportunity to withdraw her portfolio prior to denial, and then to have an extra time period in which to improve her portfolio. At the time, she was warned that if the portfolio were allowed to continue being considered, tenure would be denied." This position is unsupported by evidence in the record.

This instruction is also misleading and otherwise confusing. For example, Defendants characterize Tudor's decision to not withdraw her 2009-10 application as "selfish and cavalier." This is plainly inappropriate, attempts to mislead the jury as to Tudor's motivations during the 2009-10 cycle, confuses the issues at hand, and is otherwise unsupported by evidence in the record. Defendants also state that Tudor failed to "accept personal

responsibility for her own inadequacies in a very detail-oriented process" and go on to obliquely describe some but not all of Tudor's internal and external complaints. Defendants' characterization of Tudor's motivations during the 2009-10 cycle is without support in the record and is otherwise misleading. Defendants' cherry-picked references to some but not all of Tudor's grievances is also misleading. Defendants also reference the fact that the United States initiated this lawsuit "five (5) years" after Tudor filed a charge with the Department of Education and thereafter Tudor joined the lawsuit. This portion of the instruction is misleading as it implies Tudor did not act with diligence and it confuses the issues before the jury which is simply whether there is a factual basis to support Tudor's merits claims, not the timing of when this lawsuit was filed.

Defendants' Proposed Jury Instruction No. 2: Objection. This instruction is misleading and otherwise confusing for several reasons.

First, the instruction fails to accurately identify the cycle in which Tudor was denied tenure by the Southeastern administration (the 2009-10 cycle). The failure to accurately identify the cycle at issue is misleading and otherwise confusing.

Second, the instruction only references Tudor's discrimination claim concerning Defendants denial of her 2009-10 application (though not expressly identified as such) and does not mention that Tudor also has a

discrimination claim regarding Defendants' decision to not allow her to reapply in the 2010-11 cycle which led to her termination.[1] This instruction is thus misleading to the extent that it implies Tudor only has a discrimination claim covering the 2009-10 application and not also the 2010-11 application.

Third, this instruction misstates Tudor's legal and factual position as to her discrimination claims covering the 2009-10 and 20010-11 applications. In both applications, Tudor endeavored to seek both tenure and promotion to Associate Professor. However, Defendants' instruction only makes reference to "tenure" not promotion to associate professor.

Fourth, this instruction is misleading because it confuses the distinction between what Tudor sought through her 2009-10 and 2010-11 applications—tenure and promotion to Associate Professor—and the technical legal issue that Tudor in effect sought a form of "promotion."

Fifth, the instruction is misleading and otherwise misstates applicable legal principles to the extent that Defendants intend footnote 1 to this instruction to be a part of the instruction. Footnote 1 makes the legal argument that Title VII's sex discrimination proscription only "encompasses discrimination between men and women but does not encompass

[1] In her Complaint, Tudor alleges that Defendants discriminated against because of her sex when they (a) denied her tenure and promotion application in the 2009-10 cycle ("failure to promote claim") (see ECF No. 24 ¶¶ 162, 172) and (b) denied her the opportunity to reapply for tenure and promotion in the 2010-11 cycle, resulting in her termination ("termination claim") (*see* ECF No. 24 ¶¶ 163, 164, 171, 172).

discrimination based on gender identity *per se*, including transgender status" and goes on to cite the October 4, 2017 memorandum issued by U.S. Attorney General Jeff Sessions. The legal position proffered by Defendants has not been adopted by this Court and is otherwise in tension with this Court's prior order (ECF No. 34 at 4–5). Additionally, this instruction is misleading because it implies to the jury that legal memoranda issued by the U.S. Attorney General settles the legal issue of the scope of legal protection to be afforded to transgender persons under Title VII for the purposes of this case.

Sixth, the instruction is misleading and otherwise misstates the applicable law as to Defendants' defense. The instruction states that "SEOSU and RUSO claim the decision was based on lawful reasons, i.e., Intervenor was not qualified for tenure." However, the instruction leaves out that Defendants must demonstrate by at least a preponderance of the evidence that Tudor was not qualified for tenure (and promotion) in order to make out this defense. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F3d 1419, 1427 (10th Cir. 1993).

Seventh, portions of this instruction purport to set forth the position of the parties despite the instruction being labeled "Unlawful Discrimination." The parties positions do not speak to what constitutes as a legal matter "unlawful discrimination"—thus, portions of Defendants' instruction

speaking to the parties' positions alone constitute improper advocacy of a party position in a jury instruction and should be struck.

Defendants' Proposed Jury Instruction No. 3: Objection. This instruction is misleading and otherwise misstates applicable legal principles. In sub-part 3, Defendants instruct that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity *per se*, including transgender status." The legal position proffered by Defendants has not been adopted by this Court and is otherwise in tension with this Court's prior order (ECF No. 34 at 4–5). Moreover, Title VII reaches all forms of sex discrimination—not just "discrimination between men and women." *See, e.g.*, *also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) ("But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits 'discriminat[ion] . . . because of . . . sex' in the 'terms' or 'conditions' of employment. Our holding that this includes sexual harassment must extend to sexual harassment of any kind that meets the statutory requirements."). Additionally, this instruction is misleading because it implies that transgender persons such as Dr. Tudor are unable to

avail themselves of the protections of Title VII even where they face sex discrimination.

Defendants' Proposed Jury Instruction No. 4: Objection.

First, this instruction is confusing because it is labeled "essential elements" but does not indicate the claim for which is sets forth "essential elements."

Second, to the extent Defendants intended for this instruction to set forth the "essential elements" of Tudor's sex discrimination claims, it does not set forth the elements of those claims. This instruction inappropriately presents the *McDonnell Douglas* test to the jury and uses technical legal terms without defining them (e.g., "adverse action," "business judgment," and "preponderance of the evidence") both of which are inappropriate. *See, e.g.*, *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts, therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges.").

Third, this instruction misstates applicable law. Defendants' instruction claims that "[i]n order to succeed on the discrimination claim, Intervenor must persuade you by a preponderance of the evidence that were it not for gender discrimination, she would have been granted tenure." However, where Tudor makes out the other essential elements of her discrimination claims, if the jury disbelieves Defendants' nondiscriminatory rationale this is grounds that gives rise to an inference of discrimination which may sustain a verdict in favor of Tudor. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Fourth, the instruction misstates Tudor's legal and factual positions because it only references Tudor's discrimination claim concerning Defendants denial of her 2009-10 application (though not expressly identified as such) and does not mention that Tudor also has a discrimination claim regarding Defendants' decision to not allow her to reapply in the 2010-11 cycle.[2]

Fifth, this instruction misstates Tudor's legal and factual position as to her discrimination claims covering the 2009-10 and 2010-11 applications. In both applications, Tudor endeavored to seek both tenure and promotion to

[2] See discussion and citations *supra* note 1.

Associate Professor. However, Defendants' instruction only makes reference to "tenure" not promotion to Associate Professor.

Sixth, this instruction is misleading and verges on misstating applicable law to the extent Defendants endeavor to instruct the jury that "business judgment" decisions cannot be scrutinized without also instructing the jury that, to the extent that Defendants claim they had a nondiscriminatory rationale for not granting Tudor's 2009-10 application and not allowing her to apply in the 2010-11 cycle, that their nondiscriminatory rationale must be demonstrated by a preponderance of the evidence. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 5: Objection. This instruction misstates applicable legal principles and is otherwise misleading and confusing. Tudor's claims for discrimination and hostile work environment arise under Title VII which simply states that discrimination "because of . . . sex" is forbidden. Moreover, Title VII does not state that "[g]ender refers to the quality of being male or female."

Defendants' Proposed Jury Instruction No. 6: Objection.

First, this instruction is confusing to the extent that it does not indicate which of Tudor's claims a "failure to conform to sex stereotypes" is relevant to. The jury should properly be instructed that this theory of sex

discrimination is relevant to the discrimination and hostile work environment claims, but is not relevant to the retaliation claim.

Second, this instruction is also misleading. The instruction states that "[i]t is not sufficient for the a jury to merely disbelieve the reason offered by the Defendants." However, where Tudor makes out the other essential elements of her discrimination claims, if the jury disbelieves Defendants' nondiscriminatory rationale this may give rise to an inference of discrimination which may sustain a verdict in favor of Tudor. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Third, the second paragraph of this instruction is misleading and/or otherwise misstates applicable law. For example, it is not reasonably disputed that Tudor is female. Defendants—at various points—have admitted Tudor is female. *See, e.g.*, ECF No. 212 at 10 (identifying Tudor as female in conclusion). It is improper to instruct the jury that Tudor must *prove* at trial that she is female in order to reap the protection of Title VII.

Fourth, the portion of this instruction which states that the "ultimate question in this case is whether SEOSU denied tenure to Dr. Tudor or discriminated against Tudor because of her failure to conform to sex

stereotypes" is misleading and/or otherwise misstates applicable law. As a threshold matter, Tudor has discrete act sex discrimination claims, a hostile work environment claim, as well as a retaliation claim—thus the jury is charged with several "questions." As to Tudor's discrimination claims—the "ultimate" question is whether Tudor was discriminated against because of her sex—sex-stereotyping is but one legal theory by which Tudor may show discrimination occurred but it should not limit the evidence or issues the jury considers.

Fifth, the portion of the instruction that states that Tudor must show that she "did not conform to general notions of femininity" and she was "discriminated against based upon her nonconformity" does not comport with binding precedent and is otherwise misleading. Sex stereotype discrimination can be articulated and proven in many different ways, especially where transgender persons are concerned. For example, in *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007), the Tenth Circuit conceived of sex stereotyping discrimination involving a transgender woman as being employment decisions based on the assumption that persons assigned a particular sex at birth would act or appear to as that sex.

Fifth, the portion of this instruction which states the jury "must believe [Tudor] was the victim of intentional discrimination" is misleading and misstates applicable law to the extent that Tudor's environmental claim can

be evaluated under a disparate impact theory wherein intentional discrimination need not be demonstrated. *See, e.g.*, *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) ("Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as 'disparate impact')"); *id.* 577–578 (recognizing that in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) the Court interpreted Title VII to reach "facially neutral practices that, in fact, are discriminatory in operation").

Defendants' Proposed Jury Instruction No. 7: Objection. This instruction misstates the applicable law pertaining to discriminatory remarks in the workplace and is otherwise misleading and confusing.

First, the jury may consider both direct and indirect evidence of bias, including biased remarks made by decision-makers. To the extent that this instruction implies that direct evidence should be afforded a different weight than indirect evidence it is improper. *See generally Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (employee need not present direct evidence of discrimination in a mixed motive case).

Second, as to Tudor's hostile work environment claim, though Title VII does not prescribe a "code of workplace conduct," *Chavez v. New Mexico*, 397 F.3d 826, 833 (10th Cir. 2005), it is well recognized that a barrage of animus

ridden statements, combined with other allegations, is sufficient to support a hostile work environment claim. *See, e.g.*, *Smith v. Northwest Fin. Acceptance, Inc.*, 129 F.3d 1408, 1413–14 (10th Cir. 1997) (holding that aggregation of other hostilities with "[a]t least three . . . disparaging remarks directed at Plaintiff were severe enough to affect a reasonable person's identity as a woman."). *See also Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at *11–12 (Apr. 1, 2015) (repeated references to a transgender woman with male pronouns by a coworker gives rise to a claim of hostile work environment).

Third, as to Tudor's discrimination claims, animus ridden statements made by the persons Tudor claims discriminated against her have probative value, in combination with other evidence, to the ultimate question of whether discrimination occurred. *See, e.g.*, *Meyers v. Cuyahoga Cnty., Ohio*, 182 Fed.Appx. 510, 520 (6th Cir. 2006) ("calling a transsexual or transgendered person a "he/she" is a deeply insulting and offensive slur, and we agree that using that term is strongly indicative of negative animus towards gender nonconforming people"). *See also Jamison v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at *2 (May 21, 2013) ("Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.").

Fourth, this instruction misstates applicable law—Tudor need not irrefutably prove, as Defendants contend, "that the employer actually relied on gender in making its decision." Tudor need only present evidence showing it was more likely than not that gender played some role in the decision-making process. *See, e.g.*, *Sorensen v. City of Aurora*, 984 F.2d 349, 351 (10th Cir. 1993) ("When alleging disparate treatment on the basis of sex, the plaintiff must prove by a preponderance of the evidence that the defendant had a discriminatory motive or intent.").

Defendants' Proposed Jury Instruction No. 8: Objection.

First, this instruction is confusing because it does not indicate whether it is to apply to all of Tudor's claims or just Tudor's discrete action discrimination claims.

Second, this instruction is confusing because it does not indicate whether it is applicable to Tudor's discrimination claims that proceed under a disparate impact theory.

Third, this instruction misstates Tudor's factual and legal position. Tudor claims that she was discriminated against on the basis of sex when Defendants denied her 2009-10 application for tenure and promotion to Associate Professor and again when Defendants refused to allow her to reapply in the 2010-11 cycle. Defendants' instruction only mentions that

Tudor applied for "tenure" (leaving out promotion) and does not specify that Tudor has two discrimination claims which must be separately evaluated.

Fourth, this instruction misstates applicable law insofar as Tudor's 2010-11 application is concerned. It is Defendants—not Tudor—whom carry the burden of proving by a preponderance of the evidence that Tudor would not have received tenure and promotion in the 2010-11 cycle because she was not qualified, had her application been considered. *See Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) (defendant has burden of proof by at least a preponderance of the evidence to show plaintiff were allegedly not qualified).

Fifth, Tudor need not prove that she was "overwhelmingly better qualified for tenure then [*sic.*] others granted tenure." *McDonnell Douglas Corp. v. Green*, makes clear that at trial an employee need only show that she applied for and was qualified for the job sought and, despite her qualifications, she was rejected and the reasons proffered by the employer are not believable or are otherwise pretextual. *McDonnell Douglas*, 411 U.S. at 802. *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 187–88 (1989) ("The evidence which petitioner can present in an attempt to establish that respondent's stated reasons are pretextual may take a variety of forms. Indeed, she might seek to demonstrate that respondent's claim to have promoted a better qualified applicant was pretexual by showing that she was

in fact better qualified than the person chosen for the position. The District Court erred, however, in instructing the jury that in order to succeed petitioner was *required* to make such a showing. . . . She may not be forced to pursue any particular means of demonstrating that respondent's stated reasons are pretextual."). *See also Kilcrease v. Domenico Transp. Co.*, 828 F.3d 1214, 1220–21 (10th Cir. 2016) ("But the relevant inquiry at the prima face stage is not whether an employee or potential employee is able to meet all the objective criteria adopted by the employer, but whether the employee has introduced some evidence that she possesses the objective qualifications necessary to perform the job sought. Thus, to establish a prima face case, the employee need only put forward credible evidence that [s]he meets the employer's objective requirements necessary to perform the job. A failure to satisfy either subjective criteria or objective qualifications that have no bearing on an applicant's ability to perform the job sought, cannot be used to defeat a plaintiff's prima facie case.") (cleaned up).

Sixth, this instruction is confusing to the extent it claims that Tudor must demonstrate at trial that she "was denied tenure." Neither Tudor nor Defendants dispute that Tudor was denied tenure and promotion during the 2009-10 cycle or that Tudor was not permitted to reapply for tenure and promotion during the 2010-11 cycle, ultimately resulting in Tudor's termination in late May 2011.

Defendants' Proposed Jury Instruction No. 10: Objection. This instruction misstates applicable law. The jury must scrutinize Defendants' nondiscriminatory rationales for their decision to not give Tudor promotion and tenure during the 2009-10 cycle and to not allow her to reapply in the 2010-11 cycle, not simply accept Defendants' nondiscriminatory rationales at face value. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . ."); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 12: Objection.

First, this instruction inappropriately states that Tudor must prove "by the greater weight of the evidence that SEOSU and/or RUSO intentionally discriminated against [her] because of her gender status and failing to conform to traditional gender types." Tudor is not required by law to prove *both* that she experienced gender discrimination and that she failed to conform to gender stereotypes—the ultimate question as to Tudor's discrimination claims is whether she was discriminated against because of her gender.

Second, this instruction verges on misapplying the law where it states that, "The law does not require that an employer reach a decision which the

Intervenor or anyone else would necessarily agree was reasonable and correct." This language in the instruction implies that Defendants' employment decisions cannot be scrutinized. However, binding precedent teaches that where an employer's decision is so irrational or unreasonable and/or circumstances are so unusual that the nondiscriminatory rationale may be deemed unworthy of credence. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Third, this instruction is confusing as to the weight to be afforded to a nondiscriminatory rationale. While Defendants are correct that a legitimate nondiscriminatory rationale is a total defense to disparate treatment, this defense must be proven by Defendants by a preponderance of the evidence. *See Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993) (defendant has burden of proof by at least a preponderance of the evidence to show plaintiff were allegedly not qualified). Moreover, the proposed framing that "simply because you happen to disagree" with the employment decision is confusing—this suggests that if the jury *disbelieves* the nondiscriminatory rationale that that is insufficient to find for Tudor, which is contrary to law. *See, e.g.*, *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000) ("Proof that the defendant's explanation is unworthy of credence is

simply one form of circumstantial evidence that is probative of intentional discrimination . . . .").

Defendants' Proposed Jury Instruction No. 13: Tudor does not object to this instruction, but points out that there is a typo. The beginning of the third sentence should read "The other is indirect ***or*** circumstantial evidence . . . ."

Defendants' Proposed Jury Instruction No. 14: Objection. This instruction misstates applicable law. To defend against Tudor's evidence of pretext at the jury trial stage, Defendants must do more than simply proffer a nondiscriminatory rationale—they must prove their defense by a preponderance of the evidence. *See, e.g.*, *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1427 (10th Cir. 1993).

Defendants' Proposed Jury Instruction No. 15: Objection.

This instruction—when read in connection with other instructions—is confusing to the extent that it refers to Tudor as "Plaintiff" and the other instructions refer to Tudor as "Intervenor." See also General Objection No. 1.

This instruction also misstates applicable law. To the extent that Tudor points to comparators in support of her disparate treatment theory of discrimination, the comparators need not be the exact same as Tudor in all respects but for her protected status. *See, e.g.*, *Young v. United Parcel Serv., Inc.*, 135 S.Ct. 1338, 1354 (2015) ("Neither does it require the plaintiff show

that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."). *See also EEOC v. TriCore Reference Labs.*, 849 F.3d 929, 941 (10th Cir. 2017) (recognizing *Young*'s guidance on comparator evidence as controlling).

Defendants' Proposed Jury Instruction No. 16: Objection.

First, this instruction is misleading because it is labeled "essential elements" of "Title VII Retaliation Claim," but it does not set forth the elements of retaliation. Instead, it sets forth the prima facie test portion of the burden-shifting *McDonnell Douglas* test.

Second, this instruction inappropriately presents the *McDonnell Douglas* test to the jury and uses technical legal terms without defining them (e.g., "*prima facie* case," "protected opposition to Title VII discrimination," "adverse employment action," and "causal connection between the protected activity and the adverse employment action") both of which are inappropriate. *See, e.g.*, *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("While it is appropriate for courts to use the law developed in the context of Title VII cases in ADEA disputes, *McDonnell Douglas* guidelines play differently to a jury than they do in a bench trial. The *McDonnell Douglas* inferences provide assistance to a judge as he addresses motions to dismiss, for summary judgment, and for directed verdict, but they are of little relevance to the jury. The district courts,

therefore, to avoid potential jury confusion, should prepare instructions that do not rely on technical legal distinctions likely to be understood only by attorneys and judges."); *Schobert v. Ill. Dept. of Transp.*, 304 F.3d 725, 732 (7th Cir. 2002) (holding presentation of *prima facie* test to jury is inappropriate because elements of that test are for the Court, not the jury, to decide).

Third, the first two sentences of this proposed instruction are misleading and confusing to the extent that they purport to present the parties' positions yet they are included in an instruction that is labeled "Essential Elements" of a "Title VII Retaliation Claim." The parties positions are not part of the essential elements—thus, this portion of Defendants' instruction constitutes improper advocacy of a party position in a jury instruction and should be struck.

Fourth, the instruction misapplies the law to the extent that it charges the jury to determine whether Tudor suffered an adverse action rather than whether Tudor suffered retaliation because of protected activity. *Schobert v. Ill. Dept. of Transp.*, 304 F.3d 725, 732 (7th Cir. 2002) ("The jury here should have been asked only to consider whether the plaintiffs suffered retaliation because of protected activity, rather than decide whether the allegedly adverse consequences amounted to an adverse employment action.").

Defendants' Proposed Jury Instruction No. 17: Objection.

First, this instruction is confusing. It appears to set forth elements of a hostile work environment claim (first full paragraph) and then goes on to set forth criteria two different numbered sets of criteria by which the jury should determine whether the environment was "hostile or abusive."

Second, this instruction is confusing to the extent that it uses legal terms of art that are undefined (e.g., "sufficiently severe or pervasive to alter the conditions of Intervenor's employment and create an abusive work environment").

Third, this instruction misstates the applicable law. The instruction only references behaviors or actions, but binding precedent recognizes (and Tudor alleges herein) that policies that have a disparate impact can give rise to and/or otherwise contribute to a hostile work environment. *See Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Defendants' Proposed Jury Instruction No. 18: Objection.

First, this instruction is confusing to the extent that it uses legal terms of art that are undefined (e.g., "alter the conditions of the victim's employment").

Second, this instruction misstates the applicable law. The instruction only references behaviors, but binding precedent recognizes (and Tudor alleges herein) that policies that have a disparate impact can give rise to and/or otherwise contribute to a hostile work environment. *See Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

Defendants' Proposed Jury Instruction No. 19: Objection.

As a threshold matter, Defendants are not entitled to a *Faragher/Ellerth* defense to Tudor's hostile work environment claim. There is evidence in the record that Tudor suffered tangible employment actions—denial of "promotion" (her applicable for tenure and promotion to Associate Professor was denied in the 2009-10 cycle) and denial of the opportunity to reapply for tenure and promotion in the 2010-11 cycle, which lead to her nonrenewal and ultimately her termination in late May 2011. Because Tudor suffered tangible employment actions, the *Fargher/Ellerth* defense is not available. *See, e.g.*, *Pennsylvania State Police v. Suders*, 542 U.S. 129, 137 (2004) (affirming that *Faragher/Ellerth* defense is unavailable where a tangible employment action has been taken); *Wilson v. Union Pac. R.R.*, 56

F.3d 1226, 1232 (10th Cir. 1995) ("[A] party is entitled to an instruction based on its theory of the case whenever it produces evidence to support it.").

This instruction is also misleading and otherwise misstates applicable law in numbered sentence one, which suggests that only "harassing behavior" is pertinent to an environmental claim. Tudor alleges—and evidence shows—that Defendants maintained policies that Tudor found hostile and which contributed to the hostile work environment. Under binding precedent, policies (in addition to harassing behavior) can properly give rise to a hostile work environment. *See, e.g.*, *Maldano v. City of Altus*, 433 F.3d 1294, 1304 (10th Cir. 2006) (policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim), *overruled on other grounds*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

This instruction is also misleading and otherwise misstates applicable law in numbered sentence one, because it suggests that harassment is only that which is "sexually harassing." Binding precedent teaches that gender-neutral abuse can give rise and/or also contribute to a hostile environment. *See, e.g.*, *O'Shea v. Yellow Technology Servs., Inc.*, 185 F.3d 1093, 1097 (10th Cir. 1999) ("Facially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly gender-discriminatory conduct."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987)

(any unequal treatment, even if not gendered in nature, perpetrated because of sex, can give rise to a hostile work environment claim). Additionally, heightened scrutiny—of the ilk Tudor alleges she was subjected to—which may otherwise appear to be gender neutral can also constitute evidence of hostilities. *See, e.g.*, *Barnes v. Cincinnati*, 401 F.3d 729, 738 (6th Cir. 2005) (finding heightened scrutiny of transgender officer by nontransgender supervisor was perpetrated with the intent of building a poor performance record to justify adverse employment action).

Defendants' Proposed Jury Instruction No. 20: Objection.

Defendants' instruction states in part that Tudor's own subjective belief of whether she "has been discriminated or retaliated against is not sufficient to establish her claims." This is misleading, confusing, and verges on misstating applicable law because, as to her environmental claim, Tudor's subjective belief as to whether the environment was a hostile one goes to an element of her environmental claim—that the harassment was unwelcome. *See* Tudor's Proposed Jury Instruction No. 14, ECF No. 199 at 18 ("such conduct was unwelcome").

Defendants' instruction also states that Tudor's coworkers' beliefs regarding whether Tudor was discriminated against are "not sufficient to support [Tudor's] claims and the jury cannot base a finding of discrimination or retaliation solely on a co-worker's opinion that [Tudor] should have been

granted tenure." This portion of the instruction is misleading, confusing, and verges on misstating applicable law. Both Tudor's and the testimony of other professors in the English Department pertaining to Tudor's qualifications for promotion and tenure during the 2009-10 and 2010-11 cycle are pertinent to the ultimate issues of discrimination and retaliation in this case. The jury cannot be instructed to disregard testimony of Tudor and her coworkers where such testimony is informed by substantive assessment of Tudor's qualifications in the 2009-10 and 2010-11 cycle. *See, e.g.*, *Curtis v. Okla. City Pub. Schls. Bd. of Educ.*, 147 F.3d 1200, 1217 (10th Cir. 1998) (noting that "[t]estimony of other employees may be relevant in assessing an employer's retaliatory intent if the testimony establishes a pattern of retaliatory behavior or tends to discredit the employers assertion of legitimate motives.").

Defendants' Proposed Jury Instruction No. 24: Objection.

First, this instruction is confusing because its terms imply that Tudor is only seeking (and only entitled to) damages for her discrimination claims not her retaliation and/or hostile work environment claims.

Second, this instruction is confusing to the extent it says that Tudor must demonstrate "each element" of damages to be entitled to damages but it does not set forth what the elements are.

Third, this instruction misstates Tudor's position as to which injuries she suffered entitle her to damages. For instance, the instruction claims Tudor is seeking damages for "emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life." However, Tudor is actually seeking damages for "lost income, loss of fringe benefits, humiliation, loss of enjoyment of life, and damage to her professional reputation" (Complaint, ECF No. 24 at 34) and garden variety emotional distress.

Defendants' Proposed Jury Instruction No. 25: Objection. This instruction is misleading and otherwise misstates applicable law.

Defendants' instruction misstates the applicable burdens. Once discrimination and/or retaliation is demonstrated by Tudor, it is Defendants' burden (not Tudor's) to show that Tudor did not exercise reasonable diligence in mitigating damages caused by Defendants' illegal actions. *See, e.g.*, *United States v. Lee Way Motor Freight, Inc.*, 625 F.2d 918, 938 (10th Cir. 1979) ("A claimant is required to make only reasonable exertions to mitigate damages, and is not held to the highest standards of diligence. It does not compel him to be successful in mitigation. It requires only an honest good faith effort."); *id* at 937 ("once a violation has been demonstrated and back pay has been awarded, the employer has the burden of showing that the discriminatee did not exercise reasonable diligence in mitigating damages caused by the employer's illegal action.").

Defendants' instruction is also misleading to the extent that it does not define what "reasonable efforts" are to mitigate damages and otherwise implies that if Tudor did not "seek out or take advantage of a business or employment opportunity"—without defining what kinds of opportunities are relevant—Tudor failed to mitigate damages. This is not the appropriate standard. *See, e.g.*, *Metz v. Merrill Lynch*, 1991 WL 355199, at *7 (W.D.Okla. 1991) (Cauthron, J.) ("Plaintiff is not required to be the best or even average in terms of interim earnings to entitle her to an award of back pay. Instead, the defendant has the burden of showing that plaintiff did not exercise reasonable diligence in mitigating her damages.").

Defendants' are also not entitled to a mitigation of damages affirmative defense instruction because they have failed to produce evidence that Tudor failed to mitigate damages. The evidence produced shows that Tudor applied to more than one-hundred jobs in the seven years since her separation from Southeastern. Defendants have not introduced (and cannot introduce) evidence that Tudor did not take sufficient steps to attempt to find reemployment. Indeed, the mere fact that Tudor has had difficulties finding reemployment is not evidence of failure to mitigate damages. *See, e.g.*, *Metz*, at *7. Because there is no evidence that Tudor failed to mitigate damages, Defendants are not entitled to this instruction. *See, e.g.*, *Wilson v. Union Pac. R.R.*, 56 F.3d 1226, 1232 (10th Cir. 1995) ("[A] party is entitled to an

instruction based on its theory of the case whenever it produces evidence to support it.").

Defendants' Proposed Jury Instruction No. 27: Objection. The proposed verdict form is confusing and otherwise misleading. As written, the proposed verdict form only allows the jury to reach a verdict in favor of Defendants.

WHEREFORE, Plaintiff/Intervenor Dr. Tudor respectfully requests that this Court take notice of the foregoing objections to Defendants' proposed jury instructions (ECF No. 196).

Dated: October 24, 2017

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

STANDARD OF REVIEW

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

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

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

1. Hostile Environment

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

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

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

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

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

2. Discrimination

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

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

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

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

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

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

3. Retaliation

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

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

CONCLUSION

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

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

ROBIN J. CAUTHRON
United States District Judge

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

FILED
NOV 20 2017
CARMELITA REEDER SHINN, CLERK
U.S. DIST. COURT, WESTERN DIST. OKLA.
BY_____, DEPUTY

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

INSTRUCTIONS TO THE JURY

Instruction No. 1

OPENING

Members of the Jury, you have heard the evidence in this case and in a few minutes, you will hear the arguments of counsel. It is now the duty of the Court to instruct you as to the law applicable to this case. You will be provided a written copy of these instructions for your use during deliberations.

You are the judges of the facts, the weight of the evidence, and the credibility of the witnesses. The weight of the evidence is not determined by the number of witnesses testifying on either side. In determining weight or credibility, you may consider the interest, if any, that a witness may have in the result of the trial; the relation of the witness to the parties; the bias or prejudice if any has been apparent; the candor, fairness, intelligence, and demeanor of the witness; the ability of the witness to remember and relate past occurrences; the witness's means of observation and the opportunity of knowing the matters about which the witness has testified; the

inherent probability or improbability of the testimony; and the extent to which the witness has been supported or contradicted by other credible evidence. From all the facts and circumstances appearing in evidence and coming to your observation during the trial, and aided by the knowledge that you each possess in common with other persons, you will reach your conclusions.

The arguments and statements of the attorneys are not evidence. At times during trial, you saw lawyers make objections to questions asked by other lawyers, and to answers by witnesses. This simply meant the lawyers were requesting that I make a decision on a particular rule of law. Do not draw any conclusion from either the objections or my rulings. These are only related to the legal questions that I had to determine and should not influence your thinking. If you remember the facts differently from the way the attorneys have stated them, you should base your decision on what you remember.

It is my job to decide what rules of law apply to the case and all the applicable law is contained in these instructions. You must not follow some and ignore others. Even if you disagree or do not understand the reasons for some of the rules, you are bound to follow them.

Instruction No. 2

IMPEACHMENT – INCONSISTENT STATEMENTS OR CONDUCT

You should also ask yourself whether there was evidence that, at some other time, a witness did or said something or failed to do or say something, which was different from, or inconsistent with, the testimony the witness gave during the trial. You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean the witness was not telling the truth, because people naturally tend to forget some things or remember other things inaccurately. If a witness made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood, and the significance of that may depend on if it had to do with an important fact or with only an unimportant detail.

Instruction No. 3

BURDEN OF PROOF

The burden is upon Plaintiff in a civil action such as this to prove every essential element of her claim by a preponderance of the evidence. If the proof should fail to establish any essential element of Plaintiff's claim by a preponderance of the evidence, the jury should find for Defendants.

To "establish by preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who

may have called them, and all exhibits received into evidence, regardless of who may have produced them.

Instruction No. 4

PARTIES

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law and are to be dealt with as equals in a court of justice. The fact that Plaintiff is an individual and Defendants are governmental entities should not influence your thinking, either for or against either party.

The fact that a governmental entity or agency is involved as a party must not affect your decision in any way. When a governmental agency is involved, it may act only through people as its employees; and in general, a governmental agency is responsible under the law for the acts and statements of its employees that are made within the scope of their duties as employees of the governmental agency.

Instruction No. 5

OPINION EVIDENCE - EXPERT WITNESS

Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion and give it such weight as you think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Instruction No. 6

TITLE VII

Plaintiff's claim of discrimination based on gender is brought under a federal law known as Title VII of the Civil Rights Act of 1964, as amended, often called Title VII.

Title VII makes it an unlawful employment practice for an employer:

(1) To discriminate against any individual with respect to the terms, conditions or privileges of employment because of such individual's gender;

(2) To limit, segregate or classify employees in any way, which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect her status as an employee because of such individual's gender;

(3) Title VII does not protect people because they are transgender. Thus, for Plaintiff to prevail, you must find any wrongful action occurred because of her gender or because of a perception that that person does not conform to a typical gender stereotype.

Plaintiff alleges multiple claims against Defendants. Each of the claims and the evidence applicable to the claims should be

considered separately. A verdict for Plaintiff or Defendants as to each claim should likewise be considered separately. Some evidence may pertain to more than one claim. The fact that you may find in favor of a party on one claim should not control your verdict with reference to the other claims.

Instruction No. 7

TITLE VII – TENURE

Plaintiff claims that Defendants intentionally discriminated against her because of her gender during the 2009-10 application cycle for tenure and by denying her the opportunity to apply during 2010-11 tenure cycle.

