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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Exhibit 1

Language, Literature, and Interdisciplinary Studies (LLIDS)
ISSN: 2457-0044

Exiles in Our Own Land: Native American Novelists

Rachel Tudor

Today I couldn't handle the pain of being an American Indian—Melanie Fey (Dine); As Indigenous women writers and artists we are continually trying to exist, live, and love in a world that doesn't always show its love for us—Tanaya Winder (Duckwater Shoshone); Even during a time of reconciliation, Indigenous people are faced with having to defend their identities from being mocked, used as a trend or form of entertainment every single day—Jessica Deer (Mohawk); As an Indigenous person, I have to escape in order to survive, but I don't just escape. I hold this beautiful, rich Indigenous decolonial space inside and around me—Leanne Simpson (Michi Saagiig Nishnaabeg) from #NotYourPrincess (2017).

Native Americans experience a sense of separation from other Americans because we fail to subscribe to the myth of America as an immigrant nation. Many of us live with a feeling of uprootedness because our people were relocated at gunpoint from our ancestral homelands and we often have to migrate to urban areas for employment. We experience a sense of foreignness when we try to explain our cultural values to our neighbours. In mainstream American literature and culture, we are always portrayed as the Other—from sensationalized "Captivity Narratives" to Frederick Jackson Turner's paradigmatic "Frontier Thesis" to Hollywood's *The Searchers*—Americans define themselves by their war against us.

Our sense of being exiles in our own land is institutionalized in American master narratives about nation, race, class, gender, language, and sexuality. Colonial and Neocolonial definitions of these fundamental ontological and epistemological concepts constitute a ubiquity of oppression by the dominant classes. Native American authors, however, have created a form of novelistic dialogue that challenge these dominant conceptualizations and expose them as mere forms of enforced cultural hegemony. In addition, Native American authors use the novel as a tool to facilitate their own affirming self-transformation and to gestate the seeds of self-transformation in fellow Native American readers while simultaneously welcoming non-Native readers to become "woke."

The novel, as defined by Lukács, is the form of narrative that develops in a culture after "beauty" ceases to be "the meaning of the world made visible" (*Theory* 34), before the soul

"knows it can lose itself, [before] it thinks of looking for itself" (30). Specifically, "what is given form [in the novel] is not the totality of life but the artist's relationship with that totality, his approving or condemnatory attitude towards it" (53). Unfortunately, authors cannot create a new totality with their words, "however high the subject may rise above its objects and take them into its sovereign possession, they are still and always only isolated objects, whose sum can never equal a real totality" (53). For Native Americans living in this locus (contemporary North America) and time (the present) "loneliness has become a problem unto itself, deepening and confusing the tragic problem and ultimately taking its place…such loneliness is…the torment of a creature condemned to solitude and devoured by a longing for community" (45). This is poignantly demonstrated in Native American authored novels by James Welch in *The Death of Jim Loney*, N. Scott Momaday in *House Made of Dawn*, Louise Erdrich in *The Round House*, Leslie Silko in *Ceremony*, and Thomas King in *Medicine River* among many others. In addition, Native American novels also often contain the characteristic quest motif, a hero who searches for meaning, for totality, that is no longer immanent (60). Significantly, the "problematic individual" and the "contingent world" are the hallmarks of the novel (78) as described by Lukács in general but particularly of novels by Native Americans.

According to Lukács, "The inner form of the novel has been understood as the process of the problematic individual's journeying towards himself…towards clear self-recognition" (80). And, "The immanence of meaning which the form of the novel requires lies in the hero's finding out through experience that a mere glimpse of meaning is the highest that life has to offer" (80). These characteristics sound remarkably like plot summaries of many contemporary Native American novels. Consequently, the real tension in contemporary Native American novels is between the integrating totality of our not too distant past, which is still a part of our living memory, and the fractured existence of our everyday lives. As a matter of fact, Leslie Silko's novels *Ceremony* and *Almanac of the Dead* may even be termed “post-tribal epics,” ala Giorgio Mariani, because they are tied to some other-world totality.

However, many Native American novels emphasize a historical component that allows the Native American reader to reflect on their lost homes and civilization as well as exposing the real causes of their unarticulated feelings of loss and alienation in concrete and tangible ways. Thus, allowing individual Native readers to become conscious of the true origins of their anomie. The resulting detachment from dominant cultural discourse enables Native readers to critique oppressive systems and critically reflect on their sense of self, self-worth, and liberate themselves from self-destructive ideation. Ideally, the “woke” reader will generate their own liberating counter-narratives from their own particular vantage point. Non-Native readers of indigenous novels will also be liberated from an irrational and ahistorical conceptualization of American civilization and be able to be full partners and friends in the land and conceptual space we share.

In order to understand Native American literature, it is necessary to be aware of and listen to Native American literary critics. It is not only counterproductive but also injurious to try to understand and explicate Native American literature using conventions, practices, assumptions, and techniques that have long served to oppress the very voices and narratives that constitute Native American literature. For example, non-Native literary critic Christina Patterson agrees

with Louise Erdrich's *The Last Report on the Miracles at Little Horse* that "clearly we are in the realm of magical realism; where the wilder reaches of Catholicism mingle with the hopes and dreams of a community whose traditions are in disarray and where the search for rigid classifications—saint, sinner, or miracle—is doomed to collapse in the face of messy reality" (9 March 2002). Well, she does get some things right: Erdrich's novel does address a community in disarray and her narrative does challenge the rigid classifications of the dominant society. However, the critical template of magical realism is anathema to understanding the text on its own terms. Magical realism is a form of literary criticism that colonizes instead of explicates.

To understand why magical realism is a form of literary criticism that colonizes instead of explicates, we have to take a look at its origin. While many articles and books have been written on the topic of magical realism, and some are not as racialist as others, it is important to keep in mind that the atavistic origin of magical realism is found in a seminal text on the subject by Amaryll Chanady published in 1985. In *Magical Realism and the Fantastic: Resolved Versus Unresolved Antinomy*, Chanady asserts that a dichotomous way of thinking is expressed in magical realism, which she juxtaposes as the so-called "primitive," "archaic" American Indian mentality and the mentality of the "erudite," "rational," "empirical," "super-civilization" of Europe.