Title VII prohibits an employer from intentionally discriminating against an employee by failing to promote her because of her gender. In order to prevail on her claim, Plaintiff must establish, by a preponderance of the evidence, the following elements:

(1) That Defendants denied Plaintiff tenure or the opportunity to re-apply for tenure;

(2) Plaintiff's gender was a motivating factor for Defendants' actions; and

(3) That Plaintiff suffered damages as a result of Defendants' unlawful discrimination.

If Plaintiff fails to prove any of the above elements by a preponderance of the evidence, your verdict must be for Defendants and you need not proceed further in considering this claim.

Instruction No. 8

HOSTILE WORK ENVIRONMENT

Plaintiff claims that she was subject to a hostile work environment based upon her gender. Title VII makes it unlawful for an employee to be subject to a hostile or abusive work environment based upon the employee's gender. In order to prevail on her Title VII claim for hostile work environment based upon gender, Plaintiff must establish, by a preponderance of the evidence, the following essential elements:

(1) Plaintiff was subjected to conduct by workers or supervisors at Southeastern Oklahoma State University consisting of harassment, inappropriate comments or physical violence;

(2) such conduct was unwelcome;

(3) such conduct was based on Plaintiff's gender;

(4) such conduct was sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find the work environment to be hostile or abusive;

(5) at the time such conduct occurred and as a result of such conduct, Plaintiff believed her work environment to be hostile or abusive;

(6) Defendants knew or should have known of the conduct;

(7) Defendants failed to take prompt and appropriate corrective action to end the conduct; and,

(8) Plaintiff suffered some injury or damage, even if merely nominal damage, as a result of Defendants' failure to take prompt and appropriate corrective action to end the conduct.

If Plaintiff has not proven any of the above essential elements by a preponderance of the evidence, your verdict must be for Defendants and you need not proceed further in considering Plaintiff's claim for hostile work environment.

Instruction No. 9

HOSTILE WORK ENVIRONMENT
TOTALITY OF CIRCUMSTANCES

In determining whether a reasonable person would find Plaintiff's work environment hostile or abusive, you must look at all of the circumstances. These circumstances may include the frequency of the conduct; its severity; its duration; whether it was physically threatening or humiliating, and whether it unreasonably interfered with Plaintiff's work performance. Conduct that amounts only to ordinary socializing in the workplace, such as occasional horseplay, sporadic or occasional use of abusive language, gender or age related jokes and occasional teasing, does not constitute an abusive or hostile environment. You must consider all the circumstances and the context in which the conduct occurred. Only conduct amounting to a material change in the conditions of employment amounts to an abusive or hostile work environment.

Instruction No. 10

MOTIVATING FACTOR-DEFINED

Plaintiff is not required to prove that her gender was the sole or exclusive reason for Defendants' decisions. Plaintiff must prove only that her gender was a motivating factor in defendants' decisions.

Instruction No. 11

DEFENDANTS' REASONS FOR EMPLOYMENT DECISIONS

Defendants assert there were legitimate, non-discriminatory reasons for not promoting Plaintiff. You are instructed that Defendants do not have any burden of proof with respect to the reasons for their actions. Thus, Plaintiff can prevail on her claim of gender discrimination only if she proves, by the greater weight of the evidence, that her gender was a motivating factor in Defendants' decisions to not promote her, in addition to, or instead of, any legitimate non-discriminatory reason or reasons.

It is not your role to second-guess Defendants' business judgment. Even if you were to decide that the failure to grant tenure was neither fair, nor wise, nor professionally handled, that would not be enough. In order to succeed on the discrimination claim, Plaintiff must persuade you by a preponderance of the evidence that were it

not for gender discrimination, she would have been granted tenure in 2009-10 or the opportunity to re-apply for tenure in 2010-11.

If you find that the stated reason or reasons given by the Defendants are inconsistent or implausible, or if you find that in the actions against Plaintiff, Defendants substantially deviated from their own practices or customs, then you may conclude that Defendants offered explanations are a mere pretext or sham or cover up for gender discrimination. If you find pretext, you may also infer that Plaintiff's gender was a motivating factor in Defendants' employment decision. However, you are not required to draw such an inference. If you find that Defendants' explanations are not a mere pretext, you must still consider whether Defendants' employment decisions were motivated by gender discrimination.

Instruction No. 12

RETALIATION

Plaintiff claims that Defendants retaliated against her by denying her the opportunity to apply for tenure during the 2010-11 tenure cycle because she complained of unlawful gender harassment in the workplace. Title VII prohibits an employer from retaliating against an employee for complaining of actions that violate Title VII.

In order to prevail on her Title VII claim for retaliation, Plaintiff must establish, by a preponderance of the evidence, the following elements:

(1) Defendants were aware Plaintiff had engaged in "protected activity" prior to the deadline for her tenure application during the 2010-11 tenure cycle;

(2) Defendants' prohibited Plaintiff from submitting a tenure application during the 2010-11 tenure cycle;

(3) Defendants' actions occurred because Plaintiff engaged in "protected activity;" and,

(4) Plaintiff suffered damage as a result of Defendants' actions.

Protected activity as used in this instruction means a plaintiff made complaints to a defendant about the alleged gender discrimination. Alternatively, a plaintiff engages in protected activity when he or she makes complaints about discrimination to an enforcement body such as the Equal Employment Opportunity Commission and a defendant is aware of those complaints.

If Plaintiff has failed to prove any of the above elements by a preponderance of the evidence, your verdict must be for Defendants and you need not proceed further in considering this claim.

Instruction No. 13

DAMAGES

If you find that Plaintiff has established all of the elements of any of her claims, then you must determine the damages, if any, to which she is entitled. The fact that I instruct you on damages should not be taken by you as indicating one way or another whether Plaintiff is entitled to recover anything. This is entirely for you to decide. Damages must be reasonable and not speculative. You may award only such amount of damages as will reasonably and fairly compensate Plaintiff for any injury or loss that is legally compensable.

If you should find that Plaintiff is entitled to an award of damages on one or more of her Title VII claims, you may award her only such damages as you find will reasonably compensate her for the losses and injuries which you find, that she sustained as a result

of Defendants' unlawful conduct. You may not award damages on Plaintiff's separate claims in a manner, which results in a double or multiple recovery for the same harm. Any award must fairly compensate Plaintiff for her losses and injuries, but must have a basis in the evidence and be reasonable in light of that evidence.

Instruction No. 14

TYPES OF DAMAGES

If you find that Plaintiff is entitled to damages, the following categories should be considered in determining the amount that will reasonably and fairly compensate Plaintiff for her injury or loss.

Back pay damages are to compensate Plaintiff for the economic injuries or losses she sustained as a result of Defendants' illegal discrimination or retaliation. You are provided a separate instruction providing you with the items that may be considered as a part of any damages awarded for back pay.

You may also award damages for any physical or mental distress or anguish that Plaintiff suffered as a result of Defendants' wrongful conduct. In evaluating the physical or mental distress of Plaintiff, if any, you may consider any mental anguish, emotional pain and suffering, inconvenience, loss of enjoyment of life, damage to

professional reputation, or other non-pecuniary losses, which you find Plaintiff experienced as a result of Defendants' unlawful conduct.

Conduct by Defendants that does not cause harm does not entitle Plaintiff to damages. By the same token, harm to Plaintiff which is not the result of unlawful conduct by Defendants does not entitle Plaintiff to damages.

You have heard argument that Plaintiff also seeks reinstatement to employment with Defendants. You are instructed that issues of reinstatement are for the Court and you should not consider that issue during your deliberations.

Instruction No. 15

BACK PAY DAMAGES

Back pay damages may be awarded to compensate for the economic injuries or losses sustained as a result of Defendants' unlawful conduct. You may consider the earnings to which Plaintiff proves she would have been entitled if her employment had not ended, measured from the time her employment with Defendants ended in May of 2011, until she began employment with Collin College in September of 2012. These damages are intended to put Plaintiff in the economic position she would have been if her employment with Defendants had not ended.

Instruction No. 16

NOMINAL DAMAGES

If you find that Plaintiff was retaliated against, but did not suffer any actual injuries or losses, you must award "nominal damages" in the amount of one dollar ($1.00). You may not award nominal damages and back pay, emotional distress or other compensatory damages.

Instruction No. 17

CLOSING

When you retire to the jury room to deliberate, you should elect one person as your presiding juror. That person will preside over your deliberations and speak for you with the Court.

You will then discuss the case with your fellow jurors to reach agreement, if you can do so. Each of you must decide the case for yourself, but you should do so only after you have considered all the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors. Do not be afraid to change your opinion if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right.

Your verdict must be based solely on the evidence and on the law as I have given it to you in these instructions. However, nothing that I have said or done is intended to suggest what your verdict

should be - that is entirely for you to decide. You must not use any method of chance in arriving at your verdict, nor let sympathy or prejudice affect the outcome.

A verdict form will be sent to the jury room with you, along with these written instructions of the Court and the exhibits admitted into evidence during the trial. I suggest you study the verdict form early in your deliberations so you know what you must decide. The verdict must be unanimous; that is, all of you must agree on a verdict, and when you do, the presiding juror will sign the verdict. Notify the bailiff when you have arrived at a verdict so that you may return it to open court.

In a few moments, you will go with the bailiff to the jury room to begin your deliberations. If any of you have cell phones or similar devices with you, you are instructed to be sure they are turned off and then turn them over to the bailiff as you enter the jury deliberation

room. They will be held by the bailiff for you and returned to you after your deliberations are completed and during any lunch break or similar period when you are not deliberating. The purpose of this requirement is to avoid any interruption or distraction during your deliberations and to avoid any question of outside contact with the jury during your deliberations.

If it becomes necessary during your deliberations to communicate with me, you may send a note through the bailiff signed by your presiding juror. In the message, do not tell me how you stand on your verdict. No member of the jury should ever attempt to communicate with me except by a signed writing. You will note from the oath about to be taken by the bailiff that during the course of your deliberations, the bailiff, as well as other persons, is forbidden

to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

11/17/17

ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

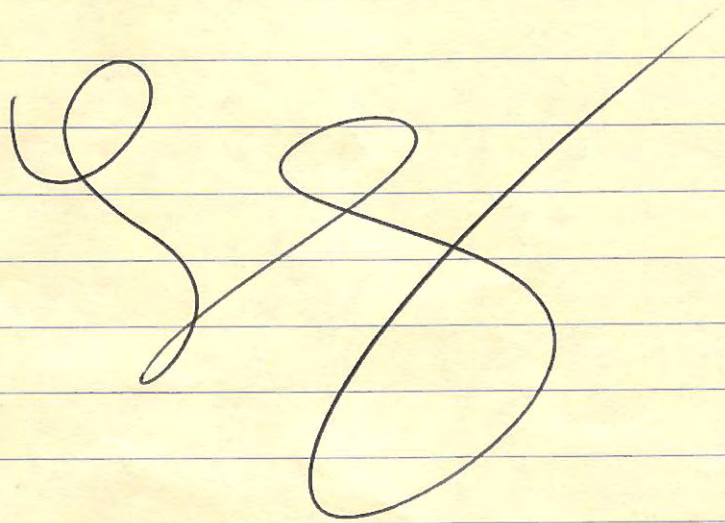
IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

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

JURY NOTE NO. 1

QUESTIONS.

1 If Dr. TUDOR WAS GRANTED TENURE WHEN WOULD THE PAY RAISE TAKE PLACE?
- WHAT MONTH?
- HOW MUCH WOULD BE GRANTED?



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

FILED
NOV 20 2017
CARMELITA REEDER SHINN, CLERK
U.S. DIST. COURT, WESTERN DIST. OKLA.
BY _____, DEPUTY

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

VERDICT FORM

We, the jury, empaneled and sworn in the above entitled cause, do, upon our oaths, find as follows:

Section I. Hostile Work Environment Claim

Question 1. Has Plaintiff proven by a preponderance of the evidence her hostile work environment claim? (Check one)

Yes ____ No ✓

(Proceed to Question 2.)

Section II. Discrimination Claims 2009-10

Question 2. Has Plaintiff proven by a preponderance of the evidence that she was denied tenure in 2009-10 because of her gender? (Check one)

Yes ✓ No ____

(Proceed to Question 3.)

Section III. Discrimination Claims 2010-11

Question 3. Has Plaintiff proven by a preponderance of the evidence that Defendants' decision to deny Plaintiff the opportunity to apply for tenure in the 2010-11 cycle was because of her gender? (Check one)

Yes ✓ No ____

(Proceed to Question 4.)

Section IV. Retaliation Claim

Question 4. Has Plaintiff proven by a preponderance of the evidence that, in retaliation for Plaintiff's complaints about workplace discrimination, Defendants denied Plaintiff the opportunity to reapply for tenure in the 2010-11 cycle? (Check one)

Yes ✓ No ____

(Proceed to Question 5).

Section V. Damages

Question 5. If you have answered yes to any of the above questions, please set, the amount of damages to which Plaintiff is entitled to compensate her for her injuries.

$ 1,165,000

11/20/17
Date

Presiding Juror

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

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

PLAINTIFF DR. RACHEL TUDOR'S MOTION FOR REINSTATEMENT AND INCORPORATED BRIEF

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I. Introduction

Dr. Tudor comes before this Court seeking closure on a difficult chapter in her life and the opportunity to do the job she earned and loves.

At trial, Dr. Tudor showed the jury evidence that Defendants discriminatorily denied her tenure in the 2009-10 cycle and then discriminatorily and retaliatory denied her the opportunity to reapply in the 2010-11 cycle, resulting in Tudor's separation from Southeastern Oklahoma State University ("Southeastern") in May 2011. In spite of what she has endured, Tudor testified that she wants to return to Southeastern and put her life back together.

Having prevailed on two claims of discrimination and one claim of retaliation under Title VII before a jury of her peers, Dr. Tudor respectfully asks that the Court to exercise its powers pursuant to 42 U.S.C. § 2000e-5(g) and order Tudor's immediate reinstatement at Southeastern with tenure and the title of Associate Professor as well as front pay from the date of the jury's verdict through the date of her reinstatement[1] Granting Tudor reinstatement

[1] At this time, Dr. Tudor is moving this Court for reinstatement with limited front pay because it is her preferred remedy and she is presumptively entitled to it under Title VII. Dr. Tudor is entitled to front pay for the period between the date of the jury's verdict and the date her reinstatement is awarded. *See Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843, 847 (2001) (observing front pay may be awarded for lost compensation between entry of verdict and reinstatement).

In the event that the Court denies reinstatement, Dr. Tudor reserves her right to appeal that decision and/or petition the Court for front pay in lieu of

on these terms will place her in the position she should have been in but for the illicit actions from Defendants during the 2009-10 and 2010-11 cycles.

Tudor can never get back the time she lost fighting for her job or undo the heartache Defendants' Title VII violations sowed. But, ordering Defendants to grant Tudor the job she earned will go a long way towards making Tudor whole.

Given Title VII's strong preference for reinstatement, the balance of equities, Defendants' inability to present evidence that reinstatement is infeasible, and other factors showing Tudor's is the kind of case justifying judicial involvement in the tenure process to remedy violations of Title VII, the Court can and should grant Tudor's motion for reinstatement.

II. Background

The Court held a 5-day jury trial beginning on November 13, 2017 (ECF No. 246, 263, 264, 265, and 266). At the conclusion of the trial, the jury found for Dr. Tudor on her two claims of discrimination and her one claim of retaliation, awarding $1.165 million in damages (ECF No. 267).

Among the evidence presented at trial was the testimony of Dr. Tudor, Dr. Robert Parker, and Dr. Margaret Cotter Lynch. Tudor testified that she wants to return to Southeastern. *See, e.g.*, ECF No. 246 at 130:2–4 ("I would

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reinstatement. *See Pollard*, 532 U.S. at 847 (noting front pay is available where district court deems reinstatement infeasible).

just like to reiterate that this is not about money. I just want my job back. I just want to go home and see my friends again."). Tudor spoke about her difficulties finding work in her field after being denied tenure at Southeastern. *See, e.g.*, ECF No. 246 at 124:8–25 and 125:1–6). Tudor also testified that even though she is deeply hurt by what happened to her at Southeastern that she does not harbor ill-will towards the university (see, e.g., ECF No. 246 at 38:14–25 and 39:1–8) and believes that she is capable of returning (see, e.g., ECF No. 246 at 119:16–24; *id.* 128:11–25 and 129:1–25 and 130:1–4).

Dr. Parker testified to Tudor's strong teaching (ECF No. 263 at 254:23–25 and 255:1–5 [characterizing Tudor's teaching as "very strong"), scholarship (*id.* 260–69 [discussing strengths of Tudor's scholarship record), and service at Southeastern (*id.* at 271:16–20 [describing Tudor's service record as comparable to tenured professor comparators in the English Department]).

Dr. Cotter-Lynch, a close friend and colleague of Tudor's and current Southeastern administrator, testified to Tudor's strengths as a professor. *See, e.g.*, *id.* at 339:5–7 ("She's really good at what she does. She's an excellent teacher."). Cotter-Lynch also testified that, to her knowledge, no one in the English Department opposed Tudor's return to Southeastern. *Id.* at 253:15–18. Cotter-Lynch shed light on how career derailing tenure denial is for a

professor, testifying that based on her own experience serving on hiring committees, if an applicant failed to get tenure in a previous position that is held against them. *Id.* at 333:1–21. Cotter-Lynch also added that in order for Southeastern to move past what happened to Tudor, Tudor must return. *Id.* at 352:6–17 (testifying that she could not recommend that a transgender colleague apply for a professor position at Southeastern until Tudor is allowed to return).

In turn, Defendants failed to rebut Tudor's strong evidence of discrimination and retaliation and did not present evidence showing reinstatement is infeasible at this juncture.

II. Standard of Review

District Court's role. Reinstatement is a preferred remedy. *Jackson v. City of Albuquerque*, 890 F.2d 225, 231 (10th Cir. 1989) (*quoting EEOC v. Prudential Ass'n*, 763 F.2d 1166 (10th Cir. 1985)). Award of "make-whole" equitable remedies, such as reinstatement, is ultimately up to the discretion of the district court but tempered by Congress' overarching desire to eradicate workplace discrimination in American workplaces and deter illicit acts in the future. The exercise of the district court's discretion to devise appropriate remedies for Title VII violations "must be tied to Title VII's twin purposes of 'providing an incentive to employers to avoid discriminatory practices' and 'making persons whole for injuries suffered on account of

unlawful employment discrimination'." *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1203 (10th Cir. 2015) (*quoting Estate of Pitre v. Western Elec. Co., Inc.*, 975 F.2d 700, 704 (10th Cir. 1992)) (cleaned up).

Reinstatement and other make-whole remedies should only be denied where there are "reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albermale Co. v. Moody*, 422 U.S. 405, 421 (1975). Reinstatement is only to be denied where the district court finds it infeasible. *Jackson*, 890 F.2d at 235 (denial of reinstatement inappropriate where it is possible for employee to return to work and employee desires reinstatement). Where the district court denies reinstatement, the rationales for denial must be explicated with particularity. *See, e.g.*, *Weaver v. Amoco Prod. Co.*, 66 F.3d 85, 89 (5th Cir. 1995) (remanding to district court to articulate with particularity rationales supporting denial of reinstatement based on finding of infeasibility).

Tudor's burden. Dr. Tudor bears the initial burden to demonstrate that she is legally entitled to reinstatement. This burden is met where the employee shows she prevailed on her discrimination and retaliation claims. *See, e.g.*, *Donnellon v. Fruehauf Corp.*, 794 F.2d 598, 602 (11th Cir. 1986) (there is a "presumption that prevailing Title VII claimants are entitled to

reinstatement"); *Garza v. Brownsville Indep't Sch. Dist.*, 700 F.2 253, 255 (5th Cir. 1983) ("reinstatement or hiring preference remedies are to be granted in all but the unusual cases").

Defendants' burden. Defendants bear a substantial burden in opposing reinstatement. They must show with particularity that reinstating Dr. Tudor is infeasible. Infeasibility can only be demonstrated in rare circumstances where the employer shows that non-illicit reasons weigh strongly against award of Title VII's preferred remedy.

Reinstatement should not be denied simply because it could make things awkward in the workplace or displace new hires. *Jackson*, 890 F.2d at 233–34 (*quoting Reeves v. Claiborne Cnty. Bd. of Educ.*, 828 F.2d 1096, 1101–02 (5th Cir. 1987) ("'While reinstatement may displace an innocent employee, the enforcement of constitutional rights (may have) disturbing consequences. Relief is not restricted to that which would be pleasing or free of irritation'.")).

The mere fact that Tudor seeks reinstatement with tenure at a university is not something that renders the relief she seeks infeasible as a matter of law. Award of tenure is an appropriate Title VII remedy where it is the only means of making whole a professor who experienced discrimination and/or retaliation in the tenure process. "[T]o deny tenure because of the intrusiveness of the remedy and because of the University's interest in

making its own tenure decisions would frustrate Title VII's purpose of 'making persons whole for injuries suffered through past discrimination'." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 360 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990) (*quoting Albermale Co. v. Moody*, 422 U.S. 405, 421 (1975)).

III. Analysis & Authorities

A. The Court should order Tudor's reinstatement at Southeastern.

1. Reinstatement is Title VII's preferred remedy.

Dr. Tudor wants to be reinstated at Southeastern. Tudor's desired resolution and Title VII's remedial scheme are aligned.

Where discrimination is proven, Title VII's provides for "make-whole relief." *Albermale*, 422 U.S. at 418 (recognizing imperative to "make persons whole" with court's "full equitable powers"). Remedies, including reinstatement, back pay, and front pay, are intended to compensate the employee for the effects of discrimination, both past and future, and to bring the employee to the position which she would have occupied but for the illegal acts. *Selgas v. Am. Airlines, Inc.*, 104 F.3d 9, 12 (1st Cir. 1997). Where Title VII violations result in employment separation, "reinstatement is the preferred remedy." *Jackson*, 890 F.2d at 231. Reinstatement is an important part of make-whole relief and is expressly provided for in Title VII's text. *See*

42 U.S.C. § 2000e-5(g) (court may "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees").

Reinstatement is important for two reasons. First, it allows the employee to return to the job she was unjustly denied. Even where substantial money damages are available, courts recognize that money alone cannot heal the sting of losing one's job for discriminatory reasons. As the Tenth Circuit observed in *Jackson*,

> The rule of presumptive reinstatement is justified by reason as well as precedent. When a person loses his job, it is at best disingenuous to say that money damages can suffice to make that person whole. The psychological benefits of work are intangible, yet they are real and cannot be ignored.

Jackson, 890 F.2d at 234 (*quoting Allen v. Autauga Cnty. Bd. of Educ.* 685 F.2d 1302, 1306 (11th Cir. 1982)). Indeed, Tudor echoes this sentiment—money alone cannot heal her. **Exhibit 1** ¶ 8 ("I am grateful for and humbled by the damages the jury awarded me. However, I know that money alone cannot replace my career."); *id.* ¶ 10 ("it is abundantly clear to me that I will not fully heal if I cannot return to Southeastern").

Second, grant of reinstatement deprives the employer of the benefit it sought by excluding the employee from the workplace in the first place. *Cf. Allen*, 685 F.2d at 1306 ("If an employer's best efforts to remove an employee for unconstitutional reasons are presumptively unlikely to succeed, there is,

of course, less incentive to use employment decisions to chill the exercise of constitutional rights"). This is important because, without the availability of reinstatement employers would be perversely incentivized to eject employees on discriminatory or retaliatory grounds without consequence. Indeed, Cotter-Lynch attests that since Tudor's departure there have not been any other transgender professors at Southeastern and she believes it unwise for such persons to even apply for positions until Tudor is permitted to return. ECF No. 263 at 352:6–17.

If the Court awards Tudor reinstatement, it should also award her front pay for the period of time between the entry of the verdict and the date Tudor is reinstated at Southeastern. An award of front pay in this situation compensates Tudor for the period of lost compensation between the entry of the verdict and reinstatement—a period not covered by a back pay award. See *Pollard*, 532 U.S. at 846. Tudor should be compensated at a rate equivalent to what tenured professors at the Associate Professor level with Tudor's years of seniority are paid. Tudor's years of seniority should be computed as if she had never separated from Southeastern—with the 2017-18 school year being treated as her twelfth year of service. Dr. Tudor estimates that she should be entitled to a yearly salary of approximately $57,091 (**Exhibit 1 ¶ 11(a)–e**), of which she should receive a pro-rated amount to cover the term of unemployment between the verdict and her date

of reinstatement.

2. Equities weigh in favor of Dr. Tudor's return to Southeastern.

Granting Dr. Tudor reinstatement is a patently fair and equitable resolution to this case.

First and foremost, Dr. Tudor desires to return to Southeastern. Tudor attests that she feels safe and at home at Southeastern. **Exhibit 1** ¶ 6(a)–(b). In spite of everything Tudor has endured, she feels certain that she can make a successful transition back to Southeastern if given the chance to return. ***Id.*** ¶ 7(a)–(c). Equity favors granting Tudor the remedy she desires, and trusting her to make a wise decision based on everything she knows about Southeastern and her personal career needs. *Cf. DuBose v. Boeing Co.*, 905 F.Supp. 953, 958 (D.Kan. 1995) (observing that it would be "turning equity on its head" to order an employee to return to a workplace against his wishes).

Second, Tudor earned her job at Southeastern and deserves the opportunity to work there. Dr. Tudor worked hard to prove herself at Southeastern and earn tenure and promotion to Associate Professor. As Tudor and others testified to at trial, Tudor worked hard the entire time she was at Southeastern all for the reward of tenure and promotion. Tudor excelled in the areas of teaching, scholarship, and service. In spite of her

separation from Southeastern, Tudor remains ready and able to serve as a Southeastern professor. **Exhibit 2** ¶ 4(e) ("Though Dr. Tudor has been away from Southeastern since May 2011, it is my belief that she has expended significant efforts to ensure that she is ready and able to return to the classroom and be reintegrated into the faculty and university community."); **Exhibit 1** ¶ 7(e) ("During my time away from Southeastern, I have endeavored to keep my skills sharp and stay abreast of developments in my field."). Tudor is a passionate, skilled teacher. *See, e.g.*, **Exhibit 2** ¶ 7(a). Tudor is an strong researcher and scholar. *See, e.g.*, *id.* ¶ 7(c). Tudor is also dedicated to service. *See, e.g.*, *id.* 7(b).

Third, reinstating Tudor at Southeastern would go a long way towards helping her rehabilitate a career which has been sidelined for almost a decade because of Defendants' illicit actions. Tudor's career should have proceeded as Dr. Cotter-Lynch's did—with salary increases, successive promotions, better opportunities for publication, and job security. *See* ECF No. 263 at 329–31. But because of Defendants' illicit actions, Tudor was kicked to the curb and forced to endure lengthy legal battles and scramble to find a new job while living with the black mark of Southeastern's discriminatory tenure denial. ECF No. 246 at 96:2–8 (Tudor testifying in reference to the impact being denied tenure as had on her that, "it's really impossible to overcome that kind of black mark on our reputation"). *See also*

Exhibit 1 ¶ 9 ("I believe my only real option to get my career back is to return to Southeastern."). Tudor can never get back the time she has spent fighting Defendants or undo the heartache their illicit deeds sowed. But, a return to Southeastern in the position she earned would go a long way toward making Tudor whole. **Exhibit 1** ¶ 8 ("I very much want to start a new chapter in my life, and rebuild what I have lost. The jury's verdict is an important part of my next chapter, but without my career I cannot completely move forward."); *id.* ¶ 10 ("I think returning to the classroom at Southeastern is essential to me regaining my confidence and self-esteem.").

Fourth, for Tudor, the prospect of returning to Southeastern means more than just job security and rehabilitating her career—it brings with it the pride and satisfaction of working at a university that sits within the historic boundaries of the Chickasaw Nation and which serves a large portion of Chickasaw students. *See, e.g.*, ECF No. 246 at 78:1–6 (Tudor testifying that "it was an honor to represent the Chickasaw Nation in my service at Southeastern"); **Exhibit 1** ¶ 5(c) ("the Chickasaw students Southeastern serves are particularly special to me").

Throughout this litigation, Tudor has been upfront that she was uniquely injured by being forced to leave Southeastern because she is Chickasaw. *See, e.g.*, Tudor Complaint, ECF No. 24 ¶¶ 122–29. When Tudor lost her job, she lost the ability to work on land that holds special import to

her as a Chickasaw citizen and was deprived of the privilege of serving the critical mass of Chickasaw college students whom matriculate at Southeastern. Tudor Complaint, ECF No. 24 ¶ 129; **Exhibit 1** ¶ 5(c) ("I took great pride in teaching all of my students at Southeastern, but it was especially rewarding to serve at Southeastern and be a resource and possibility model for the Chickasaw students."). Given Tudor's unique connection to the land Southeastern sits on and its Chickasaw students, neither money nor the prospect of another job are fair alternatives to the tenured job Tudor earned at Southeastern. **Exhibit 1** ¶ 5(c) ("In 2004, when I was evaluating offers for tenure-track positions, I chose to accept Southeastern's offer because I wanted to return to Oklahoma and make my life there because this is the location of the relocated Chickasaw Nation, of which I am a citizen."); *id.* ("The pain and suffering of Indian Removal and 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.").

Fifth, neither Dr. Tudor nor Southeastern can be made whole again with anything short of Tudor's reinstatement. Though Tudor has been vindicated by the jury's verdict, money damages alone cannot salve her wounds. As per Tudor,

> As grateful as I am for what the jury did, I know that I cannot be made whole unless I am allowed to return to Southeastern with tenure and the title of Associate Professor. For me, my case has

> always been about getting my job back and making things tolerable at Southeastern.

Exhibit 1 ¶ 2. Tudor's focus on reinstatement is understandable. Tudor spent many years training and working towards becoming a permanent, tenured professor at Southeastern. *See, e.g.*, ECF No. 246 at 50:18–22 (Tudor testifying that all of her time at Southeastern counted as work towards earning tenure); *id.* 51:15–23 (Tudor testifying that it takes "many years of preparation" to prepare oneself to write scholarly articles needed for tenure). Defendants' illicit actions have deprived Tudor of her career and life's work—"it is at best disingenuous to say that money damages can suffice to make [Tudor] whole." *Allen*, 685 F.2d at 1306. Similarly, the Southeastern community has endured many long years waiting for Tudor's situation to be righted. The pall of what happened to Tudor cannot be lifted without allowing Tudor to return. ECF No. 263 at 352:6–11 (Cotter-Lynch testifying that things will not be right at Southeastern until Tudor returns).

B. Defendants have not and cannot present evidence showing reinstatement is infeasiable.

1. Tension due to this litigation is no grounds to deny reinstatement.

Any argument by Defendants that reinstatement is not feasible because this litigation has sown tensions between Tudor and Defendants is without merit.

Tudor and her colleagues attest that no irreconcilable tensions precluding reinstatement exist. At trial, Tudor testified that despite everything she has endured, she wishes to return to Southeastern (ECF No. 246 at 130:2–4). Tudor has reaffirmed those sentiments via declaration. **Exhibit 1** ¶ 2; *id.* ¶ 4 ("I can say without any hesitation that I absolutely want to return to Southeastern. Southeastern feels like home for me. I love Southeastern even though, for many years, it has hurt me to love it so much."). Tudor's colleagues at Southeastern similarly testified that Tudor would be welcomed back. Indeed, Cotter-Lynch has provided a declaration in support of Tudor's motion affirming that there are no ill feelings towards Tudor on campus at this time. See **Exhibit 2** ¶ 5(a) (no ill will towards Tudor in the English Department); *id.* ¶ 6 (Tudor's return will not be opposed en masse); *id.* ¶ 8(a)–(c) (no tensions between Tudor and remaining administrators at Southeastern).

Additionally, there is no apparent public pressure that would make Tudor's return to Southeastern infeasible. Even though the jury's verdict garnered national attention, none of the resulting coverage in Oklahoma or elsewhere has been anything but positive towards Tudor.[2] This suggests that

[2] *See, e.g.*, Tara Fowler, "Transgender Professor Awarded $1.1M After School Denied Her Tenure and Fired Her," ABC NEWS, Nov. 21, 2017, http://abcnews.go.com/US/transgender-professor-awarded-11m-school-denied-tenure-fired/story?id=51288162; John Paul Brammer, "Jury Awards Transgender

Defendants will not face substantial public pressure to keep Tudor from returning to Southeastern if so ordered by this Court. Even if there were public pressure to deny Tudor reinstatement, this alone does not justify denial of reinstatement. *See Jackson*, 890 F.2d at 232 (holding that absent concrete evidence of an inability to work with the public in a public facing job, existence of past complaints or prospective tensions is insufficient grounds to deny reinstatement).