Chanady's racialist theory of narrative also assumes an exclusive white Western reader for magical realist narratives. White reader's sensibilities, she asserts, will not be challenged because "the reader considers the represented world as alien" and because of the "impossibility of complete reader identification in the case of a Magico-Realist work about American Indians" (163). She claims that "while the [white] reader accepts the unconventional world view [of the American Indian], he does so only within the contexts of the fictitious world, and does not integrate it in his own perception of reality" (163). In critical parlance, Chanady is referring to the focalizer in narrative. In magical realism, for example, the focalizer is European: "The Indians are the object, not the subject, of focalization" (35).

It is important to always ask, "Whose point of view is being expressed?" Chanady is correct to note who a reader is supposed to identify with but is in error in assuming that a non-Native reader will be unable to identify with a Native American character. In Native American novels "Indians" are the subjects, not the object, of focalization. Thus, it is erroneous to use the critical template of magical realism with its attendant racialist suppositions to describe or interpret novels by Native Americans. As a matter of fact, the term "magical realism" may only accurately be used to describe a text about Native Americans authored by non-Indians and wherein the indigenous characters are presented as objects instead of subjects. As Mohawk author Jessica Deer writes in #NotYourPrincess, every single day "indigenous people are faced with having to defend their identities from being mocked, used as trend or form of entertainment" (Charleyboy 61).

M. Annette Jaimes' *The State of Native America: Genocide, Colonization, and Resistance*, suggests that denying the subject status of indigenous people is why acclaimed and Nobel Prize winning non-Native authors of magical realism (strictly defined according to Chanady's paradigm) have ignored and at times even facilitated the destruction of indigenous

people and communities. How did Colombian novelist Gabriel Garcia Marquez fail to note the destruction of indigenous communities by the Colombian government? Where are the crimes Mexico committed against indigenous people documented in Mexican writer Juan Rulfo's oeuvre? More damning is Guatemalan literary giant Miguel Ángel Asturias, who as an official of the Guatemalan government, participated in the razing of Maya villages. Many of Chile's Isabelle Allende's fans may be surprised to find her labeling the indigenous population of her country as "placidly evil" (430-2). Edward Said warns that the "fictional myopia of the real-life suffering of real-life people is simply a continuing white tradition" (55-62).

Although Chanady claims magical realism to be the product of the synthesis of the dialectical relationship between two civilizations, she assumes an exclusive non-Native audience and that Native people will be portrayed as objects, not subjects. In the twenty-first century these racialist, unscientific, and irrational aspersions as a foundational theory of literature is simply unacceptable. Because of the inclusion of non-white, non-Western writers and scholars we now know that all people are capable of rational and irrational thought, rational and irrational behavior, and empirical and metaphysical reasoning. No longer may people and races be said to be stereotypically reduced to one or the other. In fact, Chanady's characterization of mental capabilities according to race may be characterized as not simply racialist but racist and we cannot use a template based on assumptions about the superiority of one race and civilization over another to explicate Native American texts or non-Western texts. The template and the resulting interpretation are not only erroneous, but underpin dominant concepts that enforce a sense of exile and inferiority on Native American readers while reinforcing the non-Native readers' sense of superiority and dominance.

I am not proposing that we dismiss Western literary criticism in totality. Just as I am not suggesting that Native American storytellers reject the novel for more traditional forms of storytelling. For instance, some of Chanady's critical analysis is not based on race or presumed civilizational hierarchies and is, indeed, helpful. She writes: "The mystery of life does not exist in objective reality, but in the subjective reaction to and interpretation of the world…the amalgamation of realism and fantasy is the means to an end, and this is the penetration of the mystery of reality" (27).

A number of Native American literary critics have proposed a number of ways to really look (non-myopic) at indigenous novels. These are not, as a body of texts, a rejection of rigorous critique or shunning of the integration of scientific literary analysis. Indeed, they, like the Native American novel, are a syncretic cultural manifestation that is dialogical and original, a balm to the centuries-old injuries of the indigenous civilization currently sharing America. For example, Native American authors, storytellers and critics, generally share the mimetic school of literary criticism's view that literature has the power to heal and that moral values that create a sense of mutual care and responsibility through generating empathy and understanding of the cares and pains of other knowing selves are a necessary component of literature. It does this by embracing a realist and subjective aesthetic, the application of realistic historical and experiential sensibilities, and the careful listening for voices embedded in the narrative. Likewise, many Native American authors embrace the postmodern aesthetic of suspending disbelief, fabulation, and an intransitive form of writing inasmuch as it does not really resolve or come together in any

finite or circumscribed way. In addition, the postmodern is multi-vocal and polyglot, rejecting any overriding single conception of reality or being in favour of a process of constant discovery and re-creation—a reflection of the incredible diversity of indigenous America.

Native American novelists embracing a spirit of constant discovery and re-creation is necessary for a revitalization of American literature. American literature and criticism are sorely in need of new points of views and ideas. As early as 1967 John Barth claims in his essay "The Literature of Exhaustion" that conventional forms, genres and modes, are "used up" and their possibilities exhausted. Unfortunately, his essay has been widely misinterpreted to mean that literature itself is exhausted. However, as he subsequently explained in his 1979—admittedly, a long pause—essay, "The Literature of Replenishment," he simply means that new forms of writing, specifically what he terms postmodernist fiction, need to be developed. It is time to welcome America's indigenous authors to participate. Bakhtin wrote in *Formal* that "New means of representation force us to see new aspects of visible reality"(134). Unfortunately, Native American contributions have yet to be commonly accepted or used by non-Native scholars and rarely, if ever, used by mainstream book reviewers. And, how can Native American contributions to literature be fully appreciated if there is not a corresponding working theory of criticism by which to evaluate, interpret, and appreciate the texts?

Harold Schweizer's book *Suffering and the Remedy of Art* encourages authors and readers to reconsider the aesthetics of the novel. It is about "wounds that will not close despite the sutures, scarring, and bandaging, the patchwork and layering of literary technique" (1). Although Schweizer does not examine Native American literature per se, Native American novels demonstrate the power of his thesis. As he explains: "In the experience of suffering the ideology of objectivity, the claims of reason and knowledge, are called into question. Philosophical distinctions of body and spirit, sensation and intellect, the universal and the particular, the physical and the metaphysical, no longer apply" (2).

Also consider, for example, two novels by Pulitzer Prize winning author N. Scott Momaday (Kiowa): *House Made of Dawn* and *The Ancient Child*. *The Ancient Child* is the chronicle of a man's journey into madness, facilitated by a world of broken connections and other wounded people, particularly, a tragically wounded young woman, Grey. And, Abel, the protagonist in *House Made of Dawn*, is alone and silent at the end of the novel, just as he is at the beginning: "He was alone and running on… There was no sound, and he had no voice; he had only the words of a song" (Momaday, *House* 191). Abel may have the words to the song of healing, but pointedly he is unable to articulate them, the word remains unspoken. Many non-Native authors, however, remark on Abel and Set's respective triumphs—when the characters are, in fact, tropes of the idea that the average Native American can triumph in America.

Abel's (*House Made of Dawn*) and Set's (*The Ancient Child*) underlying problem is that they do not know who their fathers are and, consequently, do not know who they are either. Critics have long neglected the fact that the father is absent in almost every contemporary Native American novel, which, it should be noted, stands in stark contrast to the stereotypical American novel in which it is not the absent father, but a dominating father that is ubiquitous. Thus, *The Ancient Child* and *House Made of Dawn* are really novels of suffering, but not futile suffering if

it awakens a reader's consciousness and conscience. Novels of suffering may perform their function of raising consciousness by reducing the "distances among writer, text, what is written about, and finally, the reader, [so they] all converge on a single point " (Lang xii).

N.Scott Momaday cites his mentor Yvor Winters' assertion that: "Unless we understand the history which produced us, we are determined by that history; we may be determined in any event, but the understanding gives us a chance" (Schubnell xvi). Schubenell describes Momaday's writing as "a way to create an understanding of self and history through language" (xvi). On another occasion, Momaday claims his "authority to write about the Indian world" is "based upon experience" (Isernhagen 52).

Native American authors often provide non-Native focalizers for non-Natives that embrace the universality of many of our experiences, particularly experiences of suffering. For example, Milly, in *House Made of Dawn*, is a fully-developed character with a voice and an attitude. In many ways she is the white, female equivalent of Abel. She has her own broken connections. Like Abel, she, too, has lost her father and mother and child (granting for the moment that Peter is Abel's child). She grew up watching her father "beaten by the land" and daily going into the fields "without hope," until the day he put her on a bus and told her goodbye, and she never saw him again (114-5). And, then she lost her four-year-old daughter, Carrie. As Schweizer explains, in his book's thesis "the experience of suffering the ideology of objectivity, the claims of reason and knowledge, are called into question." (2).

While there is truth to Schweizer's conclusion about suffering being universal, suffering is not necessarily individualized and ahistorical—it is also communal and historical. For example, the passage from the beginning of Louise Erdrich's (Anishinaabe) *Tracks* strikes a familiar chord with many Native Americans because it is part of our shared history:

> We started dying before the snow, and like the snow, we continued to fall. It was surprising there were so many of us left to die. For those who survived the spotted sickness from the south, our long flights west…then a wind from the east, bringing exile in a storm of government papers…by then we thought disaster must surely have spent its force, that disease must have claimed all of the Anishinabe that the earth could hold and bury. But the earth is limitless and so is luck and so were our people once (1).

Likewise, Linda Hogan (Chickasaw) describes the phenomenon eloquently in her novel *Power*: "History is the place where the Spanish cut off the hands of my ancestors. The Spanish who laughed at our desperation and dying, and I wish it didn't but history still terrifies me so that I dream it in dreams with skies the color of green bottle glass" (73).

Unflinching realism is vital in Native American novels. It is only through realism that readers are able to "accept the concept of the complete human personality as the social and historical task humanity has to solve; only if we regard it as the vocation of art to depict the most important turning-point of this process with all the wealth of the factors affecting it; only if

aesthetics assign to art the role of explorer and guide, can the content of life be systematically divided into spheres of greater and lesser importance" (Lukács 7).

According to Bakhtin a shared view of the world between author and reader, the realist aesthetic or verisimilitude, is then the underlying goal of all socially relevant fiction (135). Jessica Deer (Mohawk) writes, "the highly inaccurate and dehumanizing representations of Indigenous peoples in sports, on television, on the runway, or in costumes on the shelves of a Halloween store shape much of what people know and think about us...and that affects how society understands the real social, political, and economic issues we face" (Charleyboy 61). In other words, meaning matters for the author, the reader, and society. The question then becomes a matter of whose meanings and of what matters. Rodney Livingstone writes that for Lukács what we see is appearance, whereas the great novelist reveals the driving forces of history which are invisible to actual consciousness (12). In other words, it is the author's job to enable the reader to see through the "veils of reification" that blind one's vision of one's true self and one's true relation to other selves.

Lukács's form of realism involves a genuine love for humanity and a thirst for life. For example, he writes that without "love for humanity and life in general, something that necessarily involves the deepest hatred for a society, classes and their representatives who humiliate and deform human beings, it is impossible for any genuinely major realism to develop" (*Essays* 148). It is also vital to remember that "the tremendous social power of literature consists in the fact that it depicts the human being directly and with the full richness of his inward and outward life" (*Essays* 143). In doing so, a good critic will, in Momaday's words, "enable us to better understand literature," and "show us things that we might not see for ourselves" (Isernhagen 58).

The type of realism that Lukács advocates and those Native American authors aspire to is impossible without including numerous authentic and embodied voices in the text. Bakhtin's term for this is Heteroglossia. Chickasaw poet Linda Hogan explains this concept in her poem, "Tear": "I remember the women/Tonight they walk/out from the shadows/with black dogs/children, the dark heavy horses/and the worn-out men/ They walk inside me. This blood/is a map of the road between us/I am why they survived . . . I am the tear between them/and both sides live" (Charleyboy 14). These voices, sometimes referred to by Bakhtin as languages, are the result of real, lived experiences, personal, communal, historical, that culminate in various particular world-views that are expressed in the words, syntax, metaphors, grammar, and tone of a speaking subject that is, more or less, conscious of his or her subjectivity, or beingness vis-à-vis other beings.

Native American novels are also frequently polyphonic. Polyphony is closely related to heteroglossia, even sometimes confused with heteroglossia. Polyphony refers to a plurality of consciousnesses (Morson 238), not simply languages. In addition, these consciousnesses represent the lived life experiences of embodied voices. Hunkpapa Lakota author Tiffany Midge expresses the concept this way, "When I think of a model of Indigenous womanhood, I immediately think of my mother: a woman who lost her own mother when she was sixteen, became a widow at twenty-one with a baby girl, and no education or prospects…I also think of

my grandma Eliza, a woman who grew up dirt poor, who scraped out a living, her clothes threadbare through long, cold winters spent eating the same meal" (Charleyboy 67).