Lastly, there have been no public statements from current Southeastern employees which suggest Tudor's reinstatement would be infeasible. At trial, the only overwhelmingly negative statements about Tudor's return were attributed to former Southeastern employees. *See, e.g.*, ECF No. 264 at 524:5–9 (Mindy House testifying that Scoufos threatened to quit if Tudor returned to Southeastern). Precedent makes clear that negative statements or sentiments from former employees alone are insufficient grounds to deny reinstatement. *See Jackson*, 890 F.2d at 232. Moreover, there is evidence that current Southeastern personnel do not harbor ill-will

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Professor $1.1 Million in Discrimination Case," NBC NEWS, Nov. 21, 2017, https://www.nbcnews.com/feature/nbc-out/jury-awards-transgender-professor-1-1-million-discrimination-case-n822646; Kyle Schwab, "Jurors Award Transgender Woman $1M in Discrimination Lawsuit Against State University," THE OKLAHOMAN, Nov. 21, 2017, http://newsok.com/jurors-award-transgender-woman-1m-in-discrimination-lawsuit-against-state-university/article/5573019; Lili Zheng, "Oklahoma Transgender Professor Awarded $1.1 Million in Landmark Case," KFOR, Nov. 21, 2017, http://kfor.com/2017/11/21/transgender-professor-awarded-1-1-million-in-landmark-case/.

towards Tudor. For example, on the day the jury returned a verdict in Tudor's favor Southeastern's president, Sean Burrage, sent an email to faculty and issued a press release acknowledging and expressing respect for the verdict. *See* **Exhibit 2** ¶ 8(c)(i) and accompanying **Exhibit A** (authenticating Nov. 20, 2017 press release).

If Defendants do endeavor to present some yet to be revealed evidence of hostilities purportedly caused by Tudor's litigation, these should not be afforded significant weight. Denying reinstatement purely because an employee has zealously invoked her Title VII rights requires *extreme* hostility and is greatly disfavored. As explained by the Eighth Circuit,

> To deny reinstatement to a victim of discrimination merely because of the hostility engendered by the prosecution of a discrimination suit would frustrate the make-whole purpose of reinstatement. Antagonism between parties occurs as the natural bi-product of any litigation. Thus, a court might deny reinstatement in virtually every case if it considered the hostility engendered from litigation as a bar to relief.

Taylor v. Teletype Corp., 648 F.2d 1129, 1138 (8th Cir. 1981). Similarly, denying reinstatement simply because it would be awkward is against the weight of precedent. *See, e.g.*, *Shaw v. Mast Advertising & Pub., Inc.*, 1991 WL 128223 at *6 (10th Cir. 1991) ("Reinstatement by its very nature is always awkward to a greater or lesser extent after the parties have spent months or years opposing each other in litigation. Nevertheless reinstatement is the preferred remedy, and Shaw will not be supervised by

anyone who was involved in the termination of her job.").

2. Past issues are unlikely to recur if Tudor is reinstated.

Defendants may argue that the discrimination and retaliation Tudor endured in the past makes reinstatement infeasible. If such an argument is raised it should be cast aside.

New policies and protections in place will ease Tudor's transition. Tudor's core grievances at Southeastern involved the tenure process—issues that would not arise again if she is reinstated with tenure. Tudor also grieved environmental issues which are unlikely to recur given Southeastern's changed policies. For example, in this lawsuit Tudor grieved an illicit exclusion in Southeastern's fringe benefit health plan, restroom restrictions, make-up restrictions, and dress restrictions, and alleged she endured being called by the wrong gender referent and other hostilities. Tudor Complaint, ECF No. 24 ¶¶ 130–59. Since Tudor's departure, Southeastern has revised its own policies several times, most recently adopting a comprehensive sex nondiscrimination policy which speaks with particularity to the core issues Tudor grieved as hostile. **Exhibit 2** ¶ 10 and accompanying **Exhibit B** (authenticating copy of Southeastern's new sex policies which expressly protect transgender persons). Additionally, Southeastern's insurance bargaining unit resolved in late 2016 to remove the transgender exclusion from their fringe benefit health plan policies, which is

all Tudor has ever asked for them to do with respect to health insurance. *Compare* Tudor Complaint, ECF No. 24 ¶ 146 (alleging that transgender exclusion in health plan which denied coverage for therapy, pharmaceuticals, and surgical care contributed to hostilities) *with* **Exhibit** 4 at PI002065 and PI02121 (removing transgender exclusion from health plan).

Lastly, as a condition of a non-confidential compromise agreement with the U.S. Department of Justice (**Exhibit 3**), Defendants have adopted and/or are in the process of adopting comprehensive policies. Under the terms of the compromise agreement, Defendants are barred from violating Title VII (*id.* ¶ 15), they are under the United States' supervision for a two-year period (*id.* ¶ 37), they must provide adequate training to all employees regarding protections Tudor and others like her are to be afforded (*id.* ¶¶ 31–34), they must change Southeastern's so as to provide ensure employees are afforded the full protections of Title VII (*id.* ¶¶ 21–30); and Tudor is expressly protected from further discrimination and retaliation at Southeastern (*id.* ¶ 16).

Given these significant changes in policy coupled with the robust terms of the compromise agreement entered into between Defendants and the United States, there are no longer any real impediments to Tudor's return to Southeastern. Any barriers to return that may have existed in the past should no longer stand in the way of Tudor returning to campus and

assuming the job she earned and which the jury decided she was unlawfully denied.

Dismissal of key decision makers and others with bias. Since Tudor's departure from Southeastern in May 2011, the university administration has been restructured and decision makers and persons whom Tudor has otherwise accused of discrimination have separated. Among others, the three key decision makers during the tenure process—President Larry Minks, Vice President Douglas McMillan, Dean Lucretia Scoufos—have all left Southeastern. Additionally, human resources, affirmative action, and counseling personnel—Ms. Cathy Conway, Dr. Claire Stubblefield, and Ms. Jane McMillan, have also departed Southeastern. RUSO has also experienced substantial personnel changes, including the departure of former general counsel Mr. Charles Babb. **Exhibit 1** ¶ 6(a); **Exhibit 2** ¶ 8(b).

Individuals who are in the high levels of the administration at Southeastern currently are ones whom Tudor either does not personally know or whom she had passing and/or neutral interactions with in the past. **Exhibit 1** ¶ 6(b); **Exhibit 2** ¶ 8(b); *id.* ¶ 9. There is absolutely no evidence or reason to believe that Tudor could not forge professional working relationships with these new colleagues. *See also Carr v. Fort Morgan Sch. Dist.*, 4 F.Supp.2d 989, 996 (D.Colo. 1998) (finding no "insurmountable hostility" between parties rendering instatement infeasible in part based

upon civil interactions during hearings and trial).

As to persons at Southeastern whom worked there during Tudor's employ, there is no evidence or reason to believe Tudor will be unable to work with them going forward. Persons whom Tudor is likely to interact with at Southeastern most often—mostly tenured faculty in the English Department, such as Dr. John Mischo, Dr. Margaret Cotter-Lynch, Dr. Mark Spencer, Dr. Dan Althoff, Dr. Randy Prus, and others—are persons whom Tudor continues to enjoy collegial relationships despite her long absence. *See, e.g.*, **Exhibit 1** ¶ 5(a); **Exhibit 2** ¶ 5(a).

C. Title VII violations allow for court involvement in the tenure process.

Defendants may argue that reinstating Tudor with tenure and the title of Associate Professor is improper because the Court would be involving itself in the tenure process at Southeastern. If such argument is raised, it can and should be quickly disposed of. Title VII forbids discriminatory and/or retaliatory animus from factoring into employment decisions—tenure decisions are no exception.

Title VII does not privilege universities to make illicit personnel decisions that are otherwise forbidden in other white- and blue-collar workplaces. Congress enacted Title VII to root out the scourge of employment discrimination from American workplaces—there is no statutory carve out for

universities.

Where illicit bias sows its ugly head, district courts are empowered to order reinstatement with tenure as part of a make-whole remedy. While universities may desire to hold themselves out as special places of employment their desire for independence and other interests are subordinate to Title VII's principals. As explained by the First Circuit,

> [O]nce a university has been found to have impermissibly discriminated in making a tenure decision, as here, the University's prerogative to make tenure decisions must be subordinated to the goals embodied in Title VII.

Brown v. Trustees of Boston Univ., 891 F.2d 337, 359 (1st Cir. 1989), *cert. denied*, 110 S.Ct. 3217 (1990). *See also Ford v. Nicks,* 741 F.2d 858, 864–65 (6th Cir. 1984) (affirming district court's order to reinstate professor with tenure).

VI. Conclusion

For the reasons set forth herein, Dr. Tudor respectfully requests the Court grant Dr. Tudor's motion for reinstatement.

Dated: December 11, 2017

/s/ Ezra Young
Ezra Young (NY Bar No. 5283114)
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Brooklyn, NY 11211
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Exhibit 1

DECLARATION OF DR. RACHEL JONA TUDOR

1. **I feel vindicated by the jury's verdict.** It has felt like I have been in a living nightmare since the old Southeastern administration discriminatorily denied my tenure in early 2010. The jury's verdict has brought me some relief. I feel immense relief that the jury saw what I endured and told the world that it was wrong. I wish that I was not forced to fight this for so long, but I am grateful that the jury decided my case on the merits and fairly.

2. **But I cannot be made whole if I do not return to Southeastern.** As grateful as I am for what the jury did, I know that I cannot be made whole unless I am allowed to return to Southeastern with tenure and the title of Associate Professor. For me, my case has always been about getting my job back and making things tolerable at Southeastern. The United States' compromise settlement with the Defendants and other changes Southeastern has made in the intervening years have solved many of the issues I faced during my employment. But, as great as those changes are, they are not enough to make me whole.

3. **My job is everything to me.** I have spent the vast majority of my adult life training and working towards becoming a university

professor. It was and still is my dream to teach at a four-year university, produce scholarship, and give back to my profession and serve my university. I realize it might be hard for others to understand—but, for me, there is no alternative life path. I cannot imagine getting out of bed in the morning and finding fulfillment in any other vocation. Indeed, as hard as things have been since I left Southeastern, the one thing that has kept me going is the prospect of returning to my classroom. The classroom is my clean, well-lighted place. It is where I excel. It is where I feel comfortable. It is where I feel alive.

4. **I want to return to Southeastern.** I can say without any hesitation that I absolutely want to return to Southeastern. Southeastern feels like home for me. I love Southeastern even though, for many years, it has hurt me to love it so much.

5. **I am connected to Southeastern.** I feel a deep and strong connection to Southeastern that has not waivered after all of these years.

   a. **Relationships with my colleagues.** One of the more painful aspects of having to leave Southeastern was that I was taken away from my colleagues. During my time at Southeastern, my colleagues were a source of great support and fulfillment. I

took great pride working alongside them everyday and working together to educate our students and serve the university. I miss little things, like running into them in the hallways on my way to classes each day. I miss the conversations I used to have with other faculty about things happening in our field, like discussing the latest translation of an ancient text we taught. I miss giving feedback to junior faculty on how they can improve their craft. More than anything, I miss going to work everyday and knowing for certain that my colleagues accept me for who I am.

b. **Connection to Southeastern's students.** From the very beginning of my time at Southeastern I felt a strong and profound connection to the students. Many of the students who attend regional universities like Southeastern come from families like the one I came from—not wealthy, from Oklahoma or a near-by state, and very often, these students are the first in their families to attend college. I took great joy in teaching Southeastern's students. I endeavored in each class to help my students discover new things and push themselves. I was proud to be part of their college experience.

c. **Chickasaw connection.** In 2004, when I was evaluating offers for tenure-track positions, I chose to accept Southeastern's

offer because I wanted to return to Oklahoma and make my life there because this is the location of the relocated Chickasaw Nation, of which I am a citizen. For generations, my family had tried and fell short of being able to live permanently in Oklahoma. We always return to Oklahoma to bury our dead, but stable employment and the resources to make a permanent home near our Nation always alluded us. Taking the job at Southeastern was so important to me because it was the first time—and one of the few opportunities available—that I could make a living and a home close to my Nation. The land that Southeastern sits on is special to me because of what my family and Nation endured. The pain and suffering of Indian Removal and 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. Additionally, the Chickasaw students Southeastern serves are particularly special to me. It is a great honor and privilege to help mold the minds of young Chickasaw citizens and helping guide them through college. I took great pride in teaching all of my students at Southeastern, but it was especially rewarding to serve at Southeastern and be a resource and possibility model for the Chickasaw students.

6. **I feel safe returning to Southeastern.**

a. **Persons I had issues with in the past are no longer at Southeastern.** The administrators who mistreated me, caused me so much pain, and made my life at Southeastern difficult have all left at this point. President Larry Minks, Vice President Douglas McMillan, Dean Lucretia Scoufos, Ms. Cathy Conway, and Dr. Claire Stubblefield no longer work at Southeastern. Even Mr. Charles Babb, former lawyer for RUSO, is gone. Persons whom I was friendly with but who tried to help hide what happened to me, like Ms. Jane McMillan, have also left Southeastern. Because of these aforementioned departures, returning to Southeastern will be easier—I will not have to face the people who pushed me out and tried to hide what happened to me.

b. **I have no reason to believe President Burrage would allow me to be discriminated or retaliated against.** There are a lot of new administrators at Southeastern, many of whom I have not yet had the opportunity to meet in person, though I have heard good things about them from my former colleagues. What I do know from personal experience is that President Burrage seems to be a capable leader and does not

appear to harbor any ill-will or bias against me. Though the trial was incredibly stressful, it did give me the opportunity to interact with President Burrage. He was polite, professional, and genuinely nice. Based on these interactions and what I have heard from my colleagues, I do not fear that President Burrage will mistreat me or allow others at Southeastern working under him to mistreat me either.

7. **I am ready to return to Southeastern.** I am ready to start a new chapter in my life and move past what happened to me so many years ago. I am ready to return home.

   a. **I can put the past behind me.** I feel very strongly that I can put what happened behind me. I am able to separate the bad things I endured in the past from where things stand today. I do not blame the current administration for what I endured in the past. I am ready and willing to start fresh and extend the same opportunity to Southeastern so that we may all move forward.

   b. **I can contribute to the university again.** I also feel ready and willing to contribute to Southeastern once again. Frankly, I look forward to the opportunity to do my job and contribute just like all of my colleagues.

c. **I am comfortable returning to the classroom.** Though I have been out of the classroom for the last year and a half, I feel ready and comfortable returning to teaching. I know that the skill I honed over so many years are still sharp. I know that I can still connect with students and serve them. I also know that I am prepared for students to ask me questions about my time away from Southeastern and about my return to campus—it is only natural that some of the students will have such questions.

d. **I do not believe I will face discrimination or retaliation at Southeastern if I return.** I believe very strongly that Southeastern has changed for the better since I left. I know there are new policies that specially protect transgender persons from sex discrimination, that the health plan no longer has a transgender exclusion, and that the U.S. Department of Justice has negotiated a settlement with Defendants which protects me and others from discrimination and retaliation. Given the significant changes in the administration as well as these much needed policy changes, I believe that it is very unlikely that I will face discrimination or retaliation if I return.

e. **I have done my best to make sure I am ready to return.** During my time away from Southeastern, I have endeavored to keep my skills sharp and to stay abreast of developments in my field. Among other things, I have read hundreds of books and articles, I have continued to give academic presentations even though it has been difficult to find such opportunities, and I have sought out development opportunities and trainings. A copy of my current CV reflecting many of my efforts is attached hereto as **Exhibit A**.

8. **Money damages alone cannot make up for losing my career.** I am grateful for and humbled by the damages the jury awarded me. However, I know that money alone cannot replace my career. Going forward, I very much want to start a new chapter in my life, and rebuild what I have lost. The jury's verdict is an important part of my next chapter, but without my career I cannot completely move forward. I need to use my training and share my passion with my students and colleagues again. I need to get up every day with a place to go and something to share with the world again.

9. **If I do not return to Southeastern, I do not think I will be able to find another job teaching at a university.** Ever since I was forced to leave Southeastern in May 2011 I have tried my

best to find another job teaching at a university. Despite my best efforts and continued support of my Southeastern colleagues, I could not find another equivalent job. Even with the jury's verdict vindicating me, I do not think that other universities will welcome me. My name has, unfortunately, become synonymous with a lawsuit that has garnered national attention. I know I have done what so few employees ever imagine doing—suing to vindicate my rights. While I want more than anything to be able to move past this lawsuit and get my career back, I honestly do not believe that other universities will be able to look past this case. I believe my only real option to get my career back is to return to Southeastern. Though my last years at Southeastern were difficult, I think that the jury's verdict will help us all move on together because it resolves any lingering doubts there may have been about whether what happened to me at Southeastern was wrong.

10. **I cannot heal if I do not return to Southeastern.** Being forced to leave Southeastern and being stripped of my career is still very painful. I have spent a lot of time since I left Southeastern trying to imagine how I could ever move on and release this pain and heal. In the few weeks since the jury returned the verdict, I have made some progress in beginning the healing process. But, at this point, it is abundantly clear to me that I will not fully heal if I cannot return to

Southeastern. There is a saying that the only way to get over being thrown from a horse is to get back on that horse. When I was a child, I was thrown from a horse and broke my wrist. My father insisted I get back on that horse. I was afraid, but it was the only way for me to get over what happened to me. I think returning to the classroom at Southeastern is essential to me regaining my confidence and self-esteem. It is also essential to be able to list Southeastern for my professional healing—the only way to lift that black mark I have been living under is to add a new entry to my CV, showing that I did indeed earn tenure.

11. **Front pay for period of unemployment between verdict and reinstatement.** I have attempted to calculate out my approximate salary at Southeastern based on information available to me. Using the Salary Worksheet attached hereto as **Exhibit B** (bates marked PI00019–20 in the lower right hand corner), I believe I am entitled to an annual salary of approximately $57,091 plus fringe benefits. I arrived at the salary figure by doing the following:

a. **Degree (A).** I should be given a base salary of $38,215 because I hold a doctorate.

b. **Rank (B).** I should be given an additional $11,232 because I should hold the title of Associate Professor.

c. **Experience (C).** I counted my years of service at Southeastern (counting my time of absence due to Southeastern's discriminatory/retaliatory actions) from the 2004-05 school year through the 2017-18 school year, a total of 12 years of service, which amounts to $6,552 in addition to the base salary. I also counted four years of service at other universities (I worked for two years at the College of the Mainland, and one year at the University of Idaho and the University of Oklahoma) divided by two, which amounts to an additional $1,092.

d. **Approximate Total.** The total of the above figures—$38,215 + $11,323 + $6,552 + $1,092—is $57,091.

e. **A more accurate calculation would be possible if Defendants provide the current salary worksheet.** I based my calculation on the directions set-forth in **Exhibit B**. It is possible that salary and compensation levels have changed since this work sheet was issued. If Defendants provide my counsel with the most up-to-date worksheet, I can recalculate my yearly salary for the purposes of ascertaining the appropriate rate of compensation for front pay.

I state under penalty of perjury that the foregoing is true and correct.

Executed on (date) 12/11/2017 in (location) Plano, TX

Rachel Tudor

Rachel Jona Tudor

Exhibit A

Rachel Tudor
4595 West Spring Creek Parkway
Apt. 2612, Plano, Texas 75024
rachel.tudor@yahoo.com

Education

2000 Ph.D. English, University of Oklahoma
Concentration: *American and Native American Literature & Modernity and Theory*
Dissertation: *The Native American Postmodern Mimetic Novel*

1994 M.A. Humanities, University of Houston-Clear Lake
Concentration: *Philosophy*
Thesis: *Genocide, Imperialism, and Neocolonialism: A Native American Critique of Literature*

1991 B.A. Multi-Cultural Studies, University of Houston-Clear Lake
Concentration: *History*

Academic Teaching Experience

2012–2016 Professor of English, Collin College

2004–2011 Assistant Professor of English and Humanities, Southeastern Oklahoma State University

2002–2004 Professor of Humanities, College of the Mainland

2001–2002 Visiting Assistant Professor of English, University of Idaho

2000–2001 Post-Doctoral Lectureship, Meritoriously Awarded Position, University of Oklahoma

1997–2000 Teaching Associate, University of Oklahoma

1995–1997 Teaching Assistant, University of Oklahoma

Professional Interests

Philosophy
Modernity and Theory
American and Native American Literature

Effective Teaching

Courses Taught at Collin College

English 1301 *Composition I (including dual credit)*
English 1302 *Composition II (including dual credit)*
English 2332 *World Literature I*

English 2333 *World Literature II*
English 2327 *American Literature I*

Courses Taught at Southeastern Oklahoma State University

Internet Courses

Humanities 1213 *Ancient to Medieval*

Hybrid Courses

English 1113 *Intro to Composition*
English 1213 *Composition*
Humanities 1213 *Ancient to Medieval*
Philosophy 1213 *Intro to Philosophy*

New Courses

Oklahoma Scholar Leadership Enrichment Program: *Native American Life, Law, and Literature*

This course was created with the assistance of the renowned Native American legal scholar Dr. Rennard Strickland and introduces students to current events in Native American law, life, and literature through the prism of American jurisprudence.

English 4853 *Great Books*
English 4563/5103 *Native American Literature*

Other Courses at Southeastern

English 1113 *Intro to Composition*
English 1213 *Composition*
English 2313 *Intro to Literature*
English 4563/5103 *Native American Literature*
Humanities 1213 *Ancient to Medieval*
Philosophy 2113 *Intro to Philosophy*

Courses Taught at College of the Mainland

English 1301 *Composition and Rhetoric in Communication*
English 1302 *Composition and Reading*
English 2328 *American Literature II*
Humanities 1301 *Ancient to Medieval*
Humanities 1302 *Renaissance to Modern*
Philosophy 2306 *Ethics*

Courses Taught at the University of Idaho

English 208 *Personal and Expository Writing*
English 295 *American Indian Drama*

English 484 *American Indian Literature*

Courses Taught at the University of Oklahoma

English 1113 *College Composition I*
English 1213 *College Composition II*
English 2213 *Introduction to Fiction*
English 2223 *Poetry*

Publications

Articles:

2012 "The Ethics and Ethos of Eighteenth-Century British Literature." *ASEBL Journal*. Volume 8. Issue 1, January (2012)

2011 "Genre and the Native American Novel." *Parnassus: An Innovative Journal of Literary Criticism*. Issue 2/3, July (2011)

2011 "Sara Suleri: A Study in the Idioms of Dubiety and Migrancy in *Boys Will Be Boys* and *Meatless Days*." *disClosure: A Journal of Social Theory*. 20th Anniversary Issue, April (2011)

2011 "*Pearl*: A Study in Memoir and First-Person Narrative Poetry." *Diesis: Footnotes on Literary Identities*. Spring (2011)

2010 "A Reading of Jonathan Swift's 'A Modest Proposal' Using Roman Jakobson's Poetic Function." *The Atrium: A Journal of Academic Voices*. Winter (2010)

2010 "Romantic Voyeurism and the Idea of the Savage." *The Texas Review*. Spring/Summer (2010)

2010 "Memoir as Quest: Sara Suleri's *Meatless Days*." *Research and Criticism*. Special Issue on Contemporary Literature and Theory. Volume 1 (2010)

2010 "N. Scott Momaday's *The Ancient Child* and the American Dime Novel." *Indian Review of World Literature in English*, Volume 6, Number II, July (2010)

2010 "*House Made of Dawn*: A New Interpretation." In *Diasporic Consciousness: Literature From the Postcolonial World*. Ed. Smirti Singh. Berlin, Germany: VDM Verlag, 2010 ISBN: 3639302036

2010 "Latin American Magical Realism and the Native American Novel." *Teaching American Literature: A Journal of Theory and Practice*. Spring/Summer (2010)

2009 "Historical and Experiential Postmodernism: Native American and Euro-American." *Journal of Contemporary Thought*. Winter (2009)

Editor:

2014–2016 Reviewer. *Quest*: Collin College's Undergraduate Research Journal

2008 Co-Editor. Symposium *Proceedings*. "Sixty-Seven Nations and Counting: Proceedings of the Seventh Native American Symposium."

2006 Co-Editor. Symposium *Proceedings*. "Native Women in the Arts, Education, and Leadership: Proceedings of the Sixth Native American Symposium."

Book Review:

1997 Book Review. *Outlaws, Renegades, and Saints: Diary of a Mixed-Up Halfbreed*. Tiffany Midge. *World Literature Today*. Winter, 1997

1996 Book Review. *Deadly Medicine*. Peter C. Mancall. *American Indian Libraries Newsletter.* Winter 1996

1995 Book Review. *Shadow Distance: A Gerald Vizenor Reader*. Comp. A. Robert Lee. *American Indian Libraries Newsletter*. Spring, 1995

Creative:

2007 Open-Mic Chapbook. *Alien Nations*

2005 Open-Mic Chapbook. *Diaspora*

1992 Play. *The Trial of Columbus*

Committees and Special Assignments

Collin College

2012–2016 *English Sourcebook Committee*

- Compiled and edited a sourcebook for English faculty

2012–2016 *Curriculum Review Committee*

- Review English curriculum and proposed changes to the curriculum

2014–2016 Chair, *Interdisciplinary Colloquium*

- Led monthly colloquiums on philosophy and teaching

2014–2015 *English Faculty Search Committee*

- Reviewed applications of prospective faculty members

- Interviewed prospective faculty
- Participated in deliberations and evaluations of applicants

2014–2016 *Mentor*, Collin College Mentor Program

- Mentor undergraduate students

2013–2014 *Panel Chair*, Collin College Undergraduate Research Conference

- Recruited student participants
- Edited student papers
- Supervised presentations

Southeastern Oklahoma State University

2010–2011 *Faculty Senate Personnel Policies Committee*

- Reviewed and assessed policy and procedure changes in reference to their impact on the faculty
- Proposed policy changes to the Faculty Senate in reference to salary, teaching, and tenure

2009–2011 *Faculty Senate*

- Reviewed, evaluated, and made recommendations for changes in undergraduate and graduate academic policies and procedures
- Reviewed and made recommendations for changes in the Policy and Procedures Manuel

2009–2010 *Faculty Senate Planning Committee*

- Facilitated the development and implementation of long-term goals relating to curriculum

2007–2010 *Chair, Assessment, Planning, and Development Committee, Department of English, Humanities, and Languages*

- Wrote yearly assessment report for the department
- Compiled, distributed, and tabulated department assessment of upper-level capstone student papers
- Compiled, distributed, and tabulated department assessment of junior-level student papers
- Organized meetings and agendas

2004–2010 *Native American Symposium Committee*

- Moderated panels
- Recommend themes and speakers
- Edited the 6th and 7th Symposium proceedings
- Provided transportation for speakers and guests to and from hotels and Dallas Airport

2007 *Oklahoma Scholar Leadership Enrichment Program*

- Assisted Dr. Rennard Strickland prepare a course curriculum and syllabus for program

- Served as local director and supervising professor of Dr. Strickland's course
- Graded student presentations and papers

2004–2011 *Hiring Committee*

- Reviewed applications of prospective faculty members
- Interviewed prospective faculty
- Participated in deliberations and evaluations of applicants

2004–2011 *Five-Year Program Review Committee*

- Compiled pertinent paperwork
- Contributed to review of curriculum
- Assisted outside reviewer with assessment report

2004–2007 *Assessment, Planning, and Development Committee, Department of English, Humanities, and Languages*

- Evaluated upper-level capstone student papers
- Evaluated junior-level student papers
- Participated in regular meetings and deliberations of committee

College of the Mainland

2002–2004 *Curriculum Committee*

- Recommended revisions of curriculum to align with Texas' *Academic Course Manual*
- Reviewed new course proposals

2002–2004 *Multi-Cultural Team*

- Organized multicultural activities on campus
- Promoted and publicized events
- Invited speakers to campus
- Hosted guest speakers on campus

2002–2004 *Estrella Award Committee*

- Reviewed nominees and applications for award to honor outstanding Hispanic student leaders in the community

University of Idaho

2001–2002 *Native American Advisory Board*

- Advised on issues important to the Native American community
- Liaison between the university and local Native American tribes

Professional Activities

2017 Presentation. "Post-Truth America: A Native American Guide to Survivance." Guest Lecture. Ramapo College, Mahwah, New Jersey

2016 Presentation. "Using Pericles' *Funeral Oration* to Teach Argument." Trends in Teaching College Composition Conference. Collin College, Plano, Texas

2015 Presentation. "An Experiential Discourse on Gender and Race in Faculty Affective Relations, Community Formations, and Pedagogic Practices." Texas Tech Comparative Literature Conference. Texas Tech University, Lubbock, Texas

2014 Presentation. "Teaching Argument as a Civic Virtue." Trends in Teaching College Composition Conference. Collin College, Plano, Texas

2013 Presentation. "Using Teams to Facilitate Collaborative Learning and Critical Thinking." Trends in Teaching College Composition Conference. Collin College, Plano, Texas

2012 Presentation. "Integrating Native American Literature into the Curriculum." Faculty Colloquium. Collin College, Plano, Texas

2011 Presentation. "Modern Media's Translation of Greece's Atavistic Myths." 13th Annual McCleary Interdisciplinary Symposium. Texas Southern University, Houston, Texas

2009 Presentation. "Native American Protest Fiction." 11th Annual McCleary Interdisciplinary Symposium. Texas Southern University, Houston, Texas

2007 Art Exhibit. "Kachinas and Gourds." Centre Art Gallery, Juried Art Show, Southeastern Oklahoma State University, Durant, Oklahoma

2005 Presentation. "The Lynching of Ward Churchill." Sixth Annual Native American Symposium. Southeastern Oklahoma State University, Durant, Oklahoma

1998 Presentation. "Charlotte Bronte's Indians" SAGES Conference, University of Oklahoma, Norman, Oklahoma

1996 Presentation. "Self-Selected and Other-Attributed Gender Performance: A Theoretical and Experiential Investigation." Culture Studies/Cultural Intervention, University of Colorado, Boulder, Colorado

1995 Presentation. "What is Native American Literature?" Southwest/Texas Popular Culture Association, Regional Meeting, Oklahoma State University, Stillwater, Oklahoma

1994 Presentation. "Suicide or Genocide? Self-Inflicted Death in Native American Novels." English Graduates for Academic Development. Annual Conference, East Texas State University, Commerce, Texas

1992 Director. *The Trial of Columbus*. Performed at the Mecotha Theater, Houston, Texas

Professional Training and Continuing Education

2016 *Faculty Development Day Conference*. Collin College

- Using Microsoft Office Templates to Work Smarter
- Strange Attractors: Mathematics and Poetry
- Facilitating Mindful Practices in the Classroom
- Social Media in the Classroom
- Evaluating Group Work in Distance Education

2015 *Faculty Development Day Conference*. Collin College

- Google Tools for Education
- The Library as Textbook
- Creativity in Teaching
- Apps for a More Efficient Workflow
- Pythagoreans: The Mystical Mathematicians

2014 *Faculty Development Day Conference*. Collin College

- Composition Revision: Cultivating a Critical Eye
- Integrating Marginalized Women into the Curriculum
- How to use Smartphones and IPad for Educational Purposes
- Death by PowerPoint
- Establishing Class Consciousness

2013 *Faculty Development Day Conference*. Collin College

- Using E-Books for Research Effectively
- Using Streaming Audio and Video in the Classroom
- Teaching Teamwork Skills
- Teaching Social Responsibility
- Teaching Critical Thinking

2012 *Faculty Development Day Conference*. Collin College

- Writing and Memory
- Beyond YouTube
- Ancient, Medieval, and Modern Metaphors
- Teaching Innovative Perspectives and Strategies
- Character, Conflict, Resolution: Educating Students Through Storytelling

2011 *Faculty Grant Writing Workshop*, Dr. Kathryn Plunkett, Digital Information Literacy Librarian, Southeastern Oklahoma State University

2009 *PowerPoint to Windows Media Player*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2009 *SMARTBoard Basics*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2009 *Getting Started: Toward Online Teaching*, The Sloan Consortium

2009 *Blackboard Assessments*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2009 *PowerPoint to Windows Media Video*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2009 *Respectful Workplace*, Southeastern Organizational Leadership Development, Southeastern Oklahoma State University

2009 *Legal Aspects of the Faculty*, Southeastern Organizational Leadership Development, Southeastern Oklahoma State University

2008 *On Media, Culture, Violence, and the College Student*, Southeastern Office of Violence Prevention, Southeastern Oklahoma State University

2008 *Teacher Tube*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2008 *BlackBoard Discussion Forums*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2008 *Using Microsoft Office Powerpoint*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2007 *New Technologies for Enhancing Instruction*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2007 *Customizing Your Blackboard Course*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2007 *Grading Documents Electronically*, Center for Instructional Development and Training, Southeastern Oklahoma State University

2003 *Introduction to Microsoft Powerpoint*, Department of Continuing Education, College of the Mainland, Texas City, Texas

2003 *Interactive Instruction Training*, Department of Continuing Education, College of the Mainland, Texas City, Texas

Awards and Honors

Bishop-Baldwin, Barton & Phillips Civil Rights Advocacy Award, Oklahomans for Equality, 2016
Faculty Senate Recognition Award for Excellence in Scholarship, Southeastern Oklahoma State University, 2011

Writer of the Year, Wordcraft Circle of Native Writers and Storytellers, 2000
Post-Doctoral Lectureship, University of Oklahoma, 2000
Residential Writing Fellowship, Virginia Center for the Creative Arts, 2000
Merit Tuition Scholarship, University of Oklahoma, 1996-1999
Roy and Florena Hadsell Award for Research, University of Oklahoma, 1995
Sigma Tau Delta, Rho Omega Chapter of the National English Honor Society, 1993
Omicron Delta Kappa, Atrium Circle Chapter of the National Leadership Honor Society, 1992

Professional Memberships

- Modern Language Association
- Wordcraft Circle of Native Writers and Storytellers

References

- **Dr. Margaret Cotter-Lynch** (Professor) Department of English, Humanities, and Languages, School of Arts & Sciences, Southeastern Oklahoma State University, 1405 North 4th Avenue, Durant, Oklahoma, 74701. mcotter@se.edu (580) 745-2986

- **Dr. Michael Schueth** (Professor) Department of English and Humanities, School of Arts and Sciences, Collin College, 2800 East Spring Creek Parkway, Plano, Texas, 75074. mschueth@collin.edu (972) 516-5083

- **Dr. Daniel Althoff** (Professor) Department of English, Humanities, and Languages, School of Arts & Sciences, Southeastern Oklahoma State University, 1405 North 4th Avenue, Durant, Oklahoma, 74701. dalthoff@se.edu (580) 745-2584

- **Dr. Mark Spencer** (Professor) Department of English, Humanities, and Languages, School of Arts & Sciences, Southeastern Oklahoma State University, 1405 North 4th Avenue, Durant, Oklahoma, 74701. mspencer@se.edu (580) 745-2921

- **Dr. John Mischo** (Professor) Department of English, Humanities, and Languages, School of Arts & Sciences, Southeastern Oklahoma State University, 1405 North 4th Avenue, Durant, Oklahoma, 74701. jmischo@se.edu (580) 745-2000

Exhibit B

SALARY CALCULATION FORM 2011-2012
Full-Time Faculty

NAME:_____

DEPARTMENT:_____ **SCHOOL:**_____

==========

DEGREES/EXPERIENCE

1. **DEGREE STATUS**
a. Highest Earned Degree?_____
b. If answer to (a.) is Master's than number of hours above the Master's in the teaching field, relevant field, or on an approved Doctoral program?_____

2. **ACADEMIC RANK?**_____
a. _____ Tenured (1)
b. _____ On Tenure Track (2)
c. _____ Not On Tenure Track (3)

3. **EXPERIENCE *(SEE NOTE 1)***
a. Total Yrs. at SOSU in a full-time professional capacity?_____
b. Yrs. at other colleges or univ.?_____
_____/ 2 (maximum 5 yrs.)_____
c. Yrs. common school experience?
_____ / 2 (maximum 3 yrs.)_____
d. Yrs. allowable service?
(a + b + c)_____

4. **MISCELLANEOUS**
a. Department Chair?_____
b. CPA?_____
c. Add-on?_____
If yes, attach detailed justification (requires President's approval)

==========

NOTE 1: ***Explanation*:** The number of allowable years are computed as follows:
a. Total number of years at SOSU in a full-time professional capacity.
b. One-half of the total number of years of full-time teaching experience at other colleges/universities up to five (5) years.
c. One-half of the total number of years of full-time teaching experience at the elementary or secondary level up to three (3) years.