N. Scott Momaday (Kiowa) explains a similar phenomenon as a process of learning, sometimes long after publication, "what's really going on" (Abbott 30). He explains: "When a man is writing, he is operating on two levels: he writes out of his consciousness and out of his unconsciousness. And very many times he will not, after the fact, know all about his writing" (30). He explains in a later interview with Gretchen Bataille that while writing there are things he understood "on one level and ha[s] come to understand on a different level and will again in the future understand on yet another level" (63). Along these same lines, Momaday consistently refuses to answer what happens to Abel after the end of the novel *House Made of Dawn*. His typical response is, "your idea is as good as mine" (Bonnetti 140): indicating that Abel has an existence independent of the author which somehow occurs through the dynamic process of storytelling (Bonetti 131).

False consciousness or inauthentic voices are also a concern for Native American authors. For instance, Greg Sarris (Miwok) warns of his struggle with a false consciousness in *Keeping Slug Woman Alive*, a Fanonian (Frantz Fanon's *The Wretched of the Earth*) consciousness of internal colonization manifested through self-destructive behavior and self-loathing. Hayles worries that the "disintegration of the subject [authentic consciousness] will precipitate a crisis in representation which makes a traditional novel impossible to write" (*Chaos* 256). However, we should also keep in mind what Sholes notes in *Structural Fabulation*, "in its cognitive function, fiction helps us to know ourselves and our existential situation" (5).

The realism of Native American novels gives added poignancy to the so-called magical element which is not magical at all. As explained, use of the term 'magical', as opposed to the more accurate ascription of the considered use of postmodern sensibilities and strategies by Native American authors to subvert hegemonic cultural discourses in reference to Native American history, ontology, and epistemology, is fallacious and harmful. N. Katherine Hayles warns us that "theories about language which claim that it is free to be interpreted in any way whatsoever are the allies and precursors of state terrorism" (*Chaos* 126). Native Americans have a long experience with state terrorism and it is known as colonialism.

Critics who fail to make the distinction between magical realism and postmodern sensibilities fail to recognize the conceptual ecology of Native American novels. According to Stanislaw Lem a "conceptual ecology" is one in which within any given conceptual space, which he calls a topology, certain forms are facilitated while others are suppressed. The "particularities of history and personality determine which actually appear and which are repressed. All forms that are realized…are linked to each other by the common attributes that define the space" (Hayles, *Chaos* 185). The contemporary Native American novel is an emergent form and the product of a literary community with a common socio-historical experience and facing similar epistemological and ontological challenges to their survival.

Instead of labeling Thomas King's (Cherokee) *Green Grass, Running Water* as magical realism, let's take the postmodern anti-realist elements in the novel seriously. If we do, we see

that his novel reveals the absurdity of life, of history; moreover, we often cannot make sense of them, and the harder we try, the greater fools we make of ourselves. For instance, just as the witnesses' differing descriptions of the tricksters vary from observer to observer to observer in *Green Grass, Running Water*, our perception of reality and anti-reality varies. Despite the posturing and polemics of King's characters, in the end chaos and uncertainty, angst, and purposelessness appears to rule the universe and drives what we call history. It is comic only in the sense that it is a maniacal laugh into the maw of the abyss. Similarly, Linda Hogan's (Chickasaw) Pulitzer Prize nominated *Mean Spirit* contains a minor character that the reader is asked to believe is a ghost. However, *Mean Spirit* is not a ghost story. The ghost is there to present a meta-textual perspective on historical events.

Unfortunately, Native American authors are often exiles from the dominant literary community of America. Literary critics and fellow novelists who should be our allies are sometimes our enemies. For instance, in W.J. Stuckey's *The Pulitzer Prize Novels: A Critical Backward Look*, Stuckey claims Momaday was awarded the Pulitzer Prize, not because of merit, but because 1969 "was not a year remarkable for good fiction" (226). He does not cite any of the committee members to support his malign claim. Stuckey's explication of the novel reduces the symbolism, the allegorical functions, and the interpersonal implications of the characters and actions to one single, simple metaphor with the purpose of blaming the white man. Stuckey claims that the scene between Abel and the "white woman" (tellingly, Stuckey does not ever use her name) is an "obvious" metaphor for the corruption of Indians by white society. However, Abel has affairs with two white women: Angela Grace St. John and Milly. Although Angela Grace St. John exploits Abel, Milly represents a clear opportunity for Abel to make a vital, loving connection, which he lamentably fails to seize.

It seems difficult for Stuckey to imagine Momaday as anything but a simple Indian. He repeatedly uses the word "pretentious" in reference to Momaday. However, it should be noted that pretentious means pretending, make-believe, playing-at, in essence Stuckey's aspersion is not a literary one, but a pejorative personal one, one of character: Momaday is an Indian playing at being an author, he is only pretending, imitating, mimicking, being a writer.

As a Chickasaw PhD candidate I almost asked a professor to be a member of my dissertation committee who shared Stuckey's attitude. Fortunately, a white friend informed me that when he told this professor that he selected Native American literature as the focus of his studies, this professor asked him: "You are smart, why don't you study real literature?" Until these attitudes change, Native Americans will continue to be exiles in our own land. A good beginning is to accept Native Americans as equals. Take Indigenous voices and literature seriously. Invite Native Americans to be participants and partners.

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CASE NO. 15-cv-324-C

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.

DEFENDANTS AMENDED SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND REGIONAL UNITIVERY SYSTEM OF OKLAHOMA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF REINSTATEMENT, OR, ALTERNATIVELY, FOR FRONT PAY

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March 20, 2018

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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 AMENDED[1] SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR RECONSIDERATION OF REINSTATEMENT, OR, ALTERNATIVELY, FOR FRONT PAY

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), submit the following Response in Opposition to Plaintiff's Motion for "Reconsideration[2] of Reinstatement, or, Alternatively, For Front Pay"

[1] This Response is being amended to correct exhibits. The correct Exhibit 5 was inadvertently left out of [Doc. 283]. Thus, causing Exhibits 5 and 6 to be misnumbered, which is being corrected in this amended response.

[2] The Motion in question is at least Plaintiff's third (3rd) filing submitted in an attempt to convince this Court to subject the students, faculty, staff, and administration of Defendants Southeastern Oklahoma State University and the Regional University System of Oklahoma to the unwelcome and unworkable situation of Plaintiff's reinstatement.

(hereinafter "Motion"), [Doc. 279]. For reasons already argued and examined at some length, the Court should once again deny Plaintiff's request for reinstatement. For the reasons newly set forth herein, Plaintiff's reinstatement should, again, be denied. Further, the Court should deny Plaintiff's request for front pay.