(Number of allowable years) = a + b + c. This sum is not to exceed the number of years allowed at each of the following academic ranks:

Instructor	7 years
Assistant Professor	10 years*
Associate Professor	15 years*
Professor	28 years*

*Includes years at lower ranks.

SALARY CALCULATION

CALCULATION FOR DEGREE:

Less than master's	$24,570
Master's	27,295
Master's + 15 hrs*	30,025
Master's + 30 hrs*	32,760
Master's + 55 hrs*	35,490
Doctorate	38,215

A._____

* Toward Doctorate (See Note 2)

CALCULATION FOR RANK:

Instructor	$4,098
Assistant Prof with Masters	6,558
Assistant Prof with Doctorate	8,196
Associate Prof	11,232
Professor	15,912

B._____

CALCULATION FOR EXPERIENCE:
$546.00 X (# of allowable years) ***(See Note 1)*** C._____

ADD FOR DEPARTMENT CHAIR:
($2,190) D._____

ADD-ON: E._____

TOTAL SALARY (A+B+C+D+E) **$**_____

==========

NOTE 2: Hours "toward Doctorate" means graduate hours in the teaching field, relevant fields, or on an approved doctoral program. These hours will be certified by the Department Chair, the appropriate Dean, and the Vice-President for Academic Affairs.

==========

Department Chair_____**Dean**_____

VICE PRESIDENT FOR ACADEMIC AFFAIRS_____

GUIDE FOR APPLICATION OF THE SALARY CARD

1. Upper-level undergraduate and graduate hours taken at SOSU after the Master's degree will not be counted as work toward the Doctorate unless the Doctoral Granting Institution documents in writing (letter, degree plan) that these hours will count on a specific degree program.

2. After a Master's degree has been completed, post master's graduate hours taken at SOSU in School Administration may be counted as hours toward a doctorate when these hours are directly related to the teaching assignment.

3. An MFA degree will be counted at the level of "Masters + 30" hours toward the Doctorate.

4. A Master's degree with a CPA will be counted at the level of "Master's + 30" hours toward the Doctorate.

5. Two Master's degrees will be counted at the level of "Masters + 15" hours toward the Doctorate when both degrees are relevant to the teaching assignment.

6. Part-time SOSU faculty who have taught 3/4 time or more during a semester will receive credit toward years of college teaching experience should they become full-time faculty.

7. Individuals with prior employment at SOSU in a non-teaching professional capacity will receive consideration toward years of college teaching experience. Typically, such employment has been coded in one of the following HEGIS categories:

   01--Executive Officers
   02--Directors of Units
   03--Administrators within Units
   06--Specialist Support (ex: Counselor, Librarian)

8. A paid sabbatical from SOSU counts toward SOSU teaching experience. Leave without pay does not count toward experience.

9. College-level teaching or administrative experience at other institutions will count only when it is documented to be a full-time faculty appointment. Post-doctoral experience at other institutions will count when it is documented to be a full-time appointment.

10. Elementary or secondary teaching experience will count only when it is documented to be a full-time appointment.

11. On the Salary Schedule, Under "3. EXPERIENCE", parts a, b, and c will be computed using increments of one-half (.5).

Exhibit 2

DECLARATION OF DR. MARGARET COTTER-LYNCH

1. I am a full professor with tenure at Southeastern Oklahoma State University ("Southeastern").

2. I started working at Southeastern in Fall 2005. Since that time, I have been in Southeastern's English, Humanities, and Languages Department ("English Department"). As a full professor with tenure, I am considered a senior member of the English Department.

3. Since June 2016, I have served as Director of Southeastern's Honors Program. As Honors Director, I am considered both a member of Southeastern's faculty as well as a member of the administration.

4. **I do not have any concerns regarding Tudor's return to Southeastern.**

   a. I worked with Dr. Tudor in the English Department between Fall 2005 and her departure in late May 2011. I am deeply familiar with Dr. Tudor's work at Southeastern both in and outside the classroom and Department as well as her work and job search efforts since leaving Southeastern.

   b. I am also a close friend of Dr. Tudor and we share mutual interests, including teaching and literature. We regularly discuss developments in our field, goings on at Southeastern, as well as

emerging issues in university teaching in and outside of Southeastern.

c. As a senior, tenured member of the English Department and as a Southeastern administrator, I have absolutely no reservations whatsoever about Dr. Tudor returning to Southeastern. I do not believe Tudor's return would negatively effect the current administration, the faculty, or Southeastern's students.

d. I wholeheartedly believe that Dr. Tudor possesses the character, temperament, work ethic, and intellectual curiosity necessary to successfully teach at Southeastern.

e. Though Dr. Tudor has been away from Southeastern since May 2011, it is my belief that she has expended significant efforts to ensure that she is ready and able to return to the classroom and be reintegrated into the faculty and university community. Among other things, I know that Tudor is a voracious reader, seeks out professional development opportunities available to her, and is an experienced teacher whose skills are undoubtedly sharp and well suited for Southeastern's student population.

5. Tudor would be welcomed back by the English Department.

a. ***There is no ill will towards Tudor.*** I am actively involved in the English Department and have had many conversations with my tenured and non-tenured colleagues about Tudor's potential return. I am not aware of any member of the English Department who would resist Tudor's return to Southeastern.

b. ***Department is short staffed and needs good professors, like Tudor.*** The English Department is tasked with teaching core classes that all students at Southeastern must take to graduate with a four-year degree. At present, our Department is understaffed and we are struggling to split the workload amongst current professors. I wholeheartedly believe that Tudor's return to Southeastern would be of great help to the Department because, among other things, she could take over some of the classes we are struggling to staff. I recall having at least two conversations with Dr. Randy Prus, Department Chair, about the staffing issue and the possibility of bringing Tudor back to Southeastern in early November 2017. Prus agreed with me that bringing Tudor back would help the Department with the staffing problem.

c. ***Tudor is already knowledgeable of Department policies.*** I believe that Dr. Tudor could comfortably reintegrate into the Department. Tudor worked with us for seven years. Tudor knows nearly every member of the Department and support staff very well. Tudor is also deeply familiar with longstanding Department policies, objectives, and interests.

d. ***The few changes since Tudor's departure are things she could quickly learn.*** Though there have been some changes since Tudor's separation, she could quite easily familiarize herself with these changes and quickly adjust. For example, there is a instructor certification program we now use called Quality Matters. I have discussed the possibility of Tudor getting training on Quality Matters with Department Chair Randy Prus as recently as early November 2017—Prus and I both agree that Tudor could complete this training in a timely fashion. There are also a handful of more minor changes, all of which Tudor could quite easily adjust to upon her return. Moreover, if Tudor were to return to the Department I am happy to personally assist her in transitioning back into the Department.

e. ***The Department will be sensitive to Tudor as she reintegrates.*** While I know myself and my colleagues wish that

Tudor had never had to leave Southeastern, especially under the terms she left, I believe that our longstanding commitment to supporting Tudor will help her as she transitions back into the Department. All members of the Department (tenured and non-tenured faculty as well as staff) are aware of what happened to Tudor and are aware of her legal case and her long struggle to return to us. I think the fact that we all know what happened will make Tudor's transition back into the Department easier rather than harder. We have a keen understanding of how long Tudor fought and why she fought so long. We all have the requisite knowledge to support Tudor when she returns. I also think that our long-lasting support—as individuals as well as a Department—will help Tudor feel safe, secure, and supported upon her return.

6. **Tudor's return will not be opposed en masse.** I have regularly discussed the possibility of Tudor returning to Southeastern with my colleagues and administrators since Tudor's separation in May 2011. To my knowledge, the current administration, faculty, and staff do not as a whole have concerns about Tudor's return. I have no reason to believe that Tudor's return will unduly disrupt Southeastern or impair our ability to serve our students.

7. **No concerns regarding Tudor's teaching, service, or scholarship.** As a senior member of the English Department and Southeastern administrator, I have a keen interest in ensuring that both the Department and Southeastern hire, retain, and nurture professors who can amply contribute to our profession, effectively teach our students, and serve our university. I have absolutely no reason to believe that, if Tudor returns to Southeastern, she would be unable to meet Southeastern's exacting standards in the areas of teaching, service, and scholarship.

a. ***Teaching.***

i. Dr. Tudor is one of the most gifted teachers I have ever known. She is exceptional in the way she connects to students, her insight and passion for the literature she reads and her belief that it all makes a difference. Tudor really believes in teaching students to read critically. I want Tudor to return to Southeastern for her own sake, but also for the sake of Southeastern's students. Speaking as someone who works at Southeastern who works hard to help kids here, we need more people who are passionate and committed to the students.

ii. Though Tudor has not taught college courses since her departure from Collin College in May 2016, this relatively short absence will not negatively affect her teaching at Southeastern. Tudor is a highly skilled teacher—her empathy, insights, and many years of experience will undoubtedly ease her transition back into the classroom. A professor of Tudor's skill simply does not forget how to teach or connect with students.

b. ***Service.*** Dr. Tudor is deeply committed to serving her community and doing good in the world. When she was at Southeastern, she went out of her way to join committees in our Department and to tackle university service activities that improved the university and our broader community. Based on my conversations with Tudor and my knowledge of her work ethic and commitment to Southeastern, I have no doubt that she will seek out and take on significant service activities at Southeastern upon her return. Moreover, upon Tudor's return, I will be happy to work with Tudor to help her identify service activities that I am involved in to help her get a head start on her reintegration.

c. ***Scholarship.*** Dr. Tudor is a skilled researcher and scholar. To date, I know that she has published 12 peer review articles and has continued to seek out conference and presentation opportunities since her departure from Southeastern. Since Tudor's departure, I have had conversations with her about projects she would like to work on once she has appropriate research support at a four-year institution. We have also discussed different opportunities she would have for publishing work if she were to receive tenure—receipt of tenure is important, in part, because editors solicit work from tenured professors and extend invitations not available to others. Based on everything that I know, I have no reason to believe that Tudor would not be a productive scholar if she were to return to Southeastern.

8. **There are no tensions between Tudor and remaining administrators at Southeastern.**

a. Since Tudor's departure from Southeastern in May 2011, I have had many conversations with administrators about the possibility of her return.

b. Over the last seven years and a half years, the only negative things I have heard from administrators came from

persons (e.g., Douglas McMillan and Lucretia Scoufos) who Tudor alleged discriminated and retaliated against her. As I testified to at trial, all of the high-level administrators who were involved in Tudor's complaints have left Southeastern and the new administrators do not, to my knowledge, harbor negative feelings about Tudor.

c. After the jury returned its verdict in Tudor's case in late November 2017, Southeastern and Regional University System of Oklahoma ("RUSO") administrators and regents made public and private statements which I interpreted to reflect that there is no lingering hostility towards Tudor that should prevent her return to Southeastern. For example,

i. On or about November 20, 2017, Southeastern President Sean Burrage sent an email to the campus indicating that Southeastern does not quibble with the jury's finding that Tudor was discriminated and retaliated against. That email was later published as a press release on Southeastern's website on a public page. A true copy of the press release is attached hereto as **Exhibit A**.

ii. In the immediate aftermath of the jury verdict, President Burrage called me to discuss Tudor's case. Burrage told me

that he hoped for "peace" for Tudor and "healing" for the campus—I told Burrage that I supported both of those goals and believed others in the English Department felt the same way. The next day I ran into Burrage in the Academic Affairs office. We briefly spoke again, and Burrage indicated that he wanted to express good will to the English Department given the jury's verdict.

iii. On or about December 4, 2017, I ran into RUSO regent Amy Ford at a Southeastern holiday party. Ms. Ford attended Tudor's trial and viewed my testimony. Ms. Ford hugged me at the party and expressed enthusiasm seeing me again.

9. **No reason that the current Southeastern administration should oppose Tudor's return.** I have had many conversations with my colleagues in the English Department and the current administrators about Tudor returning to Southeastern after the trial is over. None of the current administrators, including President Burrage, have ever told me that Tudor would not be welcomed if she returned or that they thought transgender persons more generally should not be professors at Southeastern. I have had dozens of conversations with faculty in the English Department about

Tudor's return, including many conversations as recently as late November 2017. None of my colleagues have told me that they would oppose Tudor's return or that Tudor's return would not be accepted by our students. My understanding—based on many conversations with my colleagues—is that, on balance, we believe Tudor should have received tenure in the 2009-10 cycle and we all stand by the decision made by our Department. I feel confident in stating that, now that the jury has made its decision, the English Department on whole feels vindicated by our longtime support of Tudor.

10. **New employment policies and training should protect Tudor and ease her transition back to Southeastern.** Since Tudor's departure from Southeastern, Southeastern has revised its tenure and post-tenure review policies as well as substantially revised its nondiscrimination policies, all for the better. At present, I believe our new policies do a better job of rooting out bias in faculty employment status decisions as well as more clearly and exactingly protect transgender faculty and staff from sex discrimination and retaliation. A true copy of Southeastern's current policies speaking to treatment of transgender Southeastern community members is attached hereto as **Exhibit B.** In addition to new policies, Southeastern has also recently undertaken considerable efforts to

better educate faculty and staff on our nondiscrimination policies. As recently as Friday December 8, 2017, I attended one of these new mandatory trainings along with many of my colleagues. During this training, I was expressly trained on the fact that transgender community members cannot be discriminated against based on their sex and that retaliation will not be tolerated at Southeastern. This training was the first time in all my years at Southeastern that I have ever been trained on these issues on campus. Assuming administrators, faculty, and staff continue to receive important trainings like the one I attended, I believe that Southeastern will be a more hospitable place and that it is ready and able to accept Tudor back with open arms.

I state under penalty of perjury that the foregoing is true and correct.

Executed on (date) 12/10/17 in (location) McKinney, TX

Margaret Cotter-Lynch

Exhibit A

Southeastern News

President's statement on Tudor v. Southeastern Oklahoma State University and the Regional University System of Oklahoma

NOVEMBER 20, 2017 *by* ***UNIVERSITY COMMUNICATIONS***

Re: Tudor v. Southeastern Oklahoma State University and the Regional University System of Oklahoma

Earlier today, in U.S. District Court in Oklahoma City, the jury returned a verdict in favor of the plaintiff (Dr. Rachel Tudor).

Southeastern president Sean Burrage has released the following statement:

"Southeastern Oklahoma State University places great trust in the judicial system and respects the verdict rendered today by the jury. It has been our position throughout this process that the legal system would handle this matter, while the University continues to focus its time and energy on educating students. All legal questions should be directed to the Oklahoma Office of the Attorney General."

FILED UNDER: **NEWS** TAGGED WITH: **ATTORNEY GENERAL**, **DISTRICT COURT**, **OKLAHOMA CITY**, **SEAN BURRAGE**

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Exhibit B

RECORD COPY 5/9/2017

Civil Rights & Title IX Policy for Faculty, Students and Staff

TABLE OF CONTENTS

INTRODUCTION

Southeastern Oklahoma State University affirms its commitment to an educational and working environment free from discrimination and harassment on the basis of race, color, national origin, religion, sex, sexual orientation, gender, age, disability, veteran status, and other protected characteristics. Discrimination of any kind, including harassment and retaliation, will not be tolerated. This policy specifically covers all civil rights and Title IX matters for all faculty, students, staff, student and employee applicants, contractors and visitors when the University becomes aware of discrimination, harassment or retaliation through a complaint or by other means. Southeastern is committed to promptly ending any instances of discrimination, harassment, or retaliation and taking appropriate measures to effectively prevent the repetition of such conduct. The University will impose appropriate sanctions to reasonably ensure that such actions are not repeated, and steps will promptly be taken to remedy the effects of the misconduct.

The University is committed to preventative programming and outreach to the campus community in order to improve campus attitudes and understanding about discrimination, harassment, sexual misconduct, effective consent, bystander intervention, and other important behavioral wellness topics.

POLICY STATEMENT

Southeastern Oklahoma State University, in compliance with applicable federal and state law and regulations, does not discriminate and prohibits discrimination on the basis of race, color, religion, national origin, sex, age, disability, sexual orientation, gender identity, or status as a veteran in any of its policies, practices, procedures, or programs. This includes, but is not limited to: admissions, employment, financial aid, and educational services.

PRIMARY AUTHORITY

The application of other University policies not related to discriminatory misconduct may trigger this policy if any report or complaint that arises under those processes contains elements of discriminatory misconduct, and will therefore be addressed in accordance with this policy prior to the resolution of other claims.

Examples: A student grade appeal typically routed through the Academic Appeals Committee, but which contains allegations of racial discrimination must first be evaluated in accordance with the policies and procedures contained herein, before continuing through that committee.

An employee appeal from suspension, demotion, or discharge which contains allegations of gender based discrimination must first be evaluated in accordance with the policies and procedures contained herein, before continuing through that committee.

PRIOR POLICIES ARE REPLACED BY THIS POLICY

Note: This policy has been developed to simplify and consolidate all equity-based processes and procedures under one umbrella policy. This policy replaces the following University policies, or specific portions listed, that were in place prior to adoption:

1) Academic Policies and Procedures Manual, § 1.8 Nondiscrimination, Equal Opportunity, and Affirmative Action Policy.
2) Academic Policies and Procedures Manual, § 4.4.6 Faculty Grievance Policy (insofar as discrimination complaints are concerned).
3) Academic Policies and Procedures Manual, § 7.4 Sexual Harassment, Sexual Relationship, and Sexual Assault Policy.
4) Academic Policies and Procedures Manual, § 7.5 Racial and Ethnic Policy.
5) Academic Policies and Procedures Manual, § 7.14 Americans with Disabilities Act Policy.
6) Administrative, Professional, and Support Staff Employee Handbook, § vi Nondiscrimination, Equal Opportunity, and Affirmative Action Policy.
7) Administrative, Professional, and Support Staff Employee Handbook, § 6 Americans with Disabilities Act Policy.
8) Administrative, Professional, and Support Staff Employee Handbook, § 8.9 Sexual Harassment, Sexual Relationship, and Sexual Assault Policy.
9) Administrative, Professional, and Support Staff Employee Handbook, § 8.13 Racial and Ethnic Harassment Policy.
10) Administrative, Professional, and Support Staff Employee Handbook, § 13 Employee Complaint Policy.
11) Student Handbook, § D Gender Based and Sexual Misconduct Policy and related definitions of gender-based discrimination, harassment, and retaliation in § B of the Student Handbook.
12) Sexual Harassment and Violence, Discrimination, Retaliation and Domestic Violence Policy.
13) The Grievance Procedure for Faculty, Staff, and Students with Disabilities.
14) Policy on Services for Students with Disabilities.
15) Policy for Special Housing Requests for Students with Disabilities.
16) Service and Assistance Animal Policy
17) Policy for Addressing Requests for Academic Modifications Under the Americans with Disabilities Act
18) Criteria for Accepting Documentation of Disabilities

The Civil Rights & Title IX Policy is the official University policy outlining discrimination grievance procedures. Residual copies of the policies listed above are outdated may not be relied upon in any manner upon adoption of this policy.

POLICY APPROVAL	
Southeastern Oklahoma State University – Director of Compliance and Safety:	March 1, 2017
Regional University System of Oklahoma General Counsel's Office:	April 17, 2017
President of Southeastern Oklahoma State University:	May 10, 2017

PRIMARY CONTACT FOR INQUIRES ABOUT THIS POLICY

Michael Davis, J.D.
Director of Compliance and Safety
Title IX Coordinator
Administration Building, Room 311
425 West University Blvd. Durant, OK
Phone: 580-745-3090
Email: mdavis@se.edu

PART ONE
OVERVIEW

1.1 KEY DEFINITIONS BY ALPHABETICAL ORDER

1.1A. Title IX Coordinator

The Title IX Coordinator is responsible for the oversight of the investigation and resolution of all reports of gender-based discrimination, sexual harassment, sexual violence, stalking, and domestic and dating violence involving students and employees**. At Southeastern the Title IX Coordinator is also the Affirmative Action and Equal Employment Opportunity Officer**. The Coordinator is trained in University policies and procedures as well as applicable laws, and is available to advise any individual, including a complainant, respondent, or a third party, about the courses of action available at the University, both informally and formally. The Coordinator is available to provide assistance to any University employee regarding how to respond appropriately to a report of discriminatory or sexual misconduct. The coordinator is additionally responsible for monitoring compliance with all procedural requirements, record-keeping, and timeframes outlined in this policy, as well as overseeing training, prevention, and education efforts. The Coordinator operates independently of other University administrative structures.

1.1B. Reasonable Cause

Some credible information to support each element of the offense, even if that information is merely a credible witness or victim's statement. A complaint wholly unsupported by any credible information will not be forwarded for a hearing.

1.1C. Sexual Conduct

Sexual conduct includes, but is not limited to, any sex act, erotic touching, romantic flirtation, conversation of a carnal nature, advance or proposition for sensual activity, erotically explicit joke, remark of a carnal nature describing a person's body or clothing, display of an erotic object or picture, and physical contact reasonably believed to be of a sensual or flirtatious manner. *Sexual conduct* does not include reasonable use or delivery of bona fide lecture and/or instructional acts, statements, or materials. (See RUSO POLICY MANUAL § 5.8)

1.1D. Consent

Consent means the affirmative, unambiguous and voluntary agreement to engage in a specific sexual activity during a sexual encounter. Consent can be revoked at any time. Effective Consent is freely and actively given in a mutually understandable manner through words or actions that indicate a willingness to participate in a mutually agreed upon sexual activity. Consent is voluntary.

a. Consent cannot be given by an individual who is asleep, or mentally or physically incapacitated either through the effect of drugs or alcohol or for any other reason.
b. Consent cannot be given by a person under duress, threat, coercion or force.
c. Consent cannot be inferred under circumstances in which consent is not clear, including but not limited to the absence of an individual saying 'no' or 'stop, and cannot be inferred from the existence of a prior or current relationship or sexual activity. Initiators of sexual activity are responsible for obtaining effective consent.
d. Silence or passivity is not effective consent.
e. Consent to any one form of sexual activity cannot automatically imply consent to any other forms of sexual activity.
f. Previous relationships or prior consent cannot imply consent to future sexual acts.
g. Consent may be initially given but withdrawn at any time. When consent is withdrawn or cannot be given, sexual activity must stop.
h. Prior sexual activity between individuals does not imply consent for future acts of sexual activity
i. Lack of consent includes instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity (such as being under the influence of alcohol or other drugs) and instances where the victim is threatened with force, threat, or other duress.
    i. Force negates consent. Sexual activity that is forced is by definition non-consensual, but lack of force alone does not establish consent .
    ii. There is no requirement that a party resists the sexual advance or request, but resistance is a clear demonstration of non-consent.
j. Use of alcohol or other drugs on the part of the respondent will never function as a defense for any behavior that violates this policy. For all conduct sections where consent is required consent must be present.
k.

1.2 PRESERVATION OF ACADEMIC FREEDOM AND INTELLECTUAL INQUIRY

The definition of discriminatory misconduct, including sexual harassment, in this policy is meant neither to proscribe nor to inhibit discussions, in or out of the classroom, of complex, controversial, or sensitive matters, when related to a reasonable pedagogical purpose. Southeastern promotes intellectual inquiry and debate. The mere expression of views that might be seen as offensive does not by itself create a hostile environment or constitute a per se violation of this policy.

PROHIBITED ACTS

1.2.A Discrimination

Conduct directed at a specific individual or group of individuals that subjects the individual or group to treatment that adversely affects their employment or education, or their access to institutional programs, benefits, activities or benefits, on account of race, color, religion, national origin, sex, age, disability, sexual orientation, gender identity, or status as a veteran.

1.2.B Harassment

Any act, statement, or combination of acts and/or statements, on account of race, color, religion, national origin, sex, age, disability, sexual orientation, gender identity, or status as a veteran, that is so objectively and subjectively severe or pervasive that it: (1) Deprives an individual of access to the education or employment opportunities or benefits provided by the university. (2) Create a hostile or abusive work or educational environment. (3) Creates a hostile or abusive environment for a visitor so as to deprive the reasonable visitor from exercising legal rights or privileges granted by the university in furtherance of the university's mission.

Harassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.[1]

1.2C Sexual Harassment

Sexual harassment shall be defined as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature in the following context:

[1] U.S. Department of Education, Dear Colleague Letter on Harassment and Bullying, October 26, 2010.

a) When submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or academic standing;
b) When submission to or rejection of such conduct by an individual is used as the basis for employment or academic decisions affecting such individual; or
c) When such conduct has the purpose or effect of unreasonably interfering with an individual's work or academic performance or creating an intimidating, hostile, or offensive working or academic environment.

(See RUSO POLICY MANUAL § 5.6.1)

Examples of Sexual Harassment

Conduct, whether in person, in writing, by telephone, through social media, by electronic means, or otherwise, prohibited by this policy includes, but is not limited to:

a) Unwelcome sexual flirtation, advances or propositions for sexual activity;
b) Continued or repeated verbal abuse of a sexual nature, such as suggestive comments and sexually explicit jokes;
c) Sexually degrading language to describe an individual;
d) Remarks of a sexual nature to describe a person's body or clothing;
e) Display of sexually demeaning objects and pictures;
f) Offensive physical contact, such as unwelcome touching, pinching, brushing the body;
g) Coerced sexual intercourse;
h) Sexual assault; or
i) Actions indicating that benefits will be gained or lost based on response to sexual advances.

1.2.D Sexual Violence/Assault Sexual violence/assault is a particularly pernicious form of sexual harassment. Sexual violence/assault is any sexual act directed against another person without the consent of the victim, including instances where the victim is incapable of giving consent.[2] The University may

[2] Sexual violence includes, but is not limited to, rape as defined by 21Okla.Stat. § 1111; rape by instrumentation as defined by 21 Okla. Stat. § 1111.1; forcible sodomy as defined by 21 Okla. Stat. § 888, assault as defined by 21 Okla. Stat. § 641 when committed in a sexual context, in furtherance of sexual demands, or because of a person's sex or sexual orientation; battery as defined by 21 Okla. Stat. § 642 when committed in a sexual context, in furtherance of sexual demands, or because of a person's sex or sexual orientation; aggravated assault and battery as defined by 21 Okla. Stat. § 646 when committed in a sexual context, in furtherance of sexual demands, or because of a person's sex or sexual orientation; stalking as described by 21 Okla. Stat. § 1173 when committed in a

immediately suspend on an interim basis any employee or student reasonably believed to have committed sexual violence against another person in violation of this policy, with notice and hearing to follow promptly. Sexual violence includes, but is not limited to::

a. *Rape*: The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim.
b. *Fondling*: The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.
c. *Incest*: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Oklahoma law.

(See RUSO POLICY MANUAL § 5.6.1)

1.2.E Sexual Exploitation

Taking nonconsensual or abusive sexual advantage of another for one's own advantage or benefit, or to benefit a person other than the one being exploited. This includes but is not limited to:

a. Nonconsensual video or audio recording of sexual or lewd activity, exceeding the boundaries of explicit consent.
b. Engaging in voyeurism (as in a peeping tom).
c. Knowingly transmitting a sexually transmitted disease or infection to another student or employee.

1.2.F Domestic Violence

A felony or misdemeanor crime of violence committed

a. By a current or former spouse or intimate partner of the victim.
b. By a person with whom the victim shares a child in common.
c. By a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner.
d. By a person similarly situated to a spouse of the victim who is protected from that person's acts under the domestic or family violence laws of the State of Oklahoma, specifically: Okla.Stat. Ann. Tit. 21, §644.1.
e. Domestic violence includes physical, sexual, emotional, economic, or psychological actions or threat of actions that influence another person.

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sexual context, in furtherance of sexual demands, or because of a person's sex or sexual orientation; sexual battery as defined by 21 Okla. Stat. § 1123(B); any sexual act involving a child as described in 21 Okla. Stat. 1123(A); maliciously intimidating or harassing or attempting to maliciously intimidate or harass another person because of that person's sex or sexual orientation; or inciting others, or attempting to incite others to maliciously intimidate or harass another person because of that person's sex or sexual orientation.

1.2.G Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of the interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

1.2.H Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to suffer substantial emotional distress.

a. "Course of conduct" means two or more acts, including but not limited to acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
b. "Reasonable person" means a reasonable person under similar circumstances and with similar identities to the victim.
c. "Substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

1.2.I Attempts and Complicity

Attempts to or encouraging others to commit acts prohibited by this policy will be sanctioned to the same extent as if one had committed the prohibited act. Apathy or acquiescence in the presence of prohibited conduct may constitute a violation of this policy.

1.2.J Retaliation

Any attempt to penalize or retaliate against a person for filing a complaint or participating in the investigation of a complaint of discrimination, harassment, or prohibited sexual conduct will be treated as a separate and distinct violation (also see Section 5-7 and 5-11 of RUSO Policy Manual).

Retaliating against a person who brings a complaint forward or against an individual or who has participated or is participating in in an investigation or this process is taken seriously and is prohibited.

The protections against retaliation are critical to reducing discrimination and sexual misconduct within the University community. Retaliation against anyone who has reported an incident of discrimination, harassment, or sexual misconduct, provided information, or participated in an investigation into a report is prohibited. Acts retaliation include but are not limited to intimidation, threats, and harassment – whether physical or communicated verbally or written, as well as adverse changes in work or academic environments.

1.2.K Obstruction

Obstruction, misdirection, and interference with investigation procedures or outcomes is prohibited. This includes falsification, distortion or misrepresentation of information, knowingly filing a complaint without good faith, and the harassment or intimidation of an individual involved in the investigation and sanction process including witnesses. This also includes the failure to comply with sanctions properly imposed through the conduct process.

1.2.L Employee Sexual Conduct with Students

No employee shall engage knowingly or attempt knowingly to engage in consensual or nonconsensual sexual conduct with any student whom the employee supervises, acts as academic advisor for, or over whom the employee has any power to determine the student's grade; honors; discipline; research opportunity; scholarship opportunity; acceptance in a graduate or other program of study; participation in arts, athletic, academic, or extracurricular competition; work-study assignment; or similar education-related matter. University employees' sexual liaisons with students in such situations exploit position, abuse power, and fundamentally harm the academic relationship. Voluntary intoxication with drugs, alcohol, or other substances shall not negate knowledge. (See RUSO POLICY MANUAL § 5.6.2 including the statement on exceptions to this policy).

1.2.M Employee Sexual Conduct with Supervisee

Supervisors' sexual liaisons with their supervisees may exploit position, abuse power, and fundamentally harm the working environment. No supervisor may engage knowingly or attempt knowingly to engage in consensual or nonconsensual sexual conduct with any employee, not his or her spouse, whom he or she supervises, directly or indirectly. Voluntary intoxication with drugs, alcohol, or other substances shall not negate knowledge. (See RUSO POLICY MANUAL § 5.6.2 including the statement on exceptions to this policy).

1.3 TRAINING FOR EMPLOYEES AND STUDENTS

Educational materials related to sexual misconduct will be disseminated to each new employee and student in an online format, and these materials will be designed to be compliant with the Violence Against Women Reauthorization Act of 2013 as it amends existing Clery Act law. This is achieved through the use of the *EverFi Haven* modules for students and employees and ongoing training and awareness programs conducted by the Office of Compliance and Safety and in Student Affairs.

1.4 DESIGNATION OF AND REQUIREMENTS FOR RESPONSIBLE EMPLOYEES

While all instances of discrimination, harassment, and retaliation should be properly reported to the Office of Compliance and Safety or an appropriate supervisor, Title IX rules and regulations create a legal responsibility for "Responsible Employees" to report instances of gender-based discrimination, sexual harassment, and sexual assault. Southeastern has designated all employees except health care providers and clinical counselors in the Wellness Center as "Responsible Employees," which means that if any instance of gender-based discrimination, sexual harassment, or sexual assault is reported to a University employee, then that employee should immediately report the incident or situation to the Title IX Coordinator. An employee's report should include all relevant details, including time, place, and the individuals involved so that the University can conduct a prompt and proper investigation of the matter in order to preserve a safe campus. An employee should not share this information with law enforcement unless there is an emergency or a complainant requests such a report. If complainants wish to make a report to law enforcement, the employee will assist them in doing so.

Note: Before a complainant reveals any information to a responsible employee, the employee should ensure that the complainant understands the resources available to the complainant and the employee's obligation as a mandatory reporter of the information. If the complainant wants to maintain confidentiality, then the complainant should be directed to a confidential resource such as a counselor. If the person who experienced the sexual misconduct wants to tell the responsible employee what happened, but maintain confidentiality, the employee should respond that the University will consider the request for confidentiality, but cannot guarantee that it will be honored. The confidentiality determination will be made by the Office of Compliance and Safety, based on a balancing of the complainant's privacy interest and the safety of the University community. Employees shall never pressure a complainant to make a full report if the individual is not comfortable doing so.

1.5 THE CIVIL RIGHTS AND TITLE IX COMMITTEE

The Civil Rights & Title IX Committee, or an appointed panel therefrom, will hear all claims arising under this policy, including discrimination, harassment and retaliation related to a civil rights protection or Title IX. This includes all claims that cut across the various constituencies of faculty, staff, students, contractors, and visitors. Additionally it includes all claims that the institution's

policies, procedures, services, determinations or other actions are discriminatory and cases where there is no specifically named respondent.

Note: A subset of Civil Rights and Title IX Committee members will be trained at least annually on issues specifically relating to Title IX and the four VAWA-specific categories of Dating Violence, Domestic Violence, Sexual Assault, and Stalking. This training is required by 79 CFR 62773 § 668.46(k)(2)(ii). This training will include definitional understanding including the definition of consent, and how to conduct a hearing process that protects the safety of victims and promotes accountability. This training may be done by the Title IX Coordinator or through other trainings, webinars, seminars, etc.

PART TWO
PROCEDURE

2.1 INITIAL REPORTING

Employees, staff, students, campus visitors or any other participant in a University program or activity who have been a victim of discrimination, harassment, or retaliation (including sexual harassment or sexual assault) should report the incident immediately.

2.1.A Emergency Reporting to Police

Incidents of discrimination do not always amount to criminal conduct, but instead are enforced through administrative processes to preserve equity, equal opportunity, and the protection of civil rights. However, some conduct covered by this policy is indeed criminal and should be reported as such – especially acts of domestic violence, dating violence, sexual assault, and stalking. Filing a police report allows for immediate evidence gathering procedures to be implemented which preserves future options regarding criminal prosecution, university conduct sanctions, and civil or criminal actions against the perpetrator of the crime. Reports made to Campus Police will serve to simultaneously notify University officials including the Title IX Coordinator.

Incidents can be reported to Campus Police at 301 University Boulevard by calling their emergency number at 580-745-2911 or non-emergency number at 580-745-2727. If the incident occurred off-campus, it is appropriate to call the local Police Department by dialing 911.

2.1.B Non-Emergency Reporting to the University

All university employees have a duty to forward information reported to them to the Title IX Coordinator or a supervisor, unless they are a confidential resource such as a health care provider or clinical counselor in the Wellness Center. Reporting parties may want to consider carefully whether they share personally identifiable details with non-confidential employees, as those details will be shared with the Title IX Coordinator. If a reporting party does not wish for their name to be shared, does not wish for an investigation to take place, or does not want a formal resolution to be pursued, the reporting party may make such a request to the Title IX Coordinator who will evaluate that request with legal counsel in light of the duty to ensure the safety of the campus and comply with federal law. In cases indicating pattern, predation, threat, weapons and/or violence, the University will likely be unable to honor a request for confidentiality. In cases where the victim/complainant

requests confidentiality or no formal resolution and the circumstances allow the University to honor that request, the University will offer interim supports and remedies to the victim and the community but the University will investigate and resolve the complaint to the extent possible without breaching confidentiality or revealing the complainant's identity.

A reporting party has the right, and can expect, to have reports taken seriously by University when formally reported, and to have those incidents investigated and properly resolved through this policy. Formal reporting still affords privacy to the reporter, and only a small group of officials who need to know will be told, including but not limited to: Office of Compliance and Safety; Division of Student Affairs; Campus Police, and the Behavioral Intervention Team. Information will be shared as necessary with investigators, witnesses and the responding party. The circle of people with this knowledge will be kept as tight as possible to preserve a reporting party's rights and privacy. Records will not be disclosed outside the University unless required by law.

To report any act of discrimination, harassment, or retaliation covered by this policy, the primary point of contact is the Title IX Coordinator. Students may wish to contact the Dean of Student Affairs as an alternate option.

Michael J. Davis, Title IX Coordinator
Director of Compliance and Safety
Administration Bldg., Room 311
580-745-3090
mdavis@se.edu

Liz McCraw, Dean of Student Affairs
Office for Student Affairs
Room 312 Glen D. Johnson Student Union
580-745-2080
lmccraw@se.edu

2.1.C Anonymous Reporting

Anonymous reports may prompt a need for the institution to investigate and should not be utilized for reporting emergencies. Emergencies should be reported by contacting the police (see above). Anonymous reporting may inherently limit the scope of the investigation due to limited information and evidence. The following anonymous reporting options have been made available:

1. Filing a student misconduct report through the University's Maxient incident reporting system:

https://publicdocs.maxient.com/incidentreport.php?SoutheasternOKStateUniv

2. Filing a "silent witness" report with Campus Police at the following link: http://homepages.se.edu/public-safety/campus-police/silent-witness-information-form/

3. Downloading the 911Shield app on your iPhone or Android smartphone and filing an "iReport" with Campus Police.

4. Filing an anonymous tip with the Regional University System of Oklahoma through the RUSO Tip Line in EthicsPoint: https://secure.ethicspoint.com/domain/media/en/gui/30756/index.html

2.1.D Confidential Reporting

For students:
If a student would like the details of an incident to be kept confidential and would like to decline to report an incident to the University or law enforcement, the reporting party may still speak with counselors in the Southeastern Oklahoma State University Student Counseling Center, GDJ Student Union, Room 200, (580)745–2988.The Counseling Center will maintain confidentiality except in extreme cases of immediacy of threat or danger or abuse of a minor. Campus counselors are available to help free of charge to students and can be seen on an emergency basis during normal business hours. These employees will submit yearly anonymous statistical information for Clery Act purposes unless they believe it would be harmful to their client.

For employees:
Employees can contact the Crisis Control Center at (580) 924-3000. Additionally, employees can contact the National Sexual Abuse Hotline at 800-656-4673. Resources may also be available through the Employee Assistance Program offered through Lincoln National Life Insurance Company at 1-877-757-7587 or www.eapadvantage.com.

NOTE: Victims reporting violations of this policy should be aware that university administrators must issue immediate timely warnings for incidents reported to them that are confirmed to pose a substantial threat of bodily harm or danger to members of the campus community. The university will make every effort to ensure that a victim's name and other identifying information is not disclosed, while still providing enough information for community members to make safety decisions in light of the danger.

2.2 INVESTIGATION OF A GRIEVANCE

2.2.A Process

An individual may initiate the investigation process by filing a grievance with the EEO/Title IX Coordinator. Grievances will be reduced to writing if they not already in writing. An investigation into discrimination, harassment, or retaliation may be initiated regardless of whether a formal grievance has been filed or not. The Title IX Coordinator will be available to explain the process to involved parties or third parties as requested. The investigation process will be prompt, fair, and impartial. This means the process will be completed within a reasonable timeframe and without undue delay. The individuals involved in the investigation shall not have a conflict of interest or bias for the complainant or respondent. Information relevant to conflict of interest should be disclosed by any investigating authority under this policy. If a respondent feels that any investigating authority under this policy has a conflict of interest, a description of the conflict shall be disclosed to the Title IX Coordinator as soon as possible so that a determination can be made as to whether to replace that investigator. The investigation model is different depending on whether the respondent is an employee, student, University contractor, or a visitor. In cases of contractors and visitors, the University may have limited jurisdiction over the grievance and limited ability to secure any sanction beyond banning or removing specific individuals from campus or terminating various vending agreements. Investigations shall not last longer than 60 days unless there is a circumstance that reasonably hinders the investigation. Complaints of discrimination or retaliation, by or against the President, shall be investigated by someone who does not work for Southeastern. That person shall be determined by the RUSO Board in its sole discretion.

2.2.B Distinct and Separate Process

The University may undertake a short delay to allow evidence collection when criminal charges on the basis of the same behaviors that invoke this process are being investigated by police or other law enforcement. University action will not be precluded on the grounds that civil or criminal charges involving the same incident have or have not been filed or that charges have been dismissed or reduced. The Civil Rights & Title IX Process is distinct from any criminal investigation and flows from the University's obligation under Title IX and other equity laws to ensure it is providing a safe and nondiscriminatory environment. If a complainant wishes to pursue criminal processes only and wants to waive any University response to the situation, they should make that request to the Title IX Coordinator – and such requests will usually be respected unless the University must act independently to preserve the safety of the campus community from a threat or future violation of policy.

2.2C Gatekeeping

No formal investigations shall commence unless the Title IX Coordinator or designee determines through a preliminary investigation that enough information exists and that a case merits investigation. This gatekeeping function is based on whether reasonable cause exists to believe that policy may have been violated. If the preliminary stages of investigation, including the information from the grievance itself, do not produce sufficient evidence to believe a policy may have been violated, then the investigation will cease and no formal notice of charges will be issued and no hearings will be held. Additionally, this gatekeeping function shall consider any requests for inaction from the University or confidentiality from the complainant and evaluate whether there is enough of a pattern of misconduct or threat of further harm to the campus community to honor those requests or not.

2.2D Investigation Procedures

If the complainant is not anonymous and is available, the Title IX Coordinator or appropriate designee will meet with the complainant to discuss the complaint submitted, review the investigation and hearing

process, and discuss the outcome desired from the complaint. The complainant will be notified of receipt of the grievance and the immediate interim actions or remedies the university will take, if any. The gatekeeping determination mentioned above can be determined at this point, or in any other of the preliminary phases of investigation.

If the respondent in the grievance is a student, then the Student Conduct Coordinator and/or other appropriate Student Affairs professionals will be appointed by the Title IX Coordinator to conduct an investigation. If the respondent in the grievance is an employee, contractor, or visitor, then the Title IX Coordinator or a team of investigators from the pool of Civil Rights and Title IX Committee members will be appointed to investigate.

This investigation will include meeting with the complainant(s) and with the respondent(s), meeting with relevant witnesses, and reviewing any relevant evidence, including any prior complaints of misconduct, and making any site-visits as needed. Parties may have an advisor present during any investigation meeting. The role of the advisor will be limited to being present only; the advisor will not be permitted to speak during any meeting, interview or hearing relevant to the investigation. If the advisor is an attorney, the party shall notify the Title IX Coordinator that an attorney will be present at least two days prior to the meeting, interview or hearing.

The parties involved will have equal opportunities to present information to the investigators. Investigators will compile an investigation report at the conclusion of the investigation. This report will include relevant details to the investigation and make a recommendation for sanction or other remedy if appropriate.

For Investigations of Gender-Based Discrimination, Sexual Assault, Sexual Harassment, Dating Violence, Domestic Violence and Stalking:
Information related to prior sexual history [of either of the parties will be prohibited, except in very limited circumstances regarding prior sexual history between the parties where such information may be relevant to the issue of consent. However, consent will not be assumed based solely on evidence of any prior sexual history. Any and all investigators of these matters will have the appropriate required and ongoing training on conducting trauma informed gender-based and sexual misconduct investigations.

2.3 AGREEMENT-BASED RESOLUTION OPTIONS

In appropriate cases the University may choose to pursue alternative resolution with the consent of all parties at any point in the investigation process. Alternative resolution options can include mediation, specific action plans, voluntary agreements, or sanctions. Under any alternative resolution, the complainant will not be required to resolve the problem directly with the respondent, unless desired by the complainant. All parties must be notified of the right to end the alternative resolution process at any time and resume the formal process. Mediation shall not be used in cases involving sexual violence. The investigator will document the outcome of any alternative resolution and share with the parties and the Title IX Coordinator.

In cases where the facts are generally not in dispute, and the respondent expresses a willingness to accept responsibility for all charges in a case, with the consent of the complainant, the respondent will be offered the opportunity to waive the right to a hearing and agree to receive a sanction from the University. The parties will be provided the opportunity to submit a written statement to the Title IX Coordinator, who will share this information with appropriate supervisory personnel for employee respondents or the Student Conduct Coordinator for student respondents for consideration in determining appropriate sanctions. The sanction decision will be made based on investigation information and the written statements, as well as any conduct history on the part of the respondent. Any appeal in an acceptance of responsibility resolution will be limited to the grounds that the sanction provided by the University is grossly inappropriate in light of the violations committed, or relevant aggravating and mitigating factors, and in consideration of applicable policy. Both the complainant and the respondent shall have the same right of appeal. RUSO policy protects a student's right to appeal a suspension, expulsion, or recession of credit to the Student Conduct Committee for any reason.

2.4 HEARING PROCEDURES

If neither agreement-based resolution option is appropriate or if they are declined by the parties, a hearing will take place if there is still, after investigation, enough reasonable cause on which to hold a hearing. If, after full investigation, there is no reasonable cause to believe a policy may have been violated then the grievance process can still terminate at this point for that reason at the discretion of the Title IX Coordinator.

Once the investigative report is completed, a panel of three Civil Rights and Title IX Committee members will be assembled to hold a hearing. Any investigators of the case are not eligible to serve on the hearing panel, but shall be available to explain their investigative report to the panel.

Hearing notification will occur at least five days in advance and include the hearing date, time and location. Hearings will be scheduled around work or class schedules, and will not be postponed unless extraordinary circumstances exist. At least five days prior to the hearing, the parties may view the investigative report that will be submitted to the hearing panel for review. Copies of the investigative report may not be kept or copied as a personal item in interest of preserving the continued privacy of those involved, except as FERPA may require. Advisors to the parties may have similar access to view the report.

Allegations of discrimination, harassment, or retaliation will be heard by the panel. The hearing includes opening statements, discussion of relevant parts of the investigation report, information about the incident or incidents, presentation of information by witnesses brought by the parties, and closing statements. Each party is permitted to have a person of their choosing to accompany them throughout the hearing as an advisor. Their advisor may confer quietly with their party, exchange notes, clarify procedural questions, and generally assist the party in all manner other than speaking for them on their behalf or to the panel on a substantive matter.

In sexual misconduct or other harassment cases, and at the complainant's request, the hearing room can be arranged in such a manner that prohibits line-of-sight between the complainant and respondent with screens in place. All parties are permitted to make statements and present their own witnesses and information during the hearing. The parties may challenge or provide context to information presented in the investigative report. Witnesses and information need to be directly related to the incident.

Complainant and Respondent have the same opportunity to be present and participate, including the presentation of witnesses, information, and asking questions to the witnesses. Unduly repetitive character witnesses can be limited at the discretion of the panel.

In sexual misconduct or other harassment cases, the complainant and respondent may not directly question each other, but may submit questions to the chair to be asked of the other party. The chair or other panel members will review questions prior to posing to the other party to prevent questioning that is not permitted under these proceedings.

The hearing panel will make a determination of the policy violations and recommend sanctions and remedies, if any, to the supervisor if the respondent is an employee, or the Student Conduct Coordinator if the respondent is a student. The Supervisor/Student Conduct Coordinator does not have the authority to change the policy violation determination – that is NOT a recommendation.

The standard of proof used in all university hearings is preponderance of the evidence.

2.5 OUTCOME

The outcome will be determined by a majority vote of the panel, and the sanction can be based not just on the facts in the present case but also any conduct history of the respondent in totality. Possible outcomes include the entire range of sanctions listed in this policy. Specifically, the panel shall determine if the respondent is responsible or not responsible for violations of this policy and recommend a sanction if they are responsible. Both parties have the right to be informed simultaneously, in writing, of the outcome. Both parties will be notified within seven business days after the hearing.

2.6 APPEAL

In cases of sexual assault, domestic violence, dating violence, and stalking, both parties have the right to appeal the decision reached through the hearing proceedings. In other cases, only the respondent has a right to an appeal.

Appeals shall be on paper, to a three-person panel consisting of the Title IX Coordinator, a Deputy Title IX Coordinator, and depending on whether the respondent was a student or employee – the appropriate supervisor or the Coordinator of Student Conduct. The written appeal must include the basis for seeking the appeal and include information to support such basis. It shall be received by the Title IX Coordinator no later than two (2) calendar days after the date of the determination being appealed. If no written request for an appeal is received by the University within the time specified, the request for an appeal will not be reviewed and any sanctions imposed will be final.

An appeal must be based on one of the following bases:

(1) Significant procedural error that reasonably would have affected the outcome of the case.
(2) The sanction is grossly disproportionate to the violations committed in light of all relevant aggravating and mitigating factors and in consideration of University guidelines.
(3) New evidence is now available that was not previously available.

2.7 PRESERVATION OF OTHER RIGHTS

If a tenured faculty member is dismissed from employment as a result of the process outlined in this policy, that individual preserves the right to appeal to the Appellate Committee on Dismissal of Tenured Faculty Members, consistent with section 4.6.12 in the Academic Policies and Procedures Manual. If a tenured faculty member receives a sanction other than dismissal, then that individual preserves the rights in section 4.6.11.

Employees preserve the rights listed in the Employee Handbook, Section 9 and 10. Nothing in this policy is intended to conflict with the provision of those employment appeal rights.

Students who were respondents who were sanctioned via this policy and complainants in a case brought through this policy for gender-based discrimination, sexual harassment, domestic violence, dating violence, sexual assault or stalking have exhausted their appeals. The Civil Rights and Title IX Committee serves as the "Committee on Student Conduct" for these cases. However, students who were respondents in a case brought through this policy for any other violation, and who received a sanction of suspension, expulsion, or degree revocation maintain their right to a hearing before the Committee on Student Conduct as described in the Student Handbook.

The University may impose an interim suspension on an employee or student during the investigatory phase. If the University pursues this route, employees preserve rights listed in § 9.4 of the Employee Handbook, Tenured Faculty preserve rights listed in § 4.6.7 of the Academic Policies and Procedures Manual, and Students preserve rights listed in § C(2)(g) of the Student Handbook.

PART THREE
INFORMATION SPECIFIC TO SEXUAL HARASSMENT & ASSAULT

3.1 IMMEDIATE PROCEDURES FOR SEXUAL ASSAULT VICTIMS

3.1.A Preserving Evidence: In order to best preserve evidence campus police/law enforcement officials should be contacted as soon as possible after an assault has occurred. If at all possible a sexual assault victim, who has the option of going for help at the nearest emergency room, should not shower, change clothes or brush his or her teeth. Preserving evidence may be necessary to the proof of criminal domestic violence, dating violence, sexual assault, or stalking, or in obtaining a protective order. Victims are encouraged to call the campus police or local law enforcement to initiate a report and to help preserve evidence. It is up the victim if prosecution is pursued.

3.1.B If unable to get to the Emergency Room, get to a safe, secure place.

3.1.C Report by one of the following options:

a. To report as a crime or emergency, notify Campus Police (580) 745-2911 and/or Durant or other local Police at 911.
b. To report to the University and/or to have University officials assist you in notifying law enforcement, contact one of the following resources:

    i. Housing and Residence Life
        1. Main office: 580-745-2948 (use this # during regular business hours)
        2. Other Housing Contact: (580) 380-7460
    ii. The Title IX Coordinator: 580-745-3090
    iii. The Dean of Student Affairs: 580-745-2080

If you are a student and prefer not to notify law enforcement or responsible University officials, you may access campus services from the University Counseling Center. Or you can call the Crisis Control Center at (580) 924-3000 or call another support agency or office. If you are an employee and prefer not to notify law enforcement or responsible University officials, , you may contact the Crisis Control Center at (580) 924-3000. Additionally, employees can contact the National Sexual Abuse Hotline at 800-656-4673. Resources may also be available through the Employee Assistance Program offered through Lincoln National Life Insurance Company at 1-877-757-7587 or www.eapadvantage.com. Please remember that reluctance or unwillingness to make a complete report to campus security and the police will make it difficult for either the police or the University to take appropriate action or safety measures; this includes reporting the dangers to the campus community.

3.2 MANDATORY REPORTING - SEXUAL MISCONDUCT INVOLVING A CHILD OR A MINOR

Sexual misconduct involving a child/minor (anyone under 18 years of age) must be reported. Oklahoma state law requires that any person who has reason to believe that a minor is a victim of child abuse or neglect (including sexual misconduct) has an affirmative duty to make an oral report to the Department

of Human Services. You may do so using the Department of Human Services hotline at **1-800-522-3511.** Failure to report may result in criminal charges.

3.3 AMNESTY

The University strongly encourages students and employees to report instances of sexual misconduct. Therefore, students reporting an incident of sexual misconduct will not be disciplined by the University for offenses that are minor in scope and consequence that are connected to the incident of sexual misconduct. For offenses of a more serious scope, a diminished penalty will be considered if deemed appropriate under the conduct process so long as the offense is entangled in an instance of sexual misconduct and the individual requesting amnesty did indeed report the matter promptly.

3.4 RISK REDUCTION AND BYSTANDER INTERVENTION

Do not confuse risk reduction tips for victim-blaming. The Federal Violence Against Women Reauthorization Act of 2013 and associated Department of Education Regulations on the Violence Against Women Act (34 CFR Part 688) requires institutions of higher education to provide risk reduction tips to the campus community. These tips are offered in the hope that recognizing patterns can help men and women to reduce the risk of victimization. Generally, an assault by a known offender will follow a four step pattern:

1. An individual's personal space is violated in some way. For example the perpetrator may touch the victim in a way that does not feel comfortable.
2. If the victim does not express discomfort, the perpetrator may begin to view the victim as an easy target because she/he is not acting assertively.
3. The perpetrator may take the victim to a location that is secluded and where the victim is vulnerable.
4. The victim feels trapped or unable to be assertive and is raped or assaulted.

If you find yourself in an uncomfortable sexual situation, these suggestions may help you to reduce your risk:

- Make your limits known as early as possible.
- Tell a sexual aggressor "NO" clearly and firmly.
- Try to remove yourself from the physical presence of a sexual aggressor.
- Find someone nearby and ask for help.
- Take affirmative responsibility for your alcohol intake/drug use and acknowledge that alcohol/drugs lower your sexual inhibitions and may make you vulnerable to someone who views a drunk or high person as a sexual opportunity.
- Take care of your friends and ask that they take care of you.

If you find yourself in the position of being the initiator of sexual behavior, you owe sexual respect to your potential partner. These suggestions may help you to reduce your risk for being accused of sexual misconduct:

- Clearly communicate your intentions to your sexual partner and give them a chance to clearly relate their intentions to you.

- Understand and respect personal boundaries.
- DON'T MAKE ASSUMPTIONS about consent; about someone's sexual availability; about whether they are attracted to you; about how far you can go or about whether they are physically and/or mentally able to consent. If there are any questions or ambiguity then you DO NOT have consent.
- Mixed messages from your partner are a clear indication that you should stop, defuse any sexual tension and communicate better. You may be misreading them. They may not have figured out how far they want to go with you yet. You must respect the timeline for sexual behaviors with which they are comfortable.
- Don't take advantage of someone's drunkenness or drugged state, even if they did it to themselves.
- Realize that your potential partner could be intimidated by you, or fearful. You may have a power advantage simply because of your gender or size. Don't abuse that power.
- Understand that consent to some form of sexual behavior does not automatically imply consent to any other forms of sexual behavior.
- Silence and passivity cannot be interpreted as an indication of consent. Read your potential partner carefully, paying attention to verbal and non-verbal communication and body language.

3.4.A. Safe and Positive Options for Bystander Intervention

Reducing instances of sexual assault and other gender-based misconduct must be a team effort, involving all members of the campus community. We must all take it upon ourselves to respond appropriately when we notice something inappropriate or dangerous. The following are positive options for bystander intervention:

- Notice the Incident. Bystanders first must notice the incident taking place. Obviously, if they don't take note of the situation there is no way they can help.
- Interpret Incident as Emergency. Bystanders also need to evaluate the situation and determine whether it is an emergency, or at least one in which someone needs assistance. Again, if people do not interpret a situation as one in which someone needs assistance, then there is no need to provide help.
- Assume Responsibility. Another decision bystanders make is whether they should assume responsibility for giving help. One repeated finding in research studies on helping is that a bystander is less likely to help if there are other bystanders present. When other bystanders are present responsibility for helping is diffused. If a lone bystander is present he or she is more likely to assume responsibility. Defeat this tendency by assuming responsibility and helping whenever you can safely do so, whether you are alone or in a group of bystanders.
- Attempt to Help. Whether this is to help the person leave the situation, confront a behavior, diffuse a situation, or call for other support/security.
- Tips for Intervening: In a situation potentially involving sexual assault, relationship violence, or stalking:
    - Approach everyone as a friend
    - Do not be antagonistic
    - Avoid using violence
    - Be honest and direct whenever possible
    - Recruit help if necessary
    - Keep yourself safe

- If things get out of hand or become too serious, contact the police

3.5 NOTIFICATION OF RELEVANT LAWS

In accordance with the Violence Against Women Reauthorization Act of 2013, please be advised that the following definitions are applicable should you wish to pursue Oklahoma state criminal or civil actions. These definitions may differ from the University's administrative policy definitions noted above. The University's administrative system and disciplinary procedures are separate and distinct from those available to someone in a state civil or criminal action. Individuals may seek administrative remedies in accordance with this policy and also may seek state or federal civil or criminal remedies for the same incident through the applicable systems. The definitions set forth below are reviewed and verified annually; for a more frequently updated resource, please consult the Oklahoma State Court Network website at http://www.oscn.net.

1. DEFINITION OF RAPE Oklahoma Penal Code, 21 O.S. §1111 defines rape as: Rape is an act of sexual intercourse involving vaginal or anal penetration accomplished with a male or female who is not the spouse of the perpetrator and who may be of the same or the opposite sex as the perpetrator under any of the following circumstances: 1. Where the victim is under sixteen (16) years of age; 2. Where the victim is incapable through mental illness or any other unsoundness of mind, whether temporary or permanent, of giving legal consent; 3. Where force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person; 4. Where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; 5. Where the victim is at the time unconscious of the nature of the act and this fact is known to the accused; 6. Where the victim submits to sexual intercourse under the belief that the person committing the act is a spouse, and this belief is induced by artifice, pretense, or concealment practiced by the accused or by the accused in collusion with the spouse with intent to induce that belief. In all cases of collusion between the accused and the spouse to accomplish such act, both the spouse and the accused, upon conviction, shall be deemed guilty of rape; 7. Where the victim is under the legal custody or supervision of a state agency, a federal agency, a county, a municipality or a political subdivision and engages in sexual intercourse with a state, federal, county, municipal or political subdivision employee or an employee of a contractor of the state, the federal government, a county, a municipality or a political subdivision that exercises authority over the victim; or 8. Where the victim is at least sixteen (16) years of age and is less than twenty (20) years of age and is a student, or under the legal custody or supervision of any public or private elementary or secondary school, junior high or high school, or public vocational school, and engages in sexual intercourse with a person who is eighteen (18) years of age or older and is an employee of the same school system. 9. Where the victim is nineteen (19) years of age or younger and is in the legal custody of a state agency, federal agency or tribal court and engages in sexual intercourse with a foster parent or foster parent applicant. i. Rape is an act of sexual intercourse accomplished with a male or female who is the spouse of the perpetrator if force or violence is used or threatened, accompanied by apparent power of execution to the victim or to another person.

2. DEFINITION OF CONSENT Oklahoma Penal Code, 21 O.S. §1114, indicates consent is not effective in cases of: a. rape committed by a person over eighteen (18) years of age upon a person under fourteen (14) years of age; or b. rape committed upon a person incapable through mental illness or any unsoundness of mind of giving legal consent regardless of the age of the person committing the crime; or c. rape accomplished where the victim is intoxicated by a narcotic or anesthetic agent, administered by or with the privity of the accused as a means of forcing the victim to submit; or d. rape accomplished

where the victim is at the time unconscious of the nature of the act and this fact is known to the accused; or e. rape accomplished with any person by means of force, violence, or threats of force or violence accompanied by apparent power of execution regardless of the age of the person committing the crime; or f. rape by instrumentation resulting in bodily harm is rape by instrumentation in the first degree regardless of the age of the person committing the crime; or g. rape by instrumentation committed upon a person under fourteen (14) years of age.

3. DEFINITION OF DOMESTIC/DATING VIOLENCE Oklahoma Penal Code, 21 O.S. §644, defines domestic and dating violence as: "…any person who commits any assault and battery against a current or former spouse, a present spouse of a former spouse, a former spouse of a present spouse, parents, a foster parent, a child, a person otherwise related by blood or marriage, a person with whom the defendant is or was in a dating relationship as defined by Section 60.1 of Title 22 of the Oklahoma Statutes, an individual with whom the defendant has had a child, a person who formerly lived in the same household as the defendant, or a person living in the same household as the defendant shall be guilty of domestic abuse." 4. Definition of Stalking Oklahoma Penal Code,§21-1173, defines stalking as: "Any person who willfully, maliciously, and repeatedly follows or harasses another person in a manner that: a. Would cause a reasonable person or a member of the immediate family of that personas defined in subsection F of this section to feel frightened, intimidated, threatened, harassed, or molested; and b. Actually causes the person being followed or harassed to feel terrorized, frightened, intimidated, threatened, harassed, or molested…"

PART FOUR
VICTIM CARE, PROTECTIVE, AND REMEDIAL MEASURES

4.2 INTERIM REMEDIES

The Title IX Coordinator, Student Conduct Coordinator, or Dean of Student Affairs may, as requested by the complainant and as necessary, provide interim remedies intended to address the short or long-term effects of alleged harassment, discrimination and/or retaliation, *i.e.*, to redress harm to the complainant and the campus community and to prevent further harassment or violations. Interim remedies may also be used when, in the judgment of the Title IX Coordinator, the safety or well-being of any member(s) of the campus community may be jeopardized by the presence on campus of the accused individual or the ongoing activity of a student/campus organization whose behavior is in question. These interim remedies may include

- Referral to counseling and health services or to the Employee Assistance Program
- Altering the housing situation of an accused student or resident employee (or the complainant, if desired).
- Altering work arrangements
- Providing campus escorts
- Implementing contact or geographic limitations between the parties
- Offering adjustments to academic deadlines, course schedules, dining arrangements, etc.
- Impose an interim suspension on an employee or student.
- Ban specific contractors or visitors from campus.
- Re-assignment of job tasks or supervisory authority
- Provision of immediate alternative office location or workstation
- Support and guidance for obtaining a protective order

To the extent possible privacy and confidentiality will be protected throughout the implementation of all victim care and protective measures. Medical treatment is available through local physicians or at Alliance Health Durant where evidence may be collected to preserve the option of prosecution if the victim so chooses.

The University will provide written notification to victims about options for, available assistance in, and how to request changes to a working situations or other protective measures. The University will provide these measures if the victim requests them and if they are reasonably available regardless of whether the victim chooses to report the crime to campus police or local law enforcement. This written notification will also include options for existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, and other services if they are available for victims within the University or the local community. This written notification may be in the form of a brochure-style pamphlet.

4.2 SANCTIONS

4.2.A Possible Sanctions for Students Under This Policy:

- **Warning.**

- **Customized Restrictions or Projects:** Including but not limited to: letter of apology, presentation of a workshop, preparation of a research paper or project, social probation, community service, assessment or evaluation, counseling, no contact orders (may include restricted access to campus services/amenities/enrollment/facilities/etc.) , assigned a mentor/role model, required community/organizational involvement, restitution for damages, punitive fines, eviction from residence halls, loss of privileges (i.e. visiting privileges in housing or denial of access to computer or other campus services) prohibiting membership or leadership in campus organizations; or denial of participation in any official athletic or non-athletic extracurricular activity, including practices or travel; or withholding of official transcript or degree; or blocking from enrollment for a specified period of time; intervention program (may require a fee); or any combination of the above.

- **Conduct probation:** A student may be placed on conduct probation for a specified time frame. If a second violation occurs while a student is on probation, disciplinary action will be based on both charges. If the student has a Dean's disciplinary hold on the student records, it is removed at the discretion of the Conduct Officer.

- **Suspension:** A student may be suspended from the University for a definite period of time not less than the remainder of the current semester in which student is enrolled. The student who has been suspended may apply for readmission at the close of the period for which the student was suspended. A suspension hold will be placed on the student's transcript during the period of suspension.

- **Expulsion:** When a student is expelled, a record of this action will be noted on the student's transcript and it will be a part of the student's permanent record in the Office of the Registrar. A student who is expelled will not be allowed to re-enter the university.