INTRODUCTION

Since the last time the Court and Defendants heard from Plaintiff, she and/or agents working on her behalf have apparently manufactured supposedly new and compelling evidence in an attempt to cause this Court to doubt its multiple prior determinations regarding reinstatement and the awarding of tenure. The efforts of Plaintiff, (and her advocates), in this regard should not be rewarded. Even if some of Defendants' employees were open to Plaintiff's return to campus, those employees do not speak for Defendants on this point. Defendants strongly, and steadfastly, oppose Plaintiff's return to employment at SEOSU or RUSO.

Once again, Plaintiff seeks to present her "new" pieces of "evidence" that she chose not to present in her Motion for Reinstatement. And, yet again, Plaintiff presents in her Motion *ad hominem* attacks on the undersigned counsel for Defendants, (now simply referring to Defendants' "counsel" collectively and generically, rather than individually by name), no less than three times in her Motion, a continuation of Plaintiff's consistent insistence on infusing the litigation of this matter, (like her professional disagreements), with personal animus. Plaintiff presents in her Motion yet another set of newly-blossoming and self-serving "declarations;" one from herself and another from her admitted "close friend," both of

whom testified at length at trial and already presented similar "declarations" multiple times previously in this quest for reinstatement [Docs. 268 and 271] in the first place. The Court should not reward Plaintiff's ongoing attempts to do an end-run around the Court's orders regarding reinstatement.

ARGUMENT AND AUTHORITIES

PROPOSITION I: REINSTATEMENT IS NOT APPROPRIATE IN THIS CASE.

The Court already fully, and directly, addressed this line of Plaintiff's requests. Once again, despite the absence of any legal justification, Plaintiff asks this Court reconsider its Order denying her request for reinstatement. [Doc. 275]. Previously, on February 9, 2018, Plaintiff filed a motion in support of Reconsideration of Reinstatement. [Doc. 276]. In that motion, Plaintiff asked the Court to reconsider its determination for four alleged reasons: (1) unsupported factual findings, (2) legal holdings conflict with binding precedent, (3) equitable considerations, and (4) new evidence of scholarly productivity. Addressing the substance of Plaintiff's motion, the Court correctly noted, "Every issue raised by Plaintiff's Motion was considered and rejected by the Court in its Order denying her request for reinstatement." Accordingly, the Court denied Plaintiff's motion for reconsideration. [Doc. 278]. The Court should deny Plaintiff's second motion for reconsideration for the same reasons.

As the Court noted in its initial order denying reinstatement, Plaintiff's only evidence in support of reinstatement was the testimony/declarations of Plaintiff and Dr. Meg Cotter-Lynch. The same circumstances remain true now, and the new declarations of Plaintiff and Cotter-Lynch provide no legal support for

reconsideration of the Court's Order denying reinstatement. Once again, these "declaration" documents are replete with nothing but the declarants' personal preferences for Plaintiff's reinstatement.

Plaintiff erroneously contends there is new evidence supporting her request for reconsideration, relying solely upon the fact that Plaintiff sought permission from, and received from, the state chapter of the American Association of University Professors ("AAUP"), an opportunity to make a presentation at a state AAUP conference held on Southeastern's campus on March 10, 2018.[3] The crux of Plaintiff's argument is that by getting to publicly grind her axe about appellate processes in higher education, (under the auspices of the AAUP conference agenda), somehow refutes all of the solid legal and factual bases the Court relied upon in denying reinstatement.

Plaintiff attempts to impute to Southeastern the actions taken by the local AAUP chapter, and a few of its members arranging the conference. This is a blatant distortion of the facts. The AAUP is an independent organization and not an arm of the University, nor a part of the University's shared governance. (*Affidavit of Bryon*

[3] As of the date of drafting this Response, Defendants are aware that Plaintiff has filed a Motion to Supplement her Motion for Reconsideration of Reinstatement or Alternatively, for Front Pay [Doc. 280], in order to submit additional nonconsequential information regarding the AAUP conference. Defendant's objection to Plaintiff's request to supplement is noted in Plaintiff's motion. The night before this Response was due, Plaintiff apparently filed two more motions seeking to supplement, [Docs. 281 and 282], which the undersigned has not had the time to read, and therefore they are not addressed at all herein. In the event the Court permits Plaintiff's multiple and late-blooming efforts at supplementation, Defendants will seek leave to supplement this response at a later time.

Clark, attached as Exhibit 1, at ¶3.) The conference which Plaintiff lifts up as being so significant was only attended by forty-two (42) people, eleven (11) of whom were not even from the SEOSU campus. *Id.* at ¶4. In fact, SEOSU currently has a total faculty body of two-hundred and forty-one (241) full time and adjunct faculty members. *Id.* at ¶1. The AAUP chapter at SEOSU does not speak for the university, nor even its collective faculty. *Id.* at ¶2. With only thirty (30) members total, the AAUP chapter at Southeastern has less than 13% of SEOSU's total faculty as its membership. Finally, the invitation to speak at the conference was not extended by the University. *Id.* at ¶5. Plaintiff repeatedly argues that AAUP chapter's singular act of permitting Plaintiff to speak at the conference (a) evidences a complete lack of impediment to her return to campus, (b) reflects the entire SEOSU faculty's views, concerns, desires, and assessment of Plaintiff's achievements, and (c) directly evidences SEOSU's desire for Plaintiff to return. It is also important to highlight that Dr. Cotter-Lynch, Plaintiff's avowed "close friend," and cheerleader during this litigation, is actively involved in SEOSU's AAUP chapter, and has recently served as its president. [Doc. 279-4, ¶3]. One could likely surmise that she played a role in securing Plaintiff's presentation at the AAUP conference. Notably, although Plaintiff seeks to supplement her request for reinstatement [Doc. 280], she provides no indication of how many people actually attended her presentation to the AAUP conference. [Doc. 280-1].

SEOSU's willingness to allow the AAUP conference to take place on its campus evidences nothing more than SEOSU's hospitality to the state AAUP organization,

and SEOSU's respect and recognition of the principles of academic freedom generally, to which the AAUP is dedicated. To suggest SEOSU played any role in selecting conference presenters, or worse, that SEOSU would interfere with selections made by conference members, is outside the realm of credibility. For the reasons set forth above, as well as for the reasons set forth in Defendants' Response in Opposition to Plaintiff's Motion for Reinstatement [Doc. 270] and Defendants' Surreply [Doc. 274], Plaintiff's second motion to reconsider should be denied.

PROPOSITION II: MORE SUPPLEMENTATION IS NOT APPROPRIATE AT THIS TIME.

The manufactured and hollow "new evidence" Plaintiff proffers is irrelevant and misleading. As noted in Footnote 2, Defendants will refrain from addressing [Doc. 280] at length unless the Court is inclined to permit Plaintiff's request. In that event, Defendants respectfully request leave to fully brief that issue at a later time.

PROPOSITION III: FRONT PAY NOT WARRANTED IN THE WAY PLAINTIFF ARGUES.

In the alternative, Plaintiff argues that she is entitled to front pay in an amount in excess of two million dollars. Plaintiff sites *Abuan v. Level 3 Comm., Inc*., 353 F.3d 1158,1176-77 (10th Cir. 2003) in support of such an award, but fails to mention that *Abuan* not only cautions courts against granting plaintiffs a windfall, but also limits plaintiff's front pay award to two years. The *Abuan* court, states that, "[I]n determining whether, and how much, front pay is appropriate, the district court must attempt to make the plaintiff whole, yet the court must avoid granting the plaintiff a *windfall*." *Abuan v. Level 3 Communication*, 353 F.3d at 1176-77 quoting

Mason v. Okla. Turnpike Auth., 115 F.3d 1442, 1458 (10th Cir.1997) (internal quotations omitted) (emphasis added). Plaintiff here is attempting to procure a two million dollar windfall judgment of front pay where she has manifestly failed to mitigate her damages. Plaintiff seeks an exorbitant amount based solely on unsupported speculation.

Plaintiff consistently ignores her employment with, and eventual separation from, Collin Community College. Plaintiff's time there shows several things. First, it shows that Plaintiff was still employable in higher education, despite her having failed to get tenure, when she left SEOSU. *See* [Doc. 270-6, at CC5, CC13]. Second, it shows that she was able to receive compensation comparable to, or even higher than, what she made during her last year on campus at SEOSU. *See* [Doc. 270-6, at CC5, CC13]; *see also SEOSU Employee Transaction form dated Feb. 25, 2011 showing Plaintiff's base salary at the time,* attached as Exhibit 2. Third, Plaintiff's employment at Collin College shows that she was able to work, (at least enough so as to have her employment renewed multiple times there). *See* [Doc. 270-6, at CC16, CC19 and CC25]. Fourth, Plaintiff's time at Collin College shows that she received mixed evaluations from students ([Doc. 270-12, at CC1067-1082]) and administration ([Doc. 270-7, at CC299-307]), but that ultimately the school's administration saw fit to remove her. [Doc. 270-7, at CC307]. Ignoring these four factors will lead to an improper award of front pay.

A. The Calculation of Front Pay

The Tenth Circuit has put forth a test to determine when front pay is appropriate in *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1000-01 (10th Cir. 2005). The factors of the test, (as laid out by the Court of Appeals), are: (1) work life expectancy, (2) salary and benefits at the time of termination, (3) any potential increase in salary through regular promotions and cost of living adjustments, (4) the reasonable availability of other work opportunities, (5) the period within which the plaintiff may become re-employed with reasonable efforts, and (6) methods to discount any award to net present value.

In response to Plaintiff's request for front pay, Defendants proffer the following:

1. Work Life Expectancy:

Plaintiff baldly asserts that she would have worked until the age of seventy-five (75) at SEOSU, and therefore the Court is obligated to award her front pay for twenty-one (21) years. As the *Whittington* court points out, in calculating front pay, the court may consider all of the evidence presented at trial concerning the individualized circumstances of both the employee and employer. *Whittington v. Nordam Group, Inc.,* 429 F.3d 986, 10001 (10th Cir. 2005). Further, it is the sole discretion of the trial court to determine if front pay is an appropriate remedy. *Abuan v. Level 3 Comm., Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003) quoting *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir.1994). But, this court is not bound by Plaintiff's statement of employment longevity to age 75, which is, at best, arbitrarily

made and insufficiently supported. *See Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1001 (10th Cir. 2005) quoting *Courtney v. Safelite Glass Corp.*, 811 F.Supp. 1466, 1476 (D.Kan.1992)(Affirming a Kansas district court's statement that it was not bound by the Plaintiff's assertion of how long he intends to continue work in the calculation of front pay damages and decision to only grant front pay until the age of 65).

Plaintiff fails to point out that social security benefits become available at age sixty-two (62), and that most individuals reach full retirement at the age of sixty-six (66). (https://faq.ssa.gov/link/portal/34011/34019/Article/3732/When-can-I-get-Social-Security-retirement-benefits). Further, while there are credits for those that wait to retire until age seventy (70), the award of front pay through the age of seventy-five (75) would not only be too speculative, but grants Plaintiff a windfall judgment.

In the first case cited by Plaintiff in support of her request for a 21-year front pay award, *Passantino v. Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493, 511 (9th Cir. 2000), wherein the plaintiff was awarded twenty two years of front pay, the front pay award was only granted till the plaintiff's normal retirement age of 65. In the second case Plaintiff cites in support of her two-decade front pay request, *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125-26 (2nd Cir. 1996), the twenty year front pay award was based on that plaintiff's job expectancy through the age of 67. Plaintiff here attempts to mask her request for excessive front pay by describing it as a "conservative estimate" of earning potential. [Doc. 279, p. 15]. But in reality, Plaintiff has no law to support the exorbitant amount of front pay

requested, and at no time presented evidence to support that she would take on all of the duties she has calculated into her front pay award.

2 and 3. Salary and benefits at termination, expected promotions, adjustments:

Plaintiff's Motion presents no evidence that she took on administrative duties while at SEOSU in the six (6) years she was employed, nor that she taught overage classes during her time at SEOSU. Her history of limited service and work provides evidence that she would not have taken on additional duties. The test laid out by the Tenth Circuit is not a test that allows plaintiffs to throw any and all possible salary increases and extra duties at the wall and see what sticks. The calculation is based upon "potential increases in salary through *regular promotions*," *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1000-01 (10th Cir. 2005) (emphasis added). Even if Plaintiff would have received tenure, the evidence does not support that she should be entitled to any of the extremely speculative pay for work responsibilities she was unlikely to take based on the evidence presented at trial. Further, the calculation of speculative losses, like Plaintiff's request for retirement contributions, should be excluded from a front pay calculation. *Buonanno v. AT&T Broadband, LLC*, 313 F.Supp.2d 1069, 1085 (D. Colo. 2004)(rejecting front pay for a loss of a 401K matching program as too speculative.) To include this type of speculative loss ignores Plaintiff's obligation to seek and obtain other comparable employment, with comparable benefits.