- **Degree revocation or rescission of credit.**

- **Temporary suspension:** A student may be temporarily suspended from the university or university housing prior to the student code of conduct hearing to ensure safety and well-being of members of the university community or preservation of university property; to ensure a student's own physical or emotional safety and well-being; and/or if the student poses an ongoing threat or disruption. Such an administrative decision will be effective immediately. During the temporary suspension, a student may be denied access to university housing and/or all other university activities, privileges, and property for which the student might otherwise be eligible, as the conduct officer may determine to be appropriate. The temporary suspension does not replace the regular process, which shall proceed on the normal schedule, up to and through a student hearing and appeal, if required. The student will be notified in writing of this action and the reasons for the temporary suspension. The notice shall include the time, date,

and place of an initial hearing at which the student may show cause why his or her continued presence on the campus or in university housing does not constitute a threat.

4.2.B Possible Sanctions for Employees Under This Policy:

- **Warning:** A warning is a formal method of informing an employee of a violation of University rules, guidelines, and/or policies. Additional violations will initiate the progressive disciplinary process.

- **Mandated Assessment** by a university approved licensed psychologist, physician or healthcare provider.

- **Access restrictions:** geographically defined as needed.

- **Reassignment:** relocation to new job location or new job duties either physically or structurally.

- **Demotion:** A reduction in rank or status.

- **Suspension with pay:** Temporary removal of an employee from performing his/her work duties.

- **Suspension without pay:** Temporary removal of an employee from performing his/her work duties and from receiving pay.
- **Nonrenewal**
- **Termination:** If the nature of the violation is so problematic and/or harmful to the campus community that a warning or a suspension is not appropriate; the University's recommendation will be to terminate employment.

4.2.C Possible Sanctions for Contractors and Visitors Under this Policy

- Warning: A warning is a formal method of informing a contractor or visitor of a violation of University rules, guidelines, and/or policies.
- Ban: Individuals or groups may be formally banned from University property or sponsored events
- Termination: Contractor agreement will be terminated.

PART FIVE
DISABILITY RIGHTS

5.1 DEFINITION

Person with Disability

Any person who:

- has a physical or mental impairment that substantially limits one or more major life activities,
- has a record of such impairment, or
- is regarded as having such an impairment.

Major Life Activity:
"Major life activity" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, working, major bodily functions, and an impairment that is episodic or in remission.

A Qualified Individual with a Disability:
An individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

5.2 REASONABLE ACCOMMODATIONS

The Office of Compliance and Safety is the central contact point for making reasonable accommodation requests in accordance with applicable law. Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act Amendments Act of 2008 protect the right to be accommodated for disability at public institutions of Higher Education.

Accommodation Requests:
It is the responsibility of all students and employees to direct any requests for disability related accommodations to the Office of Compliance and Safety in a timely manner. Please be prepared to discuss the nature of the disability and to provide relevant documentation to the coordinator if the nature of the disability is not readily apparent. The student or employee will be asked to fill out an information form, designating precisely what type of accommodations they feel are needed. Requests should be made in advance of the anticipated need for accommodations to allow for a reasonable period of time in which to evaluate those needs and requests. Guests, employment applicants, and

other campus visitors may also request accommodations for meetings they attend and other campus functions.

Students must be admitted to and/or enrolled in the University to request accommodations. The Director of Compliance and Safety will make a case–by–case determination of any requesting party's educational or employment need for any requested auxiliary aids, accommodations, and/or other special services determined to be necessary. These services, and equipment (if deemed appropriate), will be provided at no cost to the student or employee. Students may request accommodations for class, housing, dining, student life (such as organizations, athletics, etc.), and campus jobs. Employees may request accommodations necessary for them to fulfill functions in their job description or other employment based expectations and to enjoy all the benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.

Student Accommodation Renewal by Semester:
It is the responsibility of all students who receive accommodations or services through the Office of Compliance and Safety to renew their accommodation request at the time of their enrollment for any subsequent semesters. This can be done at any time by contacting 580-745-3090. As a matter of practice, the Director of Compliance and Safety will automatically check enrollment for all students who received accommodations or services the prior semester, however this does not remove from the student their responsibility to renew their request. This renewal is especially important for students who have taken a semester off or declined accommodation during the previous semester, because the Office of Compliance and Safety will have no way of knowing whether you wish to receive accommodations or services for the upcoming semester.

Interim Accommodations:
When accommodations cannot be provided immediately, interim accommodations will be provided when feasible. Interim accommodations will be determined on a case-by-case basis and are not guaranteed. In determining whether an interim accommodation will be granted, the Director of Compliance and Safety will consider the student or employee's disability in relation to the obstacles that will arise before the accommodation would normally be processed. Students and employees should know that interim accommodations are not indicative that a reasonable accommodation will be approved, but are courtesies until the accommodation request can be processed. Interim accommodations will only be granted for 8 business days. If a student or employee needs a longer interim accommodation, they will need to contact the Office of Compliance and Safety to discuss their options. The need for interim accommodations may arise when students or employees are waiting for documentation from their treating physicians or other documentation providers.

Temporary Disabilities
Students with temporary disabilities/injuries may also seek accommodations. The process will be the same as for longer accommodations, however, the accommodation letters may show an end or expiration date or the Director of Compliance and Safety may request that the student or employee update the office when the accommodation is no longer necessary.

5.3 DOCUMENTATION

Students and employees requesting accommodations through the Office of Compliance and Safety should be prepared to provide documentation unless their disability and related impairments are readily apparent. While documentation is not always necessary, it is usually necessary and useful in the process of determining the scope and structure of reasonable accommodation on a case-by-case basis, and in the course of requesting accommodation such documentation may be requested.[3] This documentation policy is rooted in disability accommodation documentation guidelines promulgated by the Association on Higher Education and Disability in April 2012.[4]

Testimonial and Observational Documentation

The documentation process begins with an interactive process and self-report by the student or employee with the Director of Compliance and Safety.[5] This self-report is crucial to a specific understanding of access barriers that a student may encounter at the University, and the relation between those access barriers and the disability. After learning from the student or employee's personal narrative, history of experiences, and past accommodation, the Director is better informed of the nature and significance of the impairment and has a context from which to begin a determination of reasonable accommodation. In some cases, this step will be sufficient by itself to make an informed determination of eligibility for accommodation. The value of this initial disclosure is variable and subjective. Important factors include internal consistency, clarity, and congruency with observation.

Written or Formal Documentation

When there are informational gaps in a student or employee's self-report, and when the existence, scope, and nature of a mental or physical impairment are not apparent, it is appropriate for the Director to request information from the student or employee that remedy the shortcomings of mere observation and discussion. Written documentation will be used to verify the existence and scope of an impairment, provide further context on accommodation history, and can provide the Director with information from medical or psychological professionals on what accommodations are deemed appropriate by those professionals.

For all non-apparent disabilities, the Director of Compliance and Safety will request some form of written documentation that meets the need for making a determination of qualification for reasonable accommodation. This may include but is not limited to:

- Medical records, reports, or assessments from health care providers.

[3] The post-2008 regulations state that the primary purpose of the ADA Amendments "is to make it easier for people with disabilities to obtain protection under the ADA." 29 C.F. R. Section 1630.1(c) (4).
[4] The AHEAD Guidelines are designed to encourage institutions to avoid unduly burdensome or extensive medical and scientific evidence on the part of an individual requesting disability accommodation, in light of the ADA Amendments Act of 2008. http://ahead.org/resources/documentation-guidance.
[5] Students may self-report to another Student Affairs professional in cases where the Coordinator is unavailable within a reasonable time.

- Information from school psychologists, teachers, or other education providers.
- Copies of past accommodation history, including Individual Education Programs (IEP) or Summary of Performance (SOP) documents, and plans that may have been implemented in primary and secondary school to comply with Section 504 of the Rehabilitation Act (504 Plans).
- A letter from a treating physician, psychologist or psychiatrist, or other appropriate medical professional.
- Results from appropriate diagnostic instruments administered by a qualified diagnostician.
- An audiogram or visual acuity measurement administered by a qualified professional.
- Information on file with a Vocational Rehabilitation agency.
- Accommodation information from other Colleges and Universities the student may have attended.

External documentation will typically need a level of specificity that meets the need of the Director to fill in gaps from the personal narrative, and which verifies the existence of an impairment and offers context for the nature and scope of the impairment. Documentation of insufficient detail may result in a new documentation request. Documentation must generally be recent enough in time to still be valuable in the accommodation process. The unique attributes of the full range of disability prohibit an exhaustive list of potential documentation sources. Using diagnostic and/or technical information is different than using it for treatment, and a commonsense standard will be applied for interpreting written documentation. When necessary, the Director may consult with other professionals in order to better understand submitted documentation.

The Determination

Once the information-gathering phase is complete, the Director of Compliance and Safety will notify the requesting student or employee within a reasonable time about which accommodations will be made, as well as overall approval or disapproval of the accommodation request. The fundamental question being asked is: "Would an informed and reasonable person conclude from the available evidence that a disability is likely and the requested accommodation is warranted?"[6]

Accommodation letters for students will typically have a longevity of one semester, at which time the student must request renewal of their approved accommodations. Accommodation letters for employees will be customized to fit the situation. Requests for ineffective modifications or requests that amount to something that fundamentally alters or undermines the academic mission of the University will not be deemed reasonable. Requests that constitute an undue burden will not be deemed reasonable.

[6] AHEAD Documentation Guidelines, April 2012, page 4.

Storage and Sharing of Documentation

Disability related documentation for students and employees registered with approved accommodations with the Office of Compliance and Safety are kept for the duration of that students enrollment or the employee's employment at the University. After a student or employee no longer receives accommodations, documents are stored for three years in accordance with State Law.[7] No records will be shared beyond a need-to-know basis without the express written and knowing consent of the student.[8]

Student Accommodation Letters

Students who have been approved for classroom accommodations will receive an official Accommodation Letter that details specific approved academic modifications. This letter might not describe all accommodations or services that the student is approved to receive at the University, as it is intended to be a method to facilitate academic accommodation only. For example, the fact that a student may require transportation accessibility for school trips might not appear on the Accommodation Letter, since that is not a day to day classroom accommodation.

A student will receive an Accommodation Letter at the time of the activation of their accommodation or renewal. Additionally, the Office of Compliance and Safety will send a copy of the Accommodation Letter to each of that student's faculty members via email prior to the beginning of each semester. It is up to the student to communicate with their instructors if they choose to decline accommodation in a specific class. Students should consult with their instructors the first day of class or during faculty office hours to discuss their accommodations with each instructor, and ensure that proper communication about those accommodations begins in a manner that meets expectations. Failure to communicate with instructors about accommodations often leads to confusion and misunderstanding. Any student with a concern that their accommodations are not properly being implemented should immediately contact the Office of Compliance and Safety. Students who want to make a formal request to modify their accommodations should do the same.

5.4 HOUSING ACCOMMODATIONS

Students who require a live-in attendant or who must use/house adaptive equipment that requires more than the allotted space for a roommate (over 50% of the room) will be charged the regular double rate rather than the higher private room rate. This determination will be made by the Director of Residence Life and the Director of Compliance and Safety. For all other disabilities, a decision on a request for a single room (at the private room rate) will be made by the Director of Residence Life and the Director of Compliance and Safety on a case-by-case basis based on whether the request constitutes

[7] Section 1-59 of the Oklahoma Consolidated General Records Disposition Schedule for State Colleges and Universities, as updated October 16, 2014.
[8] The documentation policy was updated by the ADA Committee on 8/24/06, Approved by the Committee on 11/08/06, Revised by the Committee on 12/01/14, and approved by Legal Counsel on 12/08/2014.

a reasonable accommodation. Requests should be made three months in advance. Late requests may not be accommodated if housing is unavailable, including housing that is already under contract.

Southeastern Oklahoma State University encourages students to experience double occupancy residence, if possible. Distraction free study areas are available on campus and negotiating with a roommate for time and space are considered opportunities for personal growth while on campus. For housing applications and/or further information, please contact the Director of Residence Life, (580) 745-2948.

5.5 DINING ACCOMMODATIONS

Students or employees that require dining accommodations in relation to a disability or medical diagnosis or treatment should contact the Office of Compliance and Safety to receive Dining Accommodations. The Director will work with Dining Services in determining the appropriate accommodation.

5.6 CAMPUS VISITORS

All visitors and guests of the University, volunteer employees, guest speakers and presenters, and athletic attendees with disabilities may contact the Office of Compliance and Safety to request accommodations for their attendance or participation as a guest of the University for all services, programs, and functions open to the public. It is crucial that accommodation requests be made a reasonable time in advance so that accommodations can be put into place by the time of the event.

University Commencement Ceremonies

Any guest of a graduate that needs an accommodation for the commencement ceremony should have that graduate self-report during commencement ceremony rehearsal. The graduate will need to come prepared with details about the accommodation is being requested. The commencement ceremony is captioned and a sign language interpreter is on site. Devices that assist with hearing the audio can be tested for compatibility at the arena entrance. Please be advised that because of the athletics nature of the commencement ceremony facility, there may be areas in which cords are crossing pathways. Please use caution when at the facility.

5.7 CAPTIONING POLICY

Southeastern Oklahoma State University strives to make the University's website accessible to all of its students, staff, and visitors. The website is in compliance with Sections 504 and 508 of the Rehabilitation Act, the Americans with Disabilities Act, and University non-discrimination policies. In compliance with these laws, the Office of Disability Services has adopted a captioning policy to guide faculty, staff, and students on when captioning is appropriate and how to request it.

External Communications

Technological communication with the general public is guided by Section 504 and 508 of the Rehabilitation Act and Title III of the ADA.

- Section 504 of the Rehabilitation Act provides that "no otherwise qualified individual with a disability… shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

- Section 508 of the Rehabilitation Act requires that "when developing, procuring, maintaining, or using electronic and information technology," federal agencies shall ensure that individuals with disabilities, whether employees or members of the public, have access to and use of information and data that is comparable to the access to and use of the information and data by members of the public who are not individuals with disabilities, unless it imposes an undue burden.

- Title III of the ADA prohibits discrimination by a public accommodation. Title III provides that "no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation." This includes undergraduate schools, postgraduate private schools, or other places of education.

Any media posted to the Southeastern Oklahoma State University webpage that is intended to reach the general public must have be captioned in order to provide individuals with disabilities access to the use of information and data comparable to those without disabilities. Captioning any data used to publicize, promote, or explain the University and its departments and/or services is required in order to ensure individuals with disabilities are guaranteed the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the University. Media will not need to be captioned where the audio text is already incorporated into the visual media. For information on how to caption your media, please see the Center for Instructional Development and Technology.

Internal Communications

Captioning in the classroom or the employment environment is considered an accommodation under the ADA, and all accommodation requests for captioning should be made through the Office of Compliance and Safety. Captioning is not required for media that is used in a course restricted to an audience that is known not to include students that need captioning. For help captioning your course material, please contact the Center for Instructional Development and Technology.

5.8 SERVICE AND ASSISTANCE ANIMAL POLICY

Southeastern is welcoming of individuals with disabilities who use service or assistance animals because of a disability. Southeastern is also mindful of the health and safety concerns of other campus patrons, and must balance the needs of the individual with the disability and the impact of such animals on other campus patrons. In regard to permitting service and assistance animals, Southeastern Oklahoma State

University complies with state and federal laws regarding individuals with disabilities.[9] The University does not generally permit animals in campus buildings except as this policy accommodates. [10] The Office of Compliance and Safety is responsible for implementing and assisting students and faculty members with disabilities regarding this policy.

SERVICE ANIMALS

Only dogs and miniature horses may be service animals. A service animal is an animal that has been trained to perform specific work or tasks for a person with a disability. [11] The mere provision of emotional support by the animal's presence does not make an animal a service animal. Common service animal training might include guiding people who are blind or deaf, notifying a person of an imminent seizure, intentionally pawing or nuzzling a person with Post Traumatic Stress Disorder to calm anxiety, reminding a person to take medication, or intentionally applying calming pressure to a person prone to anxiety or panic attacks.

Service animals are permitted everywhere on campus that the animal may reasonably accompany a person with a disability. This includes University transportation, classrooms, offices, residence halls, lounges, and common areas. The University may on a case by case basis exclude the animal from laboratories or other areas where the presence of the animal may cause an unavoidable hazard, health risk, or where the animal's presence would fundamentally interfere with the service or instruction provided.

When it is not obvious what service an animal provides, University staff may make limited inquiries. Staff may ask only two questions: (1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform. However, when this two-part inquiry provides reasonable basis to conclude that the animal might not be a service animal as defined by the ADA reasonable documentation and/or demonstration of the animal's training may be requested.

The University will not require individuals with service animals to receive permission to have their animal with them on campus, nor will there be any pre-clearance requirement for the presence of the animal on campus. However, students may wish to **voluntarily** notify the Office of Compliance and Safety prior to the first day of class in order to send notifications to professors, make any necessary alterations to classrooms, and to discuss any accommodations that may be necessary for their disability. Students wishing to live on campus with their service animal will have additional documentation to

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[9] Department of Justice, *Guidance on Service Animals*: http://www.ada.gov/service_animals_2010.htm; The ADA Amendments Act: http://www.ada.gov/pubs/adastatute08.htm; HUD Memo on Service and Assistance Animals in Housing: http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

[10] Unless the animal is present for the purpose of academic instruction, University services, or University-hosted programs.

[11] Including a physical, sensory, psychiatric, intellectual, cognitive, medical, or other mental disability.

provide to the Office of Compliance and Safety and must notify Housing and Residence Life prior to the housing deadline. See *Responsibilities of the Service Animal Owner below.*

Students with service animals shall never be segregated from the general population of students or campus visitors. The University will not charge a surcharge for a deposit for having a service animal in campus housing, but reserves the ability to make appropriate assessments of charges to the owner for any damage or cleaning costs for which the animal is responsible. Additionally, room costs will not be discounted for students wishing to request larger housing to allow more space for their service animal. Students are encouraged to consider the amount of space their service animal may need when determining whether they would like to live in campus housing. The maximum **recommended** size for service animals is 50-60 pounds. Students who wish to tour campus housing prior to making this decision may contact the office of admissions.

Responsibilities of the Service Animal Owner:

- Service animals must be kept near the person with a disability and not be permitted to run free.
- Service animals must be compliant with applicable vaccination laws. Students, faculty, and staff who intend, in conformance to this policy, to have an animal with them in campus buildings on a regular basis shall submit to the Office of Compliance and Safety a copy of the animal's vaccination history from a Veterinarian or other authorized person to verify compliance with local ordinances. [12] This vaccination history shall be submitted at the beginning of each academic year or upon update of the service animal's vaccinations, whichever comes first.
- Students intending on having a service animal in campus housing must provide notice of this intent prior to the housing application deadline for the applicable semester so that appropriate planning and arrangements can be made, and so that proper notice can be provided to potential roommates and suitemates.
- The animal must be clearly labeled as a service animal or assistance animal and restrained with a harness, leash, or tether of some kind unless the nature of the disability and the animal's training precludes such physical restriction. If this is the case, the animal must be reliably controlled by voice or a substitute method of restriction.
    - *Oklahoma Law requires that a dog used by a deaf or hard-of-hearing person wear an orange identifying collar*. [13]
- The animal's excrement or other refuse must be disposed of by the owner in a prompt and hygienic manner.

[12] Applicable ordinances for the City of Durant are § 96.025 and § 96.040 of the Durant Municipal Code.
[13] 7 Okl. St. § 19.1(c)

- Owners are expected to control the volume of their animal and quell any unreasonable loudness or excitableness.
- Animals may not under any circumstances be permitted to jump on, lick, nudge, growl at, or otherwise engage another member of the campus community.
- Animals must be properly cared for, fed, and be maintained in reasonable health with due diligence. The University will not be responsible for cleaning up after an animal, feeding an animal, or watching the animal for any amount of time under any circumstance.

Service-Animals-In-Training:

Service animals in training are not considered service animals under the ADA. The dog must already be trained before it is considered a service animal. However, they may be permitted upon approval if registered as a service-animal-in-training through the Office of Compliance and Safety.

ASSISTANCE ANIMALS

Assistance Animals are not service animals.[14] Assistance animals provide emotional support that alleviates the symptoms or effects of a person's disability, but might not be specifically trained to perform any task or function, or otherwise meet the limited definition of a Service Animal.

Part I: Title I of the ADA – University Employees:

For employees of the University, an Assistance Animal may qualify as a reasonable accommodation under Title I of the ADA if it is necessary to enable the employee to perform the essential functions of the employee's position and would not cause undue hardship to the University. Employee requests to have assistance animals on campus will be determined on a case-by-case basis by the Office of Compliance and Safety. The employee or a representative of the employee will need to contact the Office of Compliance and Safety to make the request. When necessary, the Director of Compliance and Safety may request reasonable documentation that establishes that the employee has an ADA disability and that the disability necessitates a reasonable accommodation and may require that the documentation comes from an appropriate health care or rehabilitation professional.

Part II: Title II of the ADA – Students:

The University permits Assistance Animals only within residential facilities and outdoors, and not within the remainder of the campus buildings. An individual may keep an assistance animal in a residence hall if (1) the individual has a disability,(2) the animal is necessary to permit that individual to use and find comfort in their residential space, and (3) if there is an actual relationship between the disability and the

[14] Assistance animals are also sometimes called comfort animals, therapy animals, or emotional support animals.

assistance or emotional support that the animal provides to the person. Certain wild animals or animals prone to community health or safety risk, which cannot perform the role of assistance animal in a reasonable manner may not be permitted. Assistance animals are considered an accommodation, and all accommodation requests for the possession of assistance animals should be made through the Office of Compliance and Safety. Certain wild animals or animals prone to community health or safety risk, which cannot perform the role of assistance animal in a reasonable manner may not be permitted.

The University will not charge a surcharge for a deposit for having an assistance animal in campus housing, but reserves the ability to make appropriate assessments of charges to the owner for any damage or cleaning costs for which the animal is responsible. Additionally, room costs will not be discounted for students wishing to request larger housing to allow more space for their assistance animal. Students are encouraged to consider the amount of space their service animal may need when determining whether they would like to live in campus housing. Students who wish to tour campus housing prior to making this decision may contact the office of admissions.

Responsibilities of the Assistance Animal Owner:

- Assistance animals are required to be contained within the privately assigned residential area. When outside of housing, they must be in a carrier or controlled by a leash.
- Assistance animals must be compliant with applicable vaccination laws. Students, faculty, and staff who intend, in conformance to this policy, to have an animal with them in campus buildings on a regular basis shall submit to the Office of Compliance and Safety a copy of the animal's vaccination history from a Veterinarian or other authorized person to verify compliance with local ordinances.[15] Assistance Animals other than dogs and cats must have an annual clean bill of health from a licensed veterinarian.[16] The vaccination history or annual clean bill of health must be submitted at the beginning of each academic year or upon update of the animal's vaccinations, whichever comes first.
- Students intending on having an assistance animal in campus housing must provide notice of this intent prior to the housing application deadline for the applicable semester so that appropriate planning and arrangements can be made, and so that proper notice can be provided to potential roommates and suitemates.
- The animal's excrement or other refuse must be disposed of by the owner in a prompt and hygienic manner.
- Owners are expected to control the volume of their animal and quell any unreasonable loudness or excitableness.

[15] Applicable ordinances for the City of Durant are § 96.025 and § 96.040 of the Durant Municipal Code.
[16] This may include a vaccination certificate or a veterinarian's statement regarding the animal's health.

- Animals may not under any circumstances be permitted to jump on, lick, nudge, growl at, or otherwise engage another member of the campus community.
- Animals must be properly cared for, fed, and be maintained in reasonable health with due diligence. The University will not be responsible for cleaning up after an animal, feeding an animal, or watching the animal for any amount of time under any circumstance.
- Assistance animals must be kept in a kennel, crate, or some form of cage like apparatus when students are not in campus housing. This prevents the escape of or danger to the assistance animal.
- Assistance animals are not to be kept in campus housing during any period of time in which the student is leaving for a prolonged period of time. (For example, if the student leaves town for the weekend or a holiday break, the animal is to accompany the student).
    - *Roommates are not responsible for the care of any assistance animals.*
- Students are encouraged to have a plan for their assistance animals in case of emergency.
- A reasonable accommodation that allows the student an exception to the University's animal policy does not constitute an exception to any other policy. The student must abide by all other residential policies.

EXCEPTIONS TO PERMITTING SERVICE AND ASSITANCE ANIMALS ON CAMPUS:

The University may ask an individual to remove a service or assistance animal from a campus building or from University property if:

- The animal is disruptive to instruction, services, or the use of facilities.
- The animal poses a health or safety risk, or a direct threat to other campus patrons.
- The animal does not have acceptable hygiene or is not housebroken.
- The animal is not kept under control.
- The animal is no longer performing a role of disability related service or assistance.
- The presence of the animal would fundamentally alter the nature of a program or activity.
- The animal's owner does not clean up after the animal.
- The University reasonably concludes that the animal is not a service or assistance animal.
- The owner does not comply with any other element of this policy.

Please note that if an individual is asked to remove the animal from a campus building or University property permanently, the process will be handled through the University's student conduct procedure and in consultation with the Office of Compliance and Safety

STUDENTS WITH CONFLICTING DISABILITIES OR HEALTH CONDITIONS

Students with medical conditions that are affected by animals are asked to contact the Office of Compliance and Safety if they have a health or safety related concern about exposure to a service or assistance animal. The individual will be asked to provide medical documentation that identifies the medical condition. This will allow the Office of Compliance and Safety to determine whether accommodation is a necessity.

5.9 DISABILITY GRIEVANCES

Students, faculty, or staff who have a grievance relevant to disability related discrimination or harassment, or other disability rights may use the grievance procedure outlined in parts one and two of this Civil Rights & Title IX Policy. For grievances related to appropriate accommodation, accommodation approval or delay, or the service and assistance animal policy, the individual should attempt to correct the alleged violation through the Office of Compliance and Safety. If unable to resolve the problem there, the individual may file a formal grievance in accordance with this policy. In the event that the Director of Compliance and Safety has a conflict of interest in such a case, a Deputy Title IX Coordinator shall fulfill the Coordinator's functions as the grievance is handled, including on appeals.

PART SIX
TRANSGENDER INCLUSION

Southeastern is committed to ensuring an inclusive campus community for all students, faculty, staff, and visitors. This includes freedom from discrimination and harassment based on gender identity or transgender status. The University will not exclude, separate, or deny benefits to, or otherwise treat differently on the basis of sex, any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations.

Gender Identity: An individual's internal sense of gender. A person's gender identity may be different from or the same as a person's sex assigned at birth.

Transgender: Describes those individuals whose gender identity is different from the sex they were assigned at birth.

Gender Transition: The process in which transgender individuals begin asserting the sex that corresponds to their gender identity instead of the sex they were assigned at birth. During gender transition individuals begin to live and identify as the sex consistent with their gender identity and my dress differently, adopt a new name, and use pronouns consistent with their gender identity. Transgender individuals may undergo gender transition at any stage of their lives, and gender transition can happen swiftly or over a long duration of time.

When the University is notified that a student or employee will begin to assert a gender identity that differs from previous representations or records, the school will begin treating the student consistent with that student's gender identity. There is no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.

Third Party Harassment:

Southeastern will not tolerate harassment that targets and individual based on gender identity or transgender status. If such sex-based harassment creates a hostile environment, the University will take action to end the harassment, prevent its recurrence, and remedy its effects.

Identification and records:

All students, employees, and contractors of Southeastern are expected to treat individuals consistent with their gender identity even if their education or employment records indicate a different sex. This includes an expectation to use the appropriately gendered pronouns, prefixes, or abbreviations when referring to an individual either directly or indirectly.

Southeastern will entertain requests to amend educational records to make them consistent with the student or employee's gender identity. Unless an individual's name and/or gender are changed by law, not all documents may be able to be amended.

Facilities, including Housing:

Gender-segregated facilities, including restrooms, locker rooms, housing, and hotel room assignments on University sponsored trips must permit access consistent with an individual's gender identity.

Fraternities and Sororities:

Title IX, and the requirements of this University policy, do not apply to the membership practices of social fraternities and sororities. Such organizations are exempt, and may have their own policies in regard to sex and gender identity.

Athletics:

Southeastern enforces equal opportunity for transgender student athletes. To the extent any of this policy conflicts with current NCAA Division II rules, the official NCAA Division II rules will be the controlling policy as applied to student athletes at Southeastern.

A transgender student athlete should be allowed to participate in any sports activity so long as that athlete's use of hormone therapy, if any, is consistent with the National College Athletic Association (NCAA) existing policies on banned medications. Specifically, a transgender student athlete should be allowed to participate in sex-separated sports activities under the following conditions:

Transgender student athletes who are undergoing hormone treatment

1. A male-to-female (MTF) transgender student athlete who is taking medically prescribed hormone treatment related to gender transition may participate on a men's team at any time, but must complete one year of hormone treatment related to gender transition before competing on a women's team.

2. A female-to-male (FTM) transgender student athlete who is taking medically prescribed testosterone related to gender transition may not participate on a women's team after beginning hormone treatment.

3. A female-to-male (FTM) transgender student athlete who is taking medically prescribed testosterone for the purposes of gender transition may compete on a men's team with an NCAA approved medical exception.

4. In any case where a student athlete is taking hormone treatment related to gender transition, the use of an anabolic agent or peptide hormone must be approved by the NCAA before the student-athlete is allowed to participate in competition while taking these medications. The NCAA recognizes that some banned substances are used for legitimate medical purposes. Accordingly, the NCAA allows exception to be made for those student-athletes with a documented medical history demonstrating the need for regular use of such a drug. The institution, through its director of athletics, may request (to the NCAA) an exception for use of an anabolic agent or peptide hormone by submitting to the NCAA medical documentation from the prescribing physician supporting the diagnosis and treatment.

Transgender student athletes who are NOT undergoing hormone treatment

1. Any transgender student athlete who is not taking hormone treatment related to gender transition may participate in sex-separated sports activities in accordance with his or her assigned birth gender.

2. A female-to-male transgender student athlete who is not taking testosterone related to gender transition may participate on a men's or women's team.

3. A male-to-female transgender student athlete who is not taking hormone treatments related to gender transition may not compete on a women's team.

Participation in Mixed Gender Sport Activities

A mixed team has both female and male participants and may be restricted in championship play according to specific national governing body rules.

Transgender student athletes who are undergoing hormone treatment

1. For purposes of mixed gender team classification, a male-to-female (MTF) transgender student athlete who is taking medically prescribed hormone treatment related to gender transition shall be counted as a male participant until the athlete has completed one year of hormone treatment at which time the athlete shall be counted as a female participant.

2. For purposes of mixed gender team classification, a female-to-male (FTM) transgender student athlete who is taking medically prescribed testosterone related to gender transition shall be counted as a male participant and must request a medical exception from the NCAA prior to competing because testosterone is a banned substance.

Transgender student athletes who are NOT undergoing hormone treatment

1. For purposes of mixed gender team classification, a female-to-male (FTM) transgender student athlete who is not taking testosterone related to gender transition may be counted as either a male or female.

2. For purposes of mixed gender team classification, a female-to-male (FTM) transgender student athlete who is not taking testosterone related to gender transition participating on a women's team shall not make that team a mixed gender team.

3. For purposes of mixed gender team classification, a male-to-female (MTF) transgender student athlete who is not taking hormone treatment related to gender transition shall count as a male.

The student's responsibility

1. In order to avoid challenges to a transgender student's participation during a sport season, a student athlete who has completed, plans to initiate, or is in the process of taking hormones as part of a gender transition shall submit the request to participate on a sports team in writing to the athletic director upon matriculation or when the decision to undergo hormonal treatment is made.*

2. The student shall submit her or his request to the athletic director. The request shall include a letter from the student's physician documenting the student athlete's intention to transition or the student's transition status if the process has already been initiated. This letter shall identify the prescribed hormonal treatment for the student's gender transition and documentation of the student's testosterone levels, if relevant.

* The student is encouraged to meet with someone who can offer support and advice through the process, if desired. Should the student want help in finding such a person, a list of people who might serve in that role is available from the Athletic Director, the Title IX Coordinator, and the Office of the Dean of Students.

Disputation

If at any point the athletics section of this Transgender Inclusion Policy is disputed, the Athletics Compliance Officer shall notify the Director of Compliance and Safety. The Civil Rights and Title IX Policy and Procedure will govern the dispute. For parts of this policy that relate to athletics, no part of this policy is intended to conflict with NCAA policies and/or rules for member institutions, and to the extent any such conflict exists, the University will defer to NCAA regulations and interpretations of such regulations.

Policies for Intramural Sports

People participating in any intramural sports or other athletic programs, such as physical education courses, may participate in accordance with their gender identity, should that be relevant, regardless of any medical treatment.

Locker Rooms.

Anyone using sports facilities on campus—whether SE athletes, visiting athletes, or other participants and attendants—shall have access to the changing, shower, and toilet facilities that accord with their gender identity. Private facilities will be made available if asked for but transgender people will not be required to use them.

Accommodations for travel.

When possible, athletes traveling to other schools should be assigned accommodations based on their gender identity, with more privacy provided, if possible, when requested.

Names and Pronouns.

Teammates, coaches, and other participants in sports shall refer to people by their preferred names and pronouns.

Dress Codes and Uniforms

Dress codes should enable all athletes and other sports participants to dress in accord with their gender identity. For example, instead of requiring gendered forms of "dressy," such as a skirt or dress, dress codes should require students to dress with appropriate formality in ways that suit their gender identity. Since both transgender and cisgender athletes may have preferred gender expressions that do not conform to traditional norms of dress—for instance, not all women feel comfortable in a skirt—this policy should be understood to apply to all athletes. Uniforms, too, ideally, should not conflict with an athlete's gender identity.