Plaintiff's speculation and argument in this area ignores the history and facts of Plaintiff's conduct. For example, Plaintiff would have this Court assume that she

would have taught summer courses at a rate of $3,700 per course, and that she would have taught overage classes, each at a rate of $2,100 per course, per year. However, Plaintiff's history does not support that. First, Plaintiff did not always teach summer courses. In fact, in some instances, she elected to teach no summer courses at all and instead filed requests for unemployment with the Oklahoma Employment Security Commission. *OESC Documents,* attached as Exhibit 3. To put a fine point on it, Plaintiff thought it was a better use of her professional credentials and the State's resources for her to do nothing in the summertime but collect unemployment than it was for her to be in the classroom teaching or otherwise serving the university community. Plaintiff' claims she taught summer classes as available regularly, however, she has failed to produce to the Court any evidence supporting that claim.

4. Unavailability of other opportunities:

Plaintiff incredibly argues that she will be unable to find *equivalent* work to that of her employment at SEOSU. *See* [Doc. 279 at 10 and 13] (emphasis added). In her argument Plaintiff has again misunderstood the factors for the award of front pay. The pertinent factors are "the reasonable availability of other work opportunities and the period within which the plaintiff may become re-employed with reasonable efforts." *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1000-01 (10th Cir. 2005). The *Abuan* court considered Mr. Abuan's education and experience in assessing the length of time a person with Mr. Abuan's credentials would need to find another position. Within this analysis, there is no mention of front pay always being appropriate in the absence of equivalent employment opportunities. Rather, any

plaintiff has a duty to mitigate damages by finding comparable employment through reasonable efforts. *Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 383 (5th Cir. 1988). (Court remanded the case with instructions to limit a qualified teacher's front pay award where she did not exercise due diligence in securing comparable employment).

Plaintiff argues that because she cannot secure employment equal to that of her time at SEOSU, she is entitled to front pay. This is not true. Plaintiff has simply chosen not to actively pursue employment opportunities, in the teaching arena or elsewhere. To the extent that the terms "comparable" and "equivalent" might be interchangeable, (which Defendants do not concede), where a court uses one or the other, the courts can hardly be said to be encouraging Plaintiffs to *only* search for jobs that are *exactly* like that of the one lost. *NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1320 (D.C. Cir. 1972)(back pay case wherein court held that after a reasonable search time, a plaintiff must take an available job, even if it is not substantially comparable.); *Arline v. School Bd.*, 692 F.Supp. 1286, 1292 (M.D. Fla. 1988) (plaintiff seeking front pay or reinstatement failed to mitigate damages where she made only minimal efforts to locate employment outside the teaching field); *Johnson v. Chapel Hill Indep. Sch. Dist.*, 853 F.2d 375, 383 (5th Cir. 1988)(Court remanded the case with instructions to limit a qualified teacher's front pay award where she did not exercise due diligence in mitigating her damages by securing comparable employment).

The case cited by Plaintiff in support of her inability to find comparable work, *Padilla v. Metro-North Commuter R.R.*, 92 F.3d 117, 125 (2d Cir.), is distinguishable from the case at bar. The *Padilla* court held that the plaintiff, Mr. Padilla, a high school graduate, who at the time of his dismissal held the title of superintendent of train operations, would be unable to find employment because his job was so specialized that he was unlikely to find a job of that caliber that yields that salary. In that case, the plaintiff took a lower paying job in the same industry and so the court awarded the difference in salary between his lost job and his subsequent lesser employment through the age of 67. *Id.* at 126. The present Plaintiff's unwillingness to work at all since her dismissal from Collin College is not a fulfillment of her duty to mitigate damages and the law does not support rewarding her sloth with front pay. Plaintiff also cites *Passantino v. Johnson & Johnson Consumer Products, Inc.,* 212 F. 3d 493, 511 (9th Cir. 2000) wherein the court upheld a twenty-two year award of front pay to an employee who had eighteen years of experience with the company prior to her lost job. However here, Plaintiff had only six (6) years of employment at SEOSU. It is important to note that in both cases cited by this Plaintiff, the jury was given the power to decide the award of front pay, not the court, which may very well be customary in the Second and Ninth Circuits, but is not the controlling law within the Tenth Circuit. *See Abuan v. Level 3 Comm., Inc.*, 353 F.3d 1158, 1176 (10th Cir. 2003) quoting *James v. Sears, Roebuck & Co.*, 21 F.3d 989, 997 (10th Cir.1994).

In the unreported case of *Cox v. Shelby State Cmty. Coll.*, 194 F.App'x 267, 276 (6th Cir. 2006) cited by Plaintiff, the court analyzed factors similar to those

enumerated in *Whittington v. Nordam Group, Inc.*, 429 F.3d 986, 1000 (10th Cir. 2005). Those factors included the plaintiff's future in his position, the relationship he had with his employer, and the availability of other job opportunities in their consideration to award front pay to a 64 year old professor. The professor in *Cox* had been teaching at Shelby State Community College for approximately twenty-five (25) years prior to his loss of employment, and was 64 years old at the time of the judgment. *Cox v. Shelby State Cmty. Coll.*, 194 F.App'x 267, 276 (6th Cir. 2006). The present Plaintiff was nearly two decades younger than the professor in *Cox* and left SEOSU with a significantly shorter term of employment. The Sixth Circuit in *Cox* also held that the plaintiff's unsuccessful attempts at procuring employment satisfied his duty to mitigate where the plaintiff testified that he had applied to teaching positions in other states without success. *Id.* at 276.

In contrast, Plaintiff persists in her belief that only a tenure track position will do for her, as we see in Plaintiff's Exhibit 3 ¶ 4(b). [Doc. 279-3, ¶ 4(b)]. Plaintiff's argument that she is unable to find *equivalent* employment, (as a tenure track professor), as opposed to any employment, does not absolve her of her duty to mitigate her damages. When Defendants' counsel contacted the colleges and universities listed by Plaintiff as ones to which she supposedly applied for employment, most of them had no record of Plaintiff's application at all. Further, Plaintiff conveniently has no record of such applications. Plaintiff's lack of relevant evidence should be construed against the Plaintiff. *See* Fed. R. Civ. P. 37(e). Plaintiff either never applied to these schools at all, or she destroyed any evidence showing that she did apply. While

Plaintiff contends that she applied to over one hundred (100) schools in her responses to written discovery requests in this case, more than fifty (50) of those colleges and universities affirmatively indicated to counsel for Defendants a total absence of any documents or records relating to Plaintiff. *See Responses from Colleges Plaintiff Allegedly Applied to,* attached as Exhibit 4. This suggests Plaintiff never actually applied to those schools, or perhaps her employment inquiries were so minimal as to not warrant recording by the schools. It is also possible that the schools at one time had records, but have since purged them. In that event, it was *Plaintiff's* burden to keep records, (not Defendants'), showing the efforts to mitigate damages. But, in that case, Plaintiff's spoliation of evidence should not be rewarded.