Education

Athletes, coaches, trainers, and other people involved in SE Athletics should be educated about trans identities and the principles of transgender inclusion. They should be knowledgeable about how, in their particular roles, to support trans people, and prepared to put this knowledge to use.

At schools or venues where or against which SE athletes compete. Without naming or violating the privacy of transgender athletes or personnel in question, relevant authorities and personnel at those venues should be informed about expectations for the treatment of transgender athletes—including accommodation, pronoun, and name use—during and outside of play

RECORD COPY

This policy takes full effect on May 10th, 2017 and shall be distributed online and as an appendix in all Student, Employee, and Faculty handbooks.

_____ _____

Sean Burrage, President **Date**
Southeastern Oklahoma State University

_____ _____

Michael J. Davis, Director of Compliance & Safety **Date**
Southeastern Oklahoma State University

Exhibit 3

***United States of America & Dr. Rachel Tudor v. Southeastern Oklahoma State University & the Regional University System of Oklahoma* (W.D. Okla.), Case No. CIV-15-324-C**

SETTLEMENT AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA

I. INTRODUCTION

1. This Settlement Agreement ("Agreement") is entered between Plaintiff, the United States of America ("the United States"), through the Department of Justice and Defendants Southeastern Oklahoma State University ("Southeastern"), and the Regional University System of Oklahoma ("RUSO"), through their authorized representatives. Plaintiff and Defendants are referred to herein as the "Parties." Southeastern and RUSO are referred to collectively as the "Defendants."

2. This Agreement resolves a Complaint filed by the United States on March 30, 2015, against Defendants in the United States District Court for the Western District of Oklahoma, *United States of America v. Southeastern Oklahoma State University & the Regional University System of Oklahoma*, Case No. CIV-15-324-C, ECF No. 1 ("Complaint"), as well as any and all Title VII claims that could have been brought by the United States, up to the date of this agreement, based on the factual allegations set forth in the Complaint.

3. In its Complaint, the United States alleged that Defendants violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"), by discriminating against Dr. Rachel Tudor ("Complaining Party"), a transgender professor, based on her sex and by retaliating against her.

4. Complaining Party moved to intervene in the United States' case on April 9, 2015, ECF No. 7, and the Court granted her intervention on May 4, 2015, ECF No. 23. Complaining Party's Complaint in Intervention alleged violations of Title VII similar to those alleged by the United States and included additional claims under Title VII. At all times during the course of this litigation, Complaining Party has been represented by her own attorneys. Complaining Party's claims are not resolved by this Agreement. Plaintiff shall not, unless legally required to do so, provide direct assistance to Complaining Party, Defendants, or their counsel regarding their claims or defenses in this lawsuit. This includes aid in discovery, research, motion drafting, writing, document review and/or production, payment of expert witnesses, witness preparation, access to investigators or other U.S. Department of Justice personnel, trial preparation, technical or other information technology support, and financial assistance.

II. RECITALS

5. The allegations of the United States against Defendants are set forth in detail in the Complaint.

6. The Parties agree, for the purposes of this case only, that Southeastern and RUSO are an integrated enterprise and may be treated as a single employer.

7. Defendants dispute the allegations of the United States and deny that they discriminated against or retaliated against Complaining Party in violation of Title VII.

8. Nevertheless, the Parties agree that the controversy should be resolved without further proceedings of any kind.

9. To avoid the delay, uncertainty, inconvenience and expense of further litigation of Plaintiff's claims, and in consideration of the mutual promises and obligations set forth below, the Parties agree and covenant to the following material terms and conditions:

III. TERMS AND CONDITIONS

A. DEFINITIONS

10. "Days" refers to calendar days, unless business days are clearly specified in the context of a specific provision of this Agreement. To the extent this Agreement refers to "business days," those days are Monday, Tuesday, Wednesday, Thursday, and Friday regardless of whether the Defendants actually conduct business on those days. If any deadline referenced in this Agreement should fall on a weekend, State of Oklahoma holiday, or federal holiday, the deadline shall be moved to the next business day.

11. "Effective Date" refers to the date of the signature of the last signatory to the Agreement.

12. "Policies" refers to all employment, personnel, and labor policies or manuals that relate to the relationship between Defendants and their employees or job applicants, including but not limited to Southeastern's Academic Policies and Procedures Manual, any non-discrimination or non-retaliation policies, and any policies or manuals applicable to the investigation of complaints of discrimination or retaliation.

13. "Supervisor" refers to (1) any employee who has the authority to hire, fire, promote, transfer, discipline, or take any other tangible employment action against another employee; and/or (2) any employee who possesses the authority to direct the work activities of at least one other employee.

14. "Underlying Case" refers to Plaintiff's Complaint.

B. PROHIBITED CONDUCT AND AFFIRMATIVE OBLIGATIONS

i. Non-Discrimination and Non-Retaliation

15. Defendants will not discriminate against applicants or employees on the basis of sex (including a person's non-conformity to sex stereotypes) in violation of Title VII.

16. Defendants will not retaliate against any individual, including Complaining Party, because they opposed any practice that they believe in good faith violates Title VII; filed a charge with the United States Equal Employment Opportunity Commission ("EEOC") or any other state or local agency charged with enforcing anti-discrimination laws; or testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under Title VII and/or in connection with this case.

ii. Designation of EEO Officer at Southeastern

17. Defendants have designated an individual at Southeastern to serve as Equal Employment Opportunity Officer ("EEO Officer"). The EEO Officer shall be an employee of Southeastern, and the President of Southeastern shall serve as the only immediate supervisor for the EEO Officer. Southeastern shall employ an EEO Officer that meets the terms of this Agreement for the entire duration of this Agreement.

18. The EEO Officer will be responsible for (a) investigating potential Title VII violations or overseeing others who are called upon to investigate potential Title VII violations; (b) training or overseeing the training of employees on their Title VII rights; (c) implementing the policy changes discussed in this Agreement and training employees on those changes; and (d) performing other tasks as described below. Defendants will create a written job description for the EEO Officer that incorporates the job requirements described in this Agreement and they will provide it to the United States for review within 60 days of the Effective Date. The United

States' review of the job description will take place under the same timeframes and procedures set forth below in Paragraph 21(a)-(b).

19. The EEO Officer will undergo, or has undergone, 32 hours of training on how to conduct investigations of discrimination complaints during his or her first year as EEO Officer and 8 hours of continued training on this topic every year thereafter.

a. The United States shall have the opportunity to review the proposed EEO Officer training, and shall have the right to object to such training if it does not comply with the terms of this Agreement.

b. The training will cover, at a minimum, investigative techniques related to gathering and reviewing documentary and electronic evidence; interviewing witnesses; making credibility determinations; writing investigative reports; and avoiding appearances of bias toward complainants or respondents.

c. Within 60 days of the Effective Date, Defendants will identify the training program(s) the EEO Officer will undergo, or has undergone in the year prior to the Effective Date, and provide to Plaintiff all proposed training materials. Plaintiff's review of the training will occur in accordance with the timeline set forth in Paragraph 31(c)-(d) for review of other required training programs and materials. If Plaintiff objects to the training program(s) or materials and a dispute arises, the Parties would follow the procedure described in the Dispute Resolution section of this Agreement to resolve the dispute. To the extent the EEO Officer identified has undergone training during the year prior to the Effective Date that satisfies Defendants' obligations under Paragraph 19, Plaintiff will not unreasonably refuse to credit such training toward the 32-hour requirement.

d. Within fifteen (15) days of the EEO Officer's completion of the initial 32 hours of training, and the continued training annually thereafter, Defendants shall provide written confirmation to Plaintiff that the training has been completed.

20. The President of Southeastern will annually evaluate the EEO Officer's handling and/or overseeing of investigations and training.

a. For the investigations performance criterion, evaluation metrics must include whether the EEO Officer: (a) met the timeframes for investigating complaints, which are discussed below; (b) conducted investigations in a proper and impartial manner; and (c) complied with all policies, including the new or revised policies implemented pursuant to Paragraphs 21-30.

b. For the training performance criterion, the EEO Officer will solicit anonymous feedback from employees who underwent training. The President will consider that feedback, among other things, when rating the EEO Officer's performance.

c. The President's annual evaluation of the EEO Officer's performance will include a detailed written explanation of the factual basis for the evaluation.

iii. Policy Changes

21. Southeastern will modify its Policies, as defined in Paragraph 12 above, as they pertain to protected classes under Title VII, *i.e.*, race, color, sex , religion, national origin, and retaliation for protected conduct. To the extent existing Policies, including but not limited to Southeastern's Academic Policies and Procedures Manual, are inconsistent with the requirements of Paragraphs 22 to 30 below, Defendants shall revise those existing Policies.

a. No later than sixty (60) days after the Effective Date, Defendants shall provide copies of any proposed Policies created or revised pursuant this Agreement to Plaintiff for review.

b. Plaintiff will notify Defendants in writing within thirty (30) days of receipt of the proposed Policies pursuant to Paragraph 21(a) whether it has any objections to the proposed Policies. The notification shall specify the nature of the objection, if any. Plaintiff shall not unreasonably object, and may only object on the basis that the proposed Policies do not conform to the terms of this Agreement. The Parties shall make a good faith effort to confer regarding any disagreements concerning the proposed Policies prior to instigating breach proceedings pursuant to Paragraph 39.

c. Immediately after Plaintiff notifies Defendants that it has no objections to their Policy modifications or, in the event Plaintiff asserts an objection, immediately after Plaintiff's objections to the revised Policies are resolved, Defendants shall implement and shall adhere to the modified Policies.

22. The Policies must specify the following regarding who may investigate and make decisions about discrimination or retaliation complaints:

a. Neither a respondent nor a complainant in a discrimination or retaliation investigation may be one of the decision makers charged with determining whether the respondent discriminated or retaliated against the complainant.

b. If a discrimination or retaliation complaint is made either by or against the President of Southeastern, except as provided in Paragraph 22(b)(iii) below, someone who does not work for Southeastern must investigate the complaint. If a discrimination or retaliation complaint is made by or against the President of Southeastern:

i) The person who investigates the complaint must satisfy the same investigative training requirements as the EEO Officer, which are discussed in Paragraph 19 above.

ii) The RUSO Board of Regents will make the final decision on the merits of the complaint.

iii) Where the RUSO Board determines that the President of Southeastern is named as a respondent in a Complaint merely because of the Office of the President's position within the hierarchy of Southeastern management, and not because of any alleged conduct by the President personally, the investigation of that complaint may be conducted by an employee of Southeastern. In this instance, the RUSO Board must document the basis for its decision to permit the investigation to be conducted by a Southeastern employee.

23. The Policies will clearly explain how individuals may make discrimination and retaliation complaints, including:

a. The Policies will state that employees or applicants may make discrimination or retaliation complaints either orally or in writing to any person in their direct chain of command at Southeastern, the EEO Officer at Southeastern, or the RUSO Board. If the complaint is made orally initially, the recipient and/or the EEO Officer will direct the complainant to submit a written complaint. The EEO Officer may assist with the write-up if requested. The complainant shall make any necessary corrections to the write up of the complaint, and then the complainant shall sign and date the write up of the complaint.

b. The Policies will state that employees and applicants may make discrimination and/or retaliation complaints to an appropriate agency external to RUSO or Southeastern, such as the U.S. Equal Employment Opportunity Commission ("EEOC"). The Policies will provide the name and contact information (phone number, email, etc.) of the EEO Officer, the EEOC, the U.S. Department of Justice Civil Rights Division, and any other state or local government agency that could investigate Title VII complaints against Southeastern. The Policies will be timely updated when there are changes in any of these names and/or contact information.

24. The Policies will make the following statements regarding the handling of complaints:

a. Investigations of complaints will be promptly conducted and completed.

b. The EEO Officer or an investigator under the EEO Officer's oversight will conduct all investigations in a fair and impartial manner.

c. The EEO Officer and/or investigators will be subject to discipline if they conduct an investigation in an unfair or partial manner.

d. Retaliation for filing a complaint or participating in a discrimination and/or retaliation investigation is strictly prohibited.

25. The Policies will make the following statements regarding the reporting responsibilities of Supervisors:

a. All Supervisors who witness conduct or receive complaints of discrimination or retaliation shall promptly report such actions to the EEO Officer so that the EEO

Officer can ensure that complaints are promptly investigated, if necessary, in accordance with this Agreement and/or the Policies.

b. Any Supervisor who witnesses or becomes aware of conduct that she or he reasonably believes may be discriminatory or retaliatory must promptly report the conduct to the EEO Officer, even if the Supervisor has not received a complaint.

c. All Supervisors shall report complaints and/or information about discrimination or retaliation promptly. Absent unusual circumstances, Supervisors should report complaints and/or information about discrimination within ten (10) days.

26. The Policies will state that an employee or applicant who claims that he or she was subjected to discrimination and/or retaliation is not required (before making a complaint or during the course of the investigation of his or her complaint) to discuss the alleged discriminatory and/or retaliatory conduct with the person alleged to have committed the discrimination and/or retaliation.

27. The Policies will state that the EEO Officer will provide written notice to the respondent(s) and complainant(s) when he or she initiates an investigation. This written notice shall be provided within five (5) business days of the EEO Officer's receipt of a complaint or, if the EEO Officer determines that some preliminary investigation must occur prior to notifying the respondent(s) and complainant(s), within five (5) business days of the conclusion of that preliminary investigation. The written notice shall also state:

a. that the investigation should be completed within sixty (60) days of the EEO Officer's receipt of the complaint or information and, if it is not, the EEO Officer will inform the complainant, or putative victim, and respondent(s) of how much longer the EEO Officer believes the investigation will take;

b. that an investigative report will be provided to the respondent(s) and complainant(s), (or putative victim(s) in the absence of a complaint), and this report will describe the investigator's findings of fact and conclusions of merit with respect to each allegedly discriminatory and/or retaliatory action;

c. that retaliation against complainant(s) for filing a complaint, or against witnesses for participating in the investigation, is prohibited by law and university policy;

d. the identity of the person who will conduct the investigation and information about the complainant's and respondent's option to request that the investigator recuse himself or herself if the complainant or respondent has good faith basis to believe that the investigator will not conduct a proper and impartial investigation;

e. that the EEO Officer welcomes feedback from the complainant(s) and respondent(s) on whether they believe the investigation was conducted properly and impartially, and the complainant(s) and respondent(s) will receive an optional survey at the conclusion of the investigation which will seek this feedback; and

f. if the EEO Officer conducted a preliminary investigation prior to providing notice of the investigation to complainant(s) and respondent(s), the basis of the need for the pre-notice preliminary investigation.

28. If the EEO Officer receives information that reasonably supports allegations that discrimination and/or retaliation may have occurred but the putative victim(s) has not complained, the Policies will state that the EEO Officer will do the following:

a. Within five (5) business days of learning of the conduct, but prior to initiating an investigation, the EEO Officer will communicate with the putative victim(s) to gather information and to determine whether the putative victim(s) wants an

investigation to be conducted. If the EEO Officer determines that a preliminary investigation must be completed before notifying the putative victim(s), the EEO Officer will notify the putative victim(s) within five (5) days of the completion of that preliminary investigation.

b. The EEO Officer will then decide, within five business (5) days after communicating with the putative victim(s), whether to initiate an investigation, keeping in mind that the EEO Officer may initiate an investigation even if the putative victim(s) does not want an investigation to be conducted.

c. If, after communicating with the putative victim(s), the EEO Officer decides to initiate an investigation, the notification requirements described in Paragraph 27 shall be followed, except that the written notice shall be provided within five business (5) days of the EEO Officer's decision to initiate an investigation pursuant to Paragraph 28(b).

29. The Policies will provide a process for the EEO Officer and/or other investigator to recuse himself or herself if (1) his or her impartiality might reasonably be questioned; (2) he or she has a personal bias in favor of or against the complainant(s) or respondent(s); or (3) he or she is a respondent and/or took part in any of the allegedly discriminatory and/or retaliatory actions. The Policies will also set forth that:

a. If the investigator refuses to recuse himself or herself upon the request of a complainant or respondent, the person who requested recusal may appeal that decision to the President of Southeastern and, after the President, to the RUSO Board.

b. If an investigator recuses himself or herself, a person from another RUSO institution with the requisite investigatory training (discussed in Paragraph 19) may conduct the investigation instead.

30. The Policies will describe the investigative training requirements for the EEO Officer described in Paragraph 19, and will require any individual whom Southeastern charges with conducting discrimination and retaliation investigations to satisfy those same investigative training requirements.

iv. Training

31. Southeastern shall provide one-time, in-person mandatory Title VII training, conducted by a trainer from outside Southeastern and RUSO and covering the issue of Title VII's protections for people who do not conform to sex stereotypes, to all Southeastern employees within 120 days of the Effective Date. The training shall be available for remote participation at the time it is conducted and shall be recorded on video. Attendance at a showing of the recorded training shall satisfy this training requirement for those employees who are unable to attend the live training, either in person or remotely, despite reasonable efforts to do so. Plaintiff shall identify three trainers that would be acceptable to it, and RUSO shall select from among those trainers.

a. No later than twenty (20) days after the Effective Date, Defendants shall identify for Plaintiff the trainer that they have selected from among the three trainers that Plaintiff proposed.

b. No later than sixty (60) days after the Effective Date, Defendants shall provide to Plaintiff a description of their selected trainer's proposed mandatory training program as well as copies of the training materials.

c. If Plaintiff has objections to the trainer's proposed training program or materials, then Plaintiff will notify Defendants in writing within thirty (30) days of receipt of the proposed training program and materials. The notification shall specify the nature of the objection, and Plaintiff shall not unreasonably object; Plaintiff's ability to review and object to the training program and materials shall be limited to ensure that the program and materials conform to the terms of this Agreement. The Parties shall make a good faith effort to confer regarding any disagreements concerning the training program or materials prior to instigating breach resolution discussions or proceedings pursuant to Paragraph 39.

d. Within 21 days of completion of the training described in this Paragraph, Defendants shall provide written confirmation to Plaintiff that the training has been completed and that all employees of Southeastern attended and completed the training.

32. Within 180 days of the Effective Date and annually thereafter, Defendants must provide in-person training on Southeastern's non-discrimination and non-retaliation policies (including any revisions to the Policies) and Title VII to all Southeastern employees. The training shall be available for remote participation at the time it is conducted and shall be recorded on video. Attendance at a showing of the recorded training shall satisfy this training requirement for those employees who are unable to attend the live training, either in person or remotely, despite reasonable efforts to do so.

a. The training described in Paragraph 31 may satisfy this requirement for annual training on Title VII for the year in which it is given.

b. No later than 120 days after the Effective Date, Defendants shall provide to the United States a description of the proposed training program and copies of the proposed training materials for the annual training pursuant to Paragraph 32.

c. If Plaintiff has objections to Defendants' proposed training program or training materials, then Plaintiff will notify Defendants in writing within thirty (30) days of receipt of the proposal pursuant to Paragraph 32(b). The notification shall specify the nature of the objection, and Plaintiff shall not unreasonably object. Plaintiff's ability to review and object to the training program and materials shall be limited to ensure that the program and materials conform to the terms of this Agreement, including that the materials are consistent with Defendants' Policies, including any revisions to those Policies required by this Agreement. The Parties shall make a good faith effort to confer regarding any disagreements concerning the proposed training prior to instigating breach resolution discussions or proceedings pursuant to Paragraph 39.

d. Within twenty-one (21) days of completion of the training described in this Paragraph, Defendants shall provide written confirmation to Plaintiff that the training has been completed, and that all employees of Southeastern attended and completed the training.

33. All new Southeastern employees must receive training on Southeastern's non-discrimination and non-retaliation policies and Title VII within fourteen (14) business days of their first day of employment by Southeastern. This requirement may be satisfied by the annual training pursuant to Paragraph 32, provided it occurs within fourteen (14) business days of their first day of employment by Southeastern.

34. Within one hundred-eighty (180) days of the Effective Date and annually thereafter, Southeastern shall train all Supervisors on handling employee complaints of discrimination and/or retaliation that fall under one or more of the protected categories in Title VII (race, color, sex, religion, national origin, and retaliation for protected conduct). Southeastern shall also inform Supervisors that they could be subject to discipline if they do not, under the Policies revised or created pursuant to this Agreement, promptly inform the EEO Officer of discrimination and/or retaliation complaints.

a. No later than one-hundred twenty (120) days after the Effective Date, Defendants shall provide to Plaintiff a description of the proposed training program and proposed training materials for the annual Supervisor training pursuant to Paragraph 34.

b. If Plaintiff has objections to Defendants' proposed training program or training materials, then Plaintiff will notify Defendants in writing within thirty (30) days of receipt of the proposal pursuant to Paragraph 34(a). The notification shall specify the nature of the objection and Plaintiff shall not unreasonably object. Plaintiff's ability to review and object to the training program and materials shall be limited to ensure that the program and materials conform to the terms of this Agreement. The Parties shall make a good faith effort to confer regarding any disagreements concerning the proposed training prior to instigating breach resolution discussions or proceedings pursuant to Paragraph 39.

c. Within twenty-one (21) days of completion of the training described in Paragraph 34, Defendants shall provide written confirmation to Plaintiff that the training has been completed and that all Supervisors attended and completed the training.

IV. DOCUMENT RETENTION, COMPLIANCE MONITORING, AND TERM OF THE AGREEMENT

35. While this Agreement remains in effect, Defendants will retain documents relevant to implementation of the Agreement, such as documents showing which employees attended mandatory trainings; documents related to sex discrimination or retaliation complaints; and documents related to the evaluation of the EEO Officer's performance. Plaintiff may request documents and information for purposes of monitoring Defendants' compliance with the Agreement and Defendants shall make those documents available to Plaintiff within forty-two (42) days of Defendants' receipt of such a request.

36. Defendants must notify Plaintiff within twenty-eight (28) days of the initiation of any investigation of alleged sex discrimination (including discrimination based on non-conformity to sex stereotypes) and/or retaliation as described in Paragraph 16. Defendants will produce any non-privileged documents related to sex discrimination and/or retaliation investigations that Plaintiff requests.

37. Defendants' obligations under the Agreement will expire twenty-four (24) months from the Effective Date, or after all of the relief specified in the Agreement has been implemented, whichever is later.

V. DISPUTE RESOLUTION

38. The Parties shall endeavor in good faith to resolve informally any differences regarding interpretation of or compliance with this Agreement prior to initiating any court action.

39. If Plaintiff has a good faith belief that there has been a failure by either or both Defendant(s) to perform in a timely manner any act required by this Agreement, or otherwise to act in conformance with any provision thereof, whether intentionally or not, then Plaintiff will notify Defendants in writing of the concerns about purported breach, and the Parties will attempt

to resolve those concerns in good faith. Unless otherwise expressly agreed in writing, Defendants shall have twenty-one (21) days from the date the United States provides notification of any breach of this Agreement to cure the breach or provide written explanation as to why the perceived breach is not actually a breach of this Agreement. If the parties are unable to resolve a dispute over whether Defendants have breached the Agreement, Plaintiff may file a civil action to enforce the Agreement. The Parties agree that the United States District Court for the Western District of Oklahoma is a proper venue to enforce this Agreement and that they may, in any action to enforce this agreement, seek to have the court impose any remedy authorized at law or equity including, but not limited to, remedies available under Title VII. The Parties further agree that Plaintiff will not be required to exhaust any administrative remedies through the EEOC before filing an action to enforce the Agreement.

40. For the purposes of an action to enforce this Agreement, the Parties agree that each and every provision of this Agreement is material.

VI. TERMINATION OF LITIGATION HOLD

41. The Parties agree that, as of the date of the dismissal of the Underlying Case, litigation is not "reasonably foreseeable" concerning the matters alleged in Plaintiff's Complaint. To the extent that any Party previously implemented a litigation hold to preserve documents, electronically stored information (ESI), or things related to the matters described above, the Party is no longer required to maintain such litigation hold. Nothing in this Paragraph relieves any Party of any other obligations imposed by this Agreement. Nothing in this Paragraph affects any other litigation hold that the Parties may have in place with respect to claims outside of Plaintiff's Complaint.

VII. DURATION, EXECUTION, AND OTHER TERMS

42. The Agreement may be executed in multiple counterparts, each of which together shall be considered an original but all of which shall constitute one agreement. Facsimiles of signatures shall constitute acceptable, binding signatures for purposes of this Agreement.

43. Five (5) business days after the execution of this Agreement, the Parties will sign and file a Joint Stipulation of Dismissal of the Underlying Case pursuant to Federal Rule of Civil Procedure 41(a)(1).

44. This Agreement, being entered with the consent of the Parties, shall not constitute an admission, adjudication or finding on the merits of the allegations made in Plaintiff's Complaint, and it also shall not prejudice either party or be admissible by either party in any future proceedings except as described in Section V. The entry of this Agreement shall not preclude litigation of any facts or issues in any proceeding between Defendants and any other individuals.

45. Each Party shall bear its own legal and other costs incurred in connection with this litigation, including the preparation and performance of this Agreement.

46. Each Party and signatory to this Agreement represents that it freely and voluntarily enters in to this Agreement without any degree of duress or compulsion.

47. This Agreement is governed by the laws of the United States. The exclusive jurisdiction and venue for any dispute relating to this Agreement is the United States District Court for the Western District of Oklahoma. This provision does not constitute, and should not be construed as, a waiver by Plaintiff of sovereign immunity, or any other jurisdictional or legal defense available to Plaintiff. For purposes of construing this Agreement, this Agreement shall be deemed to have been drafted by all Parties to this Agreement and shall not, therefore, be

construed against any Party for that reason in any subsequent dispute. This Agreement constitutes the complete agreement among the Parties and supersedes all prior agreements, representations, negotiations, and undertakings not set forth or incorporated herein. This Agreement may not be amended except by written consent of all of the Parties.

48. The undersigned representatives of RUSO and Southeastern and their counsel represent and warrant that they are fully authorized to execute this Agreement on behalf of the persons and entities indicated below.

49. This Agreement is binding on RUSO and Southeastern's successors, transferees, heirs, and assigns.

50. The Parties agree that, until final resolution of Complaining Party's claims, they will not issue a press release regarding this case or the Agreement or post the Agreement on the website or social media accounts of the Department of Justice and will not substantively respond to requests from the press for comment on the Agreement unless response to such press requests is otherwise required by law.

51. Until final resolution of Complaining Party's claims, the United States agrees to inform the Defendants if it receives a Freedom of Information Act ("FOIA") request for the Agreement before producing the Agreement to the FOIA requester.

52. Should any provision of this Agreement be declared or determined by any court to be illegal or invalid, the validity of the remaining parts, terms or provisions shall not be affected thereby and said illegal or invalid part, term or provision shall be deemed not to be a part of this Agreement.

53. The Parties agree that they will not, individually or in combination with another, seek to have any court declare or determine that any provision of this Agreement is illegal or invalid.

FOR PLAINTIFF UNITED STATES:

DATED: Aug. 29, 2017

GREGORY B. FRIEL
Deputy Assistant Attorney General
Civil Rights Division

DELORA L. KENNEBREW
Chief
Employment Litigation Section
Civil Rights Division

MEREDITH L. BURRELL
Deputy Chief
Employment Litigation Section
Civil Rights Division
United States Department of Justice
950 Pennsylvania Avenue, NW
Patrick Henry Building, Fourth Floor
Washington, DC 20530

FOR DEFENDANT SOUTHEASTERN OKLAHOMA STATE UNIVERSITY:

DATED: August 30, 2017

President Sean Burrage

FOR DEFENDANT REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA:

DATED: 8/29/17

Regent Mark Stansberry, Chairman

Exhibit 4

Oklahoma Higher Education Employees Insurance Group
a/k/a OKHEEI Group

Minutes of Regular Meeting
655 Research Parkway
Oklahoma City, Oklahoma

Video Conferencing Sites:

East Central University
Science Hall, Room 309
1100 E 14th St
Ada, OK 74820
(580) 559-5539
Attendees: Dawn Thurber, Lynn Lofton

Thursday, October 6, 2016
10:00 a.m.

1. **Announcement of Filing Meeting Notice and Posting of the Agenda in Accordance with the Open Meeting Act.**
   The OKHEEI Group Board of Trustees met in regular session at 10:00 a.m., October 6, 2016, at State Regents, 655 Research Parkway, Oklahoma City, Oklahoma. Notice of the meeting had been properly filed with the Secretary of State by December 15, 2015 and a copy of the Agenda posted by 10:00 a.m., in compliance with the Open Meeting Act.

   a. **Call meeting to order**
      Chair Dennis Westman (MSC) called the meeting to order at 11:04 a.m.

   b. **Attendance**
      The following OKHEEI Board of Trustees were present:

      Designee T. Lynn Lofton, East Central University – via iTV
      Dennis Westman, Murray State College
      Designee Christy Landsaw, Northeastern Oklahoma State University
      Anita Simpson, Northern Oklahoma College
      David Pecha, Northwestern Oklahoma State University
      Designee Kim Andrade, Redlands Community College
      Kent Lashley, Rose State College
      Sheridan McCaffree, RUSO Administrative Office
      Braden Brown, Seminole State College
      Dennis Westman, Southeastern Oklahoma State University
      Brenda Burgess, Southwestern Oklahoma State University
      Patti Neuhold, University of Central Oklahoma
      Tricia Latham, Western Oklahoma State College

      The following Trustees were absent:

      None

Designee T. Lynn Lofton, East Central University – via iTV
Dennis Westman, Murray State College
Designee Christy Landsaw, Northeastern Oklahoma State University
Anita Simpson, Northern Oklahoma College
David Pecha, Northwestern Oklahoma State University
Designee Kim Andrade, Redlands Community College
Kent Lashley, Rose State College
Sheridan McCaffree, RUSO Administrative Office
Braden Brown, Seminole State College
Dennis Westman, Southeastern Oklahoma State University
Brenda Burgess, Southwestern Oklahoma State University
Patti Neuhold, University of Central Oklahoma
Tricia Latham, Western Oklahoma State College

Voting against the motion: None

Abstaining: None

Patti Neuhold (UCO) made the motion, seconded by Anita Simpson (NOC) to cover gender assignment according to Option B of the proposal, which does not cover surgical procedures.

Voting for the motion:

Dennis Westman, Murray State College
Designee Christy Landsaw, Northeastern Oklahoma State University
Anita Simpson, Northern Oklahoma College
David Pecha, Northwestern Oklahoma State University
Designee Kim Andrade, Redlands Community College
Kent Lashley, Rose State College
Sheridan McCaffree, RUSO Administrative Office
Braden Brown, Seminole State College
Dennis Westman, Southeastern Oklahoma State University
Brenda Burgess, Southwestern Oklahoma State University
Patti Neuhold, University of Central Oklahoma
Tricia Latham, Western Oklahoma State College

Voting against the motion:

Designee T. Lynn Lofton, East Central University – via iTV

Abstaining: None

Motion passes by a vote of 12 to 1.

10. Whitney Popchoke, RUSO/OKHEEI, discussed the option for an RFP and/or "piggybacking" on an existing state contract.

Oklahoma Higher Education Employees Insurance Group
a/k/a OKHEEI Group

Minutes of Regular Meeting
State Regents
655 Research Parkway
Oklahoma City, Oklahoma

Video Conferencing Sites:

East Central University
Science Hall, Room 309
1100 E 14th St
Ada, OK 74820
(580) 559-5539
Attendees: Jessica Kilby, Dawn Thurber, Lynn Lofton, Rhonda Kinder, Rob Thompson

Western Oklahoma State College
Main Building, Room HLC116
2801 N Main St
Altus, OK 73521
(580) 471-6994
Attendees: April Nelson, Tricia Latham

Thursday, November 10, 2016
10:00 a.m.

1. **Announcement of Filing Meeting Notice and Posting of the Agenda in Accordance with the Open Meeting Act.**
The OKHEEI Group Board of Trustees met in special session at 10:00 a.m., November 10, 2016, at State Regents, 655 Research Parkway, Oklahoma City, Oklahoma. Notice of the meeting had been properly filed with the Secretary of State by December 15, 2015 and a copy of the Agenda posted by 10:00 a.m., in compliance with the Open Meeting Act.

   a. **Call meeting to order**
   Chair Dennis Westman (MSC) called the meeting to order at 10:01 a.m.

   b. **Attendance**
   The following OKHEEI Board of Trustees were present:

   Jessica Kilby, East Central University – via iTV
   Dennis Westman, Murray State College
   Designee Christy Landsaw, Northeastern State University
   Anita Simpson, Northern Oklahoma College
   David Pecha, Northwestern Oklahoma State University
   Jena Marr, Redlands Community College
   Krista Norton, Rose State College
   Sheridan McCaffree, RUSO Administrative Office
   Designee Courtney Jones, Seminole State College
   Dennis Westman, Southeastern Oklahoma State University
   Brenda Burgess, Southwestern Oklahoma State University
   Patti Neuhold, University of Central Oklahoma
   Tricia Latham, Western Oklahoma State College – via iTV

Sheridan McCaffree (RUSO) made the motion, seconded by Jena Marr (RCC), to approve the minutes of the October 27, 2016 Special Meeting.

Voting for the motion:

Jessica Kilby, East Central University – via iTV
Dennis Westman, Murray State College
Designee Christy Landsaw, Northeastern State University
Anita Simpson, Northern Oklahoma College
David Pecha, Northwestern Oklahoma State University
Jena Marr, Redlands Community College
Krista Norton, Rose State College
Sheridan McCaffree, RUSO Administrative Office
Designee Courtney Jones, Seminole State College
Dennis Westman, Southeastern Oklahoma State University
Brenda Burgess, Southwestern Oklahoma State University
Patti Neuhold, University of Central Oklahoma
Tricia Latham, Western Oklahoma State College – via iTV

Voting against the motion: None

Abstaining: None

2. Nancy Gerrity, RUSO, discussed the need to modify the October 6th vote for changes in gender assignment coverage since it was decided by the RUSO General Counsel that OKHEEI does have to abide by Section 1557 of the IRS Code.

Sheridan McCaffree (RUSO) made the motion, seconded by David Pecha (NWOSU) to cover all medically necessary gender assignment surgery as required.

Voting for the motion:

Jessica Kilby, East Central University – via iTV
Dennis Westman, Murray State College
Designee Christy Landsaw, Northeastern State University
Anita Simpson, Northern Oklahoma College
David Pecha, Northwestern Oklahoma State University
Jena Marr, Redlands Community College
Krista Norton, Rose State College
Sheridan McCaffree, RUSO Administrative Office
Designee Courtney Jones, Seminole State College
Dennis Westman, Southeastern Oklahoma State University
Brenda Burgess, Southwestern Oklahoma State University
Patti Neuhold, University of Central Oklahoma
Tricia Latham, Western Oklahoma State College – via iTV

Voting against the motion: None

Abstaining: None

CASE NO. 15-cv-324-C

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

RACHEL TUDOR

Plaintiff,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendants.

DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR REINSTATEMENT

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December 20, 2017

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

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

DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR REINSTATEMENT

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to the Court's Minute Entry of November 20, 2017, [Doc. 256], submit the following Response Brief in Opposition to Dr. Tudor's Motion for Reinstatement [Doc. 268] asking this Court for an order reinstating Plaintiff and awarding her tenure.

INTRODUCTION

A working relationship is a lot like a marriage, and if both parties are not enthusiastic about it and eager for it to succeed, then it will not. A forced marriage is no marriage at all; it is a condition of servitude. Dr. Tudor asks this Court to force the State of Oklahoma into a condition of servitude to a dysfunctional and fundamentally broken

relationship. There is a reason that our nation's justice system has evolved to reduce disputes and their solutions to monetary payments.

The Court is now the finder of fact with respect to equitable relief. In determining whether reinstatement and/or tenure is an appropriate remedy, the Court conducts a fact-specific inquiry taking into account not only the jury verdict, but also the jury instructions and the evidence presented by the parties. If the Court finds **any** evidence that the termination was motivated by something other than discrimination, reinstatement is not an appropriate remedy. 42 U.S.C.A. §2000e-5(g)(2)(A). This inquiry should be conducted with deference given to academic or business decisions of the institution. Traditionally, federal courts have been wary of interfering with academic tenure decisions. Courts do not sit as super-tenure committees and may not readily substitute their judgment for that of a university.

Defendants ask this Court to deny Dr. Tudor's requests for (a) reinstatement and (b) tenure. Reinstatement is neither reasonably feasible, nor is it desired.

ARGUMENT AND AUTHORITY

PROPOSITION I: OPINIONS OF TUDOR'S QUALITY AS A PROFESSOR

As the Court is already well aware, the jury in this case awarded damages well in excess of the statutory cap and reasonableness. This is not evidence warranting reinstatement. Nor is the self-serving testimony of Tudor or the impassioned pleas of her "close friend," Dr. Cotter-Lynch. While Tudor and her counsel put on a case of transgender discrimination, the jury was hoodwinked into disregarding the settled law that while Title VII may protect against instances of gender stereotyping and conformity (or non-

conformity) with gender stereotypes, Title VII does not protect against discrimination based *per se* on someone's status as transgender. Dr. Tudor mistakenly or intentionally disregards the evidence presented against her proposed return to campus. Dr. Tudor also asked this Court and jury to wholly disregard (or remain wholly ignorant of) her poor work performance after leaving Southeastern. Whether or not Dr. Cotter-Lynch, Dr. Tudor, or even Dr. Tudor's expert believe Dr. Tudor was a good teacher or scholar nearly a decade ago, in 2009-2010, is not the issue now. The issue today is whether or not Dr. Tudor would be good for the students, the department, and the university presently, and in years to come. The evidence shows that she would not.

A. Dr. Randy Prus: Tenure Committee Member, Department Chair

The Court heard Dr. Prus' testimony for itself. Dr. Randy Prus is currently the Chair of Southeastern Oklahoma State University's department of English, Humanities, and Languages, ("EHL"), the department to which Dr. Tudor wishes reinstatement and tenure. Dr. Prus testified in open court that in 2009-10 he voted against granting Dr. Tudor tenure, and was the lone dissenter on that committee. (*Trial Transcript Vol. 3*, p. 465, ln. 13-18, attached as Exhibit 1). Dr. Prus testified that Dr. Tudor's portfolio in 2009-10 demonstrated a failure to properly address her audience in writing, something at which one would expect an English professor to do better. As Dr. Prus put it, Dr. Tudor's cover letter "lacked professional competence," missed its intended audience, and simply "didn't make sense." (*Id.* at p. 465, ln. 21 – p. 466, ln. 3). Dr. Prus criticized Dr. Tudor's lack of engagement and energy as a teacher. (*Id.* at p. 466, ln. 2-4). Dr. Prus testified that Dr. Tudor's inclusion of a personal journal as a form of publication was not an appropriate publication for a tenure

portfolio to include. (*Id.* at pp. 472, ln. 24 - p. 473, ln. 4). Dr. Prus testified that Dr. Tudor's portfolio references to non-tenured faculty and staff was not appropriate in seeking tenure for herself. (*Id.* at p. 473, ln. 13-16).

As the current Chair of the department, Dr. Prus testified about the logistics and benefits of Dr. Tudor's departure from (or possible return to) the EHL department. For example, Dr. Prus testified in court that no one in particular took over duties that would have been filled by Dr. Tudor had she received tenure and promotion. (*Id.* at p. 480, ln. 3-6). Regarding possible reinstatement of Dr. Tudor, Dr. Prus testified as follows:

> Q.: As the current chair of the English, Humanities, and Languages department at Southeastern, do you think it would be a good thing for that department if Dr. Tudor came back to work there now?
> Prus: No.
> Q.: Do you think it would be a good thing for those students if Dr. Tudor came back to work now?
> Prus. No.
> Q.: Do you think it would be a good thing for the university if Dr. Tudor came back to work there now.
> Prus: No.

Dr. Tudor argues in her brief on reinstatement and tenure [Doc. 268] that there would be no opposition to her return to work at Southeastern's EHL department, relying primarily on the endorsement of her "close friend," Dr. Cotter-Lynch, for this proposition. "To [Cotter-Lynch's] knowledge, no one in the English Department opposed Tudor's return to Southeastern." [Doc. 268, p. 3]. However, as noted above, Department Chair Dr. Prus, specifically objects to Dr. Tudor's return as it would not be good for the department, the students, or the university. Further, when questioned by Dr. Tudor's counsel, Dr. Prus

testified on the issue of whether anyone in the Department opposes Tudor's return, as follows:

> Q.: Do you think other faculty in the English department would welcome Dr. Tudor back at Southeastern?
> Prus: I – we didn't discuss it formally as a department, but informally, I spoke with my colleagues, and it might be split at best, you know. There are a few – there are those who would object to it for a variety of reasons.

(Ex. 1 at p. 483, ln. 11-20).

Perhaps most tellingly, and most germane to the question of tenure, was Dr. Prus' testimony about the promise of what future work Dr. Tudor demonstrated (or failed to demonstrate). Dr. Prus testified as follows:

> Prus: As I think I might have mentioned . . . tenure for me is not just a reward but a promise of what further work one is going to do in a field, and I didn't see that promise.
> Q.: And by that you mean a promise from the candidate demonstrating potential?
> Prus: Yeah.

(*Id.* at p. 474, ln. 8-14).

Dr. Tudor simply did not demonstrate potential for future contributions and success in a way that merited tenure.

Finally, Dr. Prus seems to be, perhaps, the one professional academic involved in this litigation whom everyone regards highly. For example, Dr. Tudor herself testified under oath and in open court that she trusts Randy Prus' judgment and that he is a truthful person. *(Trial Transcript, Vol. 1*, p. 90, ln. 2-5, attached as Exhibit 2). Dr. Tudor's most ardent advocate and close personal friend, Dr. Meg Cotter-Lynch, testified before the Court that she respects Dr. Randy Prus, and that she trusts him. (*Trial Transcript, Vol. 2*, p. 361,

ln. 7-10, attached as Exhibit 3). Former-Dean, Dr. Lucretia Scoufus, testified in open court that Dr. Prus is "an outstanding department chair." (*Trial Transcript, Vol. 4,* p. 631, ln. 18-20, attached as Exhibit 4). Finally, Dr. Tudor's lead counsel, himself, Mr. Ezra Young, represented in his closing remarks to that jury that, "Dr. Randy Prus [] is a bit of a curmudgeon, but he's an honest curmudgeon." (*Trial Transcript Vol. 5*, p. 835, ln. 12-13, attached as Exhibit 5). Keep in mind that Dr. Prus' honest and sworn testimony as a professional academic, as someone who reviewed Dr. Tudor's actual 2009-10 portfolio and found it lacking, and as the current Chair of the EHL department, is that Dr. Tudor should not come back to work at Southeastern; that it would not be good for the students, the EHL department, or the university. No one else in this litigation has the benefit of the insights held by Dr. Prus. Trust Dr. Randy Prus' professional judgment.

B. Dr. Tudor's Work Subsequent to Leaving Southeastern

Throughout this litigation, Dr. Tudor and counsel on her behalf have treated the concept of tenure as an entitlement, something which Dr. Tudor was owed by virtue of the fact that she worked at Southeastern for seven years, regardless of the merit and promise she failed to demonstrate. However, Dr. Tudor's work performance and professional productivity show that Dr. Prus was right about Dr. Tudor in his 2009-10 evaluation of her. To be blunt, Dr. Tudor's work performance since leaving Southeastern's employ has been demonstrably poor in the areas that matter for a professional educator and someone who claims an entitlement to tenure in the higher education setting.

1. Collin College

The jury did not get to hear about Collin College. But Dr. Tudor's performance at Collin College is directly relevant to whether or not she deserves reinstatement or tenure at Southeastern today. At the end of the spring semester of academic year 2010-11, Dr. Tudor separated from Southeastern Oklahoma State University due to her inability to merit tenure there. In the summer of 2012, Dr. Tudor signed a contract to begin teaching at Collin County Community College in the State of Texas. (*See Excerpts from Tudor's Personnel File from Collin College* at CC 5, attached as Exhibit 6). Dr. Tudor was paid a salary of $51,184 that year. (*Id.* at CC 13). Dr. Tudor then benefitted from general raises to $52,720 (2012-13) (*id.* at CC 16); then to $54,829 (2013-2014) (*Id.* at CC 19); and then to $58,022 (2014-2015) (*Id.* at CC 25).

However, despite benefitting from the general raises in her salary, Dr. Tudor ultimately demonstrated that she was not meeting the needs of the students and the College, and her contract there was not renewed. For example, during her "Faculty Performance Appraisal 2014-2015" at Collin College, dated 1/11/16, Dr. Tudor's then-dean, Dr. Donald Weasenforth, wrote the following:

> In the Fall 2014 and Spring 2015 student evaluations, a notable number of students in Professor Tudor's dual credit classes and in one College campus-based class report that Professor **Tudor's instruction is not as clear as it should be** and that **her classroom management is lacking**.

(*See Collin College Faculty Performance Appraisal 2014-2015,* CC 299 – 307 at 301, attached as Exhibit 7). (Emphasis added)

In the same annual review, Dean Weasenforth described Dr. Tudor's service to Collin College as, "adequate, albeit not outstanding." *Id.* at 303. Dean Weassenforth went on to

give Dr. Tudor an "Overall Evaluation" score of "Improvement Needed." (*Id.* at CC 307). Finally, Dean Weasenforth's "Recommendation to the Council on Excellence" was as follows:

> I_____do ___X_do not recommend this faculty member for a multi-year contract.
>
> JUSTIFICATION/COMMENTS: Professor Tudor's professional development meets standards of excellence. However, her service is adequate, and student evaluations from Fall 2014 and Spring 2015 indicate a need for improvement in instruction and classroom management.

Ex. 7.

In short, Dean Weasenforth and Collin College judged Dr. Tudor's work performance as a mixed bag – some good, some bad – but ultimately not good enough to continue teaching there.

Unable or unwilling to accept responsibility for her own deficiencies, Dr. Tudor cried discrimination, (as she did at Southeastern), and filed a grievance with Collin College accusing Dean Weasenforth of "biased performance evaluation . . . based on sex," the "deliberate distortion of information," a "factual misrepresentation of the data," and failures to respond to Tudor's inquiries. (*See Tudor's Employee Complaint* at CC 1045 – 1047, attached as Exhibit 8). Dr. Tudor accused the Dean of mishandling an incident involving "transphobic remarks" allegedly made by another professor. (*See Collin College Hearing Officer Findings*, CC 1049-1052 at 1050, attached as Exhibit 9). Dr. Tudor also argued in the internal Collin College hearing that negative remarks in certain student evaluations purportedly reflect bias against her because of her transgender status, and that some of her students allegedly called her "sir." *Id.* Dr. Tudor demanded negative

remarks be removed from her written evaluation, and that new policies or procedures be established at Collin College. Apparently, maligning people in her profession is something to which Dr. Tudor readily resorts, whether it be at Southeastern, Collin College, or who knows where else. However, the Collin College Hearing Officer found Tudor's claims "not substantiated." (*See* Ex. 9 at CC 1049-1052). Needless to say, Dr. Tudor appealed that decision, pressing her accusations of discrimination against Dr. Weasenforth. (*See Tudor Appeal*, "CC 1054-1057," attached as Exhibit 10). The Collin College lower panel's finding against Dr. Tudor was affirmed. (*See Collin College Review Panel Decision*, "CC 1058," attached as Exhibit 11).

Despite Dr. Tudor's accusations of administrative or institutional transphobia and sex discrimination, the student evaluations spoke volumes. As a sample set, the student evaluations about Dr. Tudor's performance at Collin College included the following statements directly from her students in 2014:

> "[We] are having a problem with [our] composition two professor Rachel Tudor. She is very vague on instructions and does not explain what she wants in our essays. The whole class is lost . . . I tried to get help and even went to the writing center but they could not help me because the instruction [sic] were so vague and they didn't know what I had to write about. . . . Her teaching is very unprofessional and the whole class is having problems with her. . . .
>
> On Thursday, March 20th she puts my email up for the whole class to see and she starts correcting my grammar and says that there are clear instruction [sic] for the essay. . . . . I did not give her consent for her to show my email to the whole class. . . .

(*See Collin College Student Evaluations*, "CC 1067," attached as Exhibit 12).

Another student wrote:

> "The major concern I have with this professor was in class, she informed the class that a complaint had been made about her. She put the complaint up on the overhead projector for the class to read, asking us if we agreed or disagreed with the student's complaint. I feel rather uncomfortable with this I also feel this is highly unethical. She asked the students to go to the dean saying that the statement the student made was not true.

(*Id.* at CC 1069).

Then, in one representative instance in October of 2015, Dr. Tudor held up a student's paper for ridicule in front of other students, and the authoring student's name was visible to the student's classmates. In pertinent part, that student's complaint says:

> On 10/26/15 the professor exposed my paper in front to my classmate, without my permission. She used my paper as a bad example. I felt so embarrassed because my name was on it and everybody knew it was my paper.

(*Id.* at CC 1073).

Public humiliation of her students in front of the whole class seems to be a recurring theme in Dr. Tudor's method of instruction. One can only imagine the cries of discrimination Dr. Tudor would have wailed had something like this happened to her. Another student's evaluation echoed some of these same concerns, writing, "Professor [Tudor] does not give specific instructions to students and makes fun of students' work," and "assigns papers to students in a confusing way." (*Id.* at CC 1074). Still another student evaluation in late 2015 described Dr. Tudor as a "bully." (*Id.* at CC 1076). In more banal complaints, students cited concerns such as, "I don't feel like I have learned anything this year." (*Id.* at CC 1078). More recently, in early 2016, one of Dr. Tudor's students wrote:

> I have been flagged on Blackboard [a digital classroom management tool] for the use of the word 'illegal.' She [Tudor] has made a rule that 'illegal' will result

> in expulsion from the class. I can't turn in my required blog posts due to her removing me from Blackboard discussion boards. I fear my grade will suffer because I don't align with her politically.

(*Id.* at CC 1082).

But according to Dr. Tudor, this is no doubt all part of a transphobic conspiracy to ruin her career, perpetrated at no less than two institutions of higher education, in two states, by everyone from the RUSO board, the SEOSU administration, the Collin College Administration, and the Collin College students. It is also noteworthy that in the one hundred and twenty (120) pages' worth of exhibits attached to Dr. Tudor's Motion for Reinstatement and Tenure, there is not a single reference, recommendation, or endorsement from any of Dr. Tudor's former students, either at Southeastern, Collin College, or elsewhere.

Although Dr. Randy Prus, and the administration at Southeastern Oklahoma State University may not have known how poorly Dr. Tudor would do as a professor at Collin College, the evidence shows that Dr. Prus' professional judgment was right in the first place. Dr. Tudor showed neither the potential (nor the actuality) of a successful professor in the university setting. Administrators, evaluators, and students all agree: Dr. Tudor's professional performance is lacking. She should be neither reinstated, nor granted tenure.

2. Seminole State College

In the summer of 2017, Dr. Tudor applied for work with an Oklahoma entity outside of SEOSU and the RUSO system: Seminole State College ("SSC"). (*See Declaration of Holly Newell,* attached as Exhibit 13). According to employees at SSC, Dr. Tudor declined to appear in person or to participate in a Skype/live-video interview remotely, instead

requesting only an interview by telephone. *Id.* at p. 3. She was applying for a job as an Instructor of English Composition, and was informed that part of the interview process was a sample teaching presentation which might not be effective over the telephone, and Dr. Tudor still declined to appear in person or via video conferences. *Id.* at p. 4. Dr. Tudor refused multiple attempts from Holly Newell at SCC to aid in setting up video conferencing. *Id.* According to the documentation obtained in this litigation by subpoena from SSC, Dr. Tudor seemed good on paper to SSC reviewers, getting the highest pre-interview score of the twenty applicants, but then had the poorest interview score of the six applicants who actually spoke with the reviewers. (*See SSC Documents*, attached as Exhibit 14). The SCC Interview Committee offered terms like "not engaging," "monotone," "disappointing," and "lacked energy" to describe Dr. Tudor's presentation. (Ex. 13 at p. 5).

Just as Dr. Parker (Tudor's trial expert on tenure) was impressed with Dr. Tudor on paper, (though never having observed her in a teaching or interview setting), the SSC reviewers thought her written application submissions were strong. But, Dr. Tudor then failed to inspire confidence as a potential classroom teacher in a live setting, interacting with human beings. Dr. Tudor ended up ranked sixth among the six applicants who were actually interviewed, and SSC did not hire her, meaning that at least five (5) other applicants in 2017 were better qualified over all to teach at SSC (in that institution's opinion). Dr. Tudor asks this Court to award her something that she has repeatedly demonstrated she cannot, and will not, ever merit on her own. As evidenced at trial, Dr. Tudor was given the opportunity to withdraw her tenure application so she could strengthen her publication and service, but she refused. Her refusal is very telling of her

lacking abilities, and her lack of commitment to excelling in higher education. She knew she was unable to strengthen these areas in which she was deficient, regardless of how much time she was given. She knew she would not be able to accomplish what was being asked of her, as she repeatedly demonstrated at Southeastern, at Collin College, and in the minimal efforts she put forth to obtain future employment upon her non-renewal at Collin College. Dr. Tudor is asking this Court of one person to sit as a super-tenure committee, something courts in the past have been loath to do, as set forth more fully, below.

PROPOSITION II: REINSTATEMENT IS NOT FEASIBLE; TENURE IS UNWARRANTED.

While the Court may not ignore a factual issue explicitly or implicitly resolved by the jury, the Court must construe the verdict in conjunction with the instructions the jury received and the evidence that the parties presented to the jury. *LG Electronics USA., Inc. v. Whirlpool Corp.,* 790 F.Supp.2d 708 (N.D. Ill. 2011) (citing *Bartee v. Michelin N. Am., Inc.,* 374 F.3d 906, 912-13 (10th Cir. 2004)). In this case, the jury made no finding as to whether Defendant University would have retained Plaintiff in the absence of discrimination, much less granted her tenure, nor did Plaintiff present any evidence to support such a finding.

According to Dr. Tudor, reinstatement is a preferred remedy. However, reinstatement is not an absolute right. *E.E.O.C. v. Prudential Federal Savings and Loan Ass'n*, 763 F.2d 1166 (10th Cir. 1985) cert. denied 474 U.S. 946, 106 S.Ct. 312 (1985). "Reinstatement . . . may not always be possible." *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). To determine if reinstatement is appropriate, courts conduct a fact-based assessment of feasibility. *See Greenbaum v. Svenska Handelsbanken*, 979

F.Supp. 973, 986 (S.D.N.Y. 1997). (Reinstatement "is an equitable remedy whose appropriateness depends upon the discretion of the court in the light of the facts of each individual case.") (quoting *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F.Supp. 919, 926–27 (S.D.N.Y. 1976)); *see also Zakre v. Norddeutsche Landesbank Girozentrale*, 541 F.Supp.2d 555, 570 (S.D.N.Y. 2008) ("[R]einstatement may be denied where the plaintiff's employment term would have already ended by the time of judgment, where reinstatement would displace an innocent third party, or where the[ ] employer-employee relationship may have been irreparably damaged." (internal quotation marks and citations omitted)). Dr. Tudor acknowledges in her brief that infeasibility is a proper ground for denying a plaintiff's request for reinstatement. While reinstatement might be a preferred remedy, "where it is not feasible, a plaintiff will be entitled to front pay." *Thornton v. Kaplan*, 961 F. Supp. 1433, 1437 (D. Colo. 1996) (citations omitted). "An order of reinstatement and an award of front pay are mutually exclusive remedies in this circuit." *Thornton*, *citing Anderson v. Phillips Petroleum Co.*, 861 F.2d 631, 637 (10th Cir.1989). "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 possible." *Id.* at 1437.

In the present case, the hostility between the parties is significant. What hostility may have existed in the first place has certainly been exacerbated by the protracted litigation. The discovery and motion practice engaged in by the former-Plaintiff, United States of America, in conjunction with Dr. Tudor's personal counsel, bordered on abusive, and only deepened pre-existing feelings of hostility and distrust. The relationships on campus suffered as a result of the side-choosing engaged in by university employees even

before Dr. Tudor's separation. The current Chair of the department, Dr. Prus, testified that Dr. Tudor's return to campus would not be beneficial to the students, the department, or the university. Further, there is not an available slot or budget line into which Dr. Tudor could be reinstated. There is no gap of classes not being offered, or a similar situation in need of an additional professor (tenured or otherwise). (*See Declaration of Dr. Randy Prus,* attached as Exhibit 15).

Dr. Tudor's demonstrated inability to address work conflicts without resorting to crying discrimination, (as evidenced by her accusations and filings both at Southeastern and at Collin College), mean that Dr. Tudor would bring to campus the kind of professional radioactivity that will make each situation involving her a powder keg on the edge of explosion. As a brief reminder, Dr. Tudor has accused the following colleagues of discrimination: Dr. Lisa Coleman, Dr. Lucretia Scoufus, Dr. Doug McMillan, Dr. Claire Stubblefield, Dr. Larry Minks, the entire RUSO board, former RUSO general counsel Charles Babb, Dr. Donald Weasenforth, not to mention the Collin College students whom Dr. Tudor accused of discrimination, after providing them with poor class management, confusing instruction, and public humiliation before their peers. Dr. Tudor should not be reinstated.

Of course, what Dr. Tudor really wants is reinstatement *with tenure*. As the *Thorton* court aptly noted, "the actual remedy sought by plaintiff, reinstatement with tenure, would entangle this Court excessively in matters that are left best to academic professionals." *Id.* at professionals. 1439-40 *citing Gutzwiller v. Fenik*, 860 F.2d 1317, 1333 (6th Cir.1988). As the Sixth Circuit recently said about *Gutzwiller*, "a court must not sit as a 'super tenure

committee.'" *Seoane-Vazquez v. Ohio State Univ.*, 577 F.App'x 418, 432 (6th Cir. 2014). Moreover, "federal courts have traditionally been wary of interfering with academic tenure decisions." *Ford v. Nicks*, 866 F.2d 865, 875 (6th Cir.1989). This sentiment has been echoed in other circuits. For example, "we do not sit as a super tenure review board," *Roebuck v. Drexel Univ.*, 852 F.2d 715, 731 (3d Cir. 1988). In fact, a significant body of case law emphasizes that courts do not sit as "super-tenure committees" and may not readily substitute their judgment for that of a university. *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir.1991); *Jiminez v. Mary Washington* *31 Coll., 57 F.3d 369, 376-77 (4th Cir. 1995); and *Gutzwiller*.

In *Thonton v. Kaplan,* the District Court of Colorado noted that awarding tenure in a Title VII case "is a 'significantly more intrusive remedy than remedies ordinarily awarded in Title VII cases, such as reinstatement or seniority, because a judicial tenure award mandates a lifetime relationship between the University and the professor." 937 F. Supp. 1441, 1449 (D. Colo. 1996) (*citing Brown v. Trustees of Boston University,* 891 F.2d 337 at 359 (1989). That type of intrusion is not warranted here because the would-be tenured professor, Dr. Tudor, has demonstrated over the last six (6) years the same lack of promise noted by Dr. Randy Prus during the 2009-10 tenure and promotion process. Dr. Tudor's miserable work history, service, and scholarly production since separating from Southeastern warrant against any impulse to intrude in such a significant way as to award tenure. Dr. Tudor invited a jury to ignore these things (or remain wholly ignorant of them), and focus on her personal struggle as a transgender person. But one's transgender status

does not, *per* se, merit protection under Title VII, nor does it mean entitlement to a tenured job, despite performance problems. Reinstatement and tenure should be denied.

PROPOSITION III: DR. TUDOR'S ONGOING, AND DEMONSTRATED, LACK OF SCHOLARSHIP AND SERVICE CAUTION AGAINST EITHER REINSTATEMENT OR TENURE.

Dr. Tudor claims to be an excellent scholar in her field, but has apparently published nothing in the last six (6) years. On March 25, 2016, Dr. Tudor submitted an application for an Assistant Professor of Humanities position at Rogers State University ("RSU"), in Claremore, Oklahoma. Her application materials were submitted via electronic mail to Mrs. Kristi Mallet at RSU. (*See Email of Friday, March 25, 2016 and eight (8) attachments, from Dr. Tudor to Mrs. Mallett,* attached as Exhibit 16). Included amongst the materials in her application, Dr. Tudor included zero (0) documents attached showing any of her work at Collin College. Bizarrely, Dr. Tudor's application letter was dated "24 February 2012," despite being submitted in March of 2016. *Id.* at p. 2. Dr. Tudor's CV submitted with her application to RSU in 2016 showed no work experience past 2011, despite the fact that Dr. Tudor had been working at Collin College since 2012. Both her CV and her application letter reveal what is, at best, Dr. Tudor's sloppiness and lack of attention to detail, and at worst, her deliberate deceptiveness and lack of honesty. With regard to scholarship specifically, Dr. Tudor's CV submitted to RSU in 2016 showed zero (0) publications since 2012, a year in which she apparently had a single article accepted for publication that was "pending." Based on a search performed by the undersigned, Tudor's 2012 article was a six-page article published in the January 2012 edition of the "ASEBL Journal." Thus, the article necessarily must have been written in 2011 or some time prior to 2011, and

according to Dr. Tudor's application submissions in March 2016, that was the last thing of any kind she published.

Dr. Tudor's scholarship, unlike perhaps teaching or even service, does not require her to have a full-time position anywhere, at any college, university, or high school. She could perform research and then write articles from any place on Earth that has an internet connection. And yet, over the past six (6) or so years, Dr. Tudor has published nothing. This is telling not only of Dr. Tudor's current qualifications to be a full-time university professor, but also of her promise and potential as a future employee and professor. If she has published anything, there can be no good reason for not telling a prospective employer about it 2016. This is exactly one of the considerations Dr. Randy Prus mentioned during his testimony in open court. In 2009-10, Dr. Tudor simply did not show the promise for future success that Dr. Prus wanted to see, and that Southeastern deserved. The years since Dr. Tudor's denial of tenure have only confirmed Dr. Prus' professional, academic evaluation.

As to service, Dr. Tudor's job application submissions demonstrate the same lack of service to the community and to her field. Dr. Tudor's CV submitted in March 2016 shows no service with committees, journals, think tanks, scholarly organizations, or even work with service-based organizations like community groups, tribal organizations, churches, youth groups, or civic entities. In short, Dr. Tudor has continued to demonstrate the lack of promise presaged by her poor work performance at Southeastern, and as aptly observed by Dr. Prus during the 2009-10 tenure and promotion process. Whether or not Dr. Tudor was ready and qualified for tenure in 2009-10 is debatable by the parties. However, not a

single witness that reviewed Dr. Tudor's application at the time it was submitted testified she was qualified. Every witness (Dr. Scoufos, Dr. Prus, Dr. McMillan and Dr. Spencer) all testified she did not meet the service and publication requirements, or that her portfolio of work was weak. While Dr. Cotter-Lynch (who testified that she never actually saw Tudor's tenure portfolio) thinks Tudor was ready, Dr. Prus and others testified Tudor was not. However, what is not debatable now is that Tudor is not ready for, or worthy of, either reinstatement or tenure today. To turn her loose on a student population, workplace, and university already vulnerable to insufficient funding and resources, as well as alignment divides within the institution, would only exacerbate the situation for all involved, likely set up Dr. Tudor for continued failure, but most certainly set her would-be students up for an education that fails to meet their needs. Dr. Tudor should be denied reinstatement and tenure.

PROPOSITION IV: MONEY

Dr. Tudor does not specifically ask this Court to award back pay, but does argue for "front pay for the period of time between the entry of the verdict and the date Tudor is reinstated." [Doc. 268, p. 9]. This request should be denied. Dr. Tudor found employment after leaving Southeastern. She was hired at Collin College, and earned salaries comparable to, or higher than, what she was paid at Southeastern. That is undisputed. The dispute is whether or not Dr. Tudor properly mitigated her own damages. She did not, and that is not the fault of SEOSU or RUSO. Dr. Tudor was not able to demonstrate work product sufficient to maintain her employment at Collin College. But for her own failures and deficiencies, she would still have that job today.

To begin with, plaintiffs securing equal or greater pay through subsequent employment are not entitled to back pay. *Blum v. Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987). Back pay terminates when the plaintiff begins earning higher wages at his or her new job than he or she earned (or would be making) at the old job from which he or she separated. *Stephens v. C.I.T. Group Equipment Financing, Inc.* 955 F.2d 1023, 1029 (5th Cir. 1992). Back pay is typically reduced by any interim earnings (such as those earned by Tudor at Collin College), regardless of the type of work involved. *Merriweather v. Hercules*, 631 F.2d 1161 (5th Cir. 1980). Dr. Tudor's request for front pay now, after having lost her job teaching at a community college, (where she was earning pay comparable to that at SEOSU), is yet another attempt by her to have someone else fix deficiencies of her own making for her. This Court should not be taken down that path. Dr. Tudor asks for a front pay award of pro-rated portion of $57,091, but she was actually earning ***more*** than that during her 2014-15 year at Collin College. That year, she made $58,022 (2014-2015). (*See* Ex. 6 at CC 25 cited above). Again, Dr. Tudor's inability to keep a job should not affect SEOSU and RUSO's entitlement to the full mitigation of damages warranted by Tudor's finding other employment in the first place. Any final award bestowed upon Dr. Tudor should have deducted from it the salaries she earned at Collin College, and any back pay should be limited to the time between her separation from SEOSU in 2011 and when she started working at Collin College in 2012.

Additionally, regarding the jury verdict, the statutory cap on damages, and related cost and fee issues, Defendants anticipate submitting a separate motion for remittitur within the appropriate deadlines after this Court imposes the final verdict, based on

Tudor's position. Finally, Defendants strongly disagree that there was any discrimination or retaliation. This will be appealed.

CONCLUSION

Dr. Rachel Tudor convinced some people at Southeastern Oklahoma State University to hire her in 2004. In the ensuing thirteen years, she's only been able to convince one entity to hire her: Collin College. Legitimate concerns at SEOSU over Dr. Tudor's lack of promise of future success and contributions were drowned out by Dr. Tudor's howls of discrimination, and the accusations she cast about at her colleagues, administrators, and students. Dr. Tudor's most recent work history, job performance, and her ability to interact with students and colleagues in a professional way clearly show that she should not be teaching in higher education. At this point, reinstatement of Dr. Tudor to a classroom of students is both unwarranted and unwise. Sending her back to a department divided over her is a recipe for future litigation. Forcing a university and the State of Oklahoma into a condition of servitude by giving Dr. Tudor tenure at this point would be a waste of taxpayer resources and contrary to common sense. The State of Oklahoma asks this Court to deny Dr. Tudor's requests for reinstatement and tenure.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December 2017, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I hereby certify that on November 19, 2018, I electronically transmitted a copy of the foregoing Appendix to the Clerk of the Court by using the ECF System for filing and automatic service of Appendix to all counsel of record herein.

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