Either way, the Court is left without evidence of diligent, (or even reasonable), efforts at mitigation of damages by Plaintiff. Further, Plaintiff shows no evidence that she sought employment with any other teaching positions in high schools or other educational institutions. Given the rationale in P*adilla*, Plaintiff should have pursued lesser employment to help mitigate the situation. Either Plaintiff chose not to do so, or she applied for such employment and was deemed unqualified by the hiring entities. Even Plaintiff's former colleague, and "close friend," Dr. Meg Cotter-Lynch's testimony is instructive in this regard. Dr. Cotter-Lynch testified in pertinent part at trial, as follows:

> Q. When you were going up for tenure, did you have any understanding of what would happen to you if you didn't get it within the seven years you had allotted at Southeastern?
> A. So if I didn't get tenure at all at Southeastern and had to leave?
> Q. (Nods head.)

> A. I mean, the year I was up for tenure, I did apply out. So I applied to other universities, which is not unusual. . . . So, I mean, had I not gotten tenure and had to leave, honestly, I would probably be teaching high school at this stage, which is a fine thing to do, but it's a different career.

Trial Transcript, Vol. 2, at pp. 331-332, attached as Exhibit 5. Certainly, with a Ph.D. in English, Plaintiff could have gotten a job teaching high school, but she also could have applied at other universities when she was going up for tenure. She chose not to do so. Plaintiff's expert testified that Dr. Cotter-Lynch was the best of the tenure-seekers he reviewed, and even she took the prudent step of applying outside of SEOSU at other schools in case she did not receive tenure. Plaintiff failed to take that most basic effort, even during her last year on campus when she knew she had already been denied tenure at SEOSU. The former Dean, Dr. Scoufos, even testified that part of the reason Plaintiff was given another year on campus at SEOSU after tenure denial was to help give her time to find another job. (See below.)

Defendant recognizes the duty to show that comparable work was available and that Plaintiff did not seek it out. *Rasimas v. Mich. Dep't of Mental Health*, 714 F.2d 614, 623-24 (6th Cir. 1983). However, absent any records from Plaintiff to support her applications, it can hardly be said that she has sought out, in good faith, employment to mitigate the damages she seeks now. A simple review of the website www.higheredjobs.com by the undersigned showed that there were five hundred and seventy-five (575) job postings in the area of "English and Literature" on March 19, 2018. *See HigherEdJobs Printout,* attached Exhibit 6. Those positions included titles such as "Lecturer," "Instructor," "Adjunct Assistant Professor," "Assistant Professor,"

"Part Time Instructor," "Faculty," among others, and include twelve (12) different positions at schools located within the State of Oklahoma. Four (4) of those listed in Oklahoma included "Tenure" in the title of the job posting. *See HighEdJobs Printout of Available Position,* attached as Exhibit 7. Similar job postings can be found online at a variety of sources.[4]

Additionally, in the midst of her relentless arguments that only a tenure track job is worthy of her time and effort, Plaintiff ignores Tenth Circuit precedent that requires that any front pay award be calculated by "tak[ing] into account any amounts that plaintiff[] could earn using reasonable efforts." *Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir.1991). In Plaintiff's attempts to "ward off any windfall" her "conservative estimates" of her damages fail to account for any monies she earned during her time spent at Collin College, or that she could earn through other reasonable efforts as required. *See* [Doc. 279, p. 14], and Plaintiff's brief generally.

Finally, it bears noting here that Plaintiff materially misrepresents some of the testimony offered at trial. In particular, Plaintiff's Motion states the following:

> Dr. Scoufos testified that tenure denial and ejection from one university almost always marks the end of one's career as a university professor and ruins a professor's professional reputation. (Exhibit 18 at 596).

[Doc. 279, p. 10].

[4] For example, www.diversityinhighereducation.com, www.insidehighered.com, and www.chronicle.com

But, this was not Dr. Scoufos' testimony at all. In fact, her sworn testimony was just the opposite. Dr. Scoufos testified at trial, in pertinent part, as follows:

> Q. Do they [professors not getting tenure] have the ability to go to another college or university and have a successful career?
> A. Yes, they do, and that was part of the reason that she was given another year. That was the reason that she was given another year, so she could look for employment.
> Q. If somebody is denied tenure at one university, does it ruin their professional reputation?
> A. I – I would suppose not . . .

[Doc. 279-18, p. 596, ln. 8-18]. The difference between Plaintiff's assertion in her Motion and the actual sworn testimony of this witness is obvious. Plaintiff's career was not finished. Her professional reputation was not ruined. While Plaintiff's time at SEOSU had concluded, she could have taken her career elsewhere. Instead, she abandoned scholarly work and community service almost entirely for nearly a decade.

5. Discount award to net present value:

All scenarios Plaintiff puts forth should be ignored entirely because none of them account for the amounts Plaintiff could have earned through reasonable efforts, as required. *See Carter v. Sedgwick County, Kan.*, 929 F.2d 1501, 1505 (10th Cir.1991). And, the scenarios all depend upon an assumption of Plaintiff working through the implausible age of 75, during all summer and interim sessions, teaching overage classes, and assuming extra administrative duties. Given Plaintiff's historical failure to teach at that frequency, and to work at those levels, the award sought by Plaintiff would be an unjust windfall.

B. The Propriety of Front Pay Request

***1. Amount is not appropriate*:**

Plaintiff claims to be driven to work until the age of seventy-five, (75), however she has chosen to not find *any* job since her time at Collin College. To be clear, since leaving Collin College Plaintiff has failed to fulfill any of her duty to mitigate the damages she requests, much less to support her assertion that she would have only sought retirement at such an advanced age. Plaintiff argues that no employment equivalent to her position at SEOSU is available to her, and that therefore she should be awarded "full compensation for the totality of her remaining career." [Doc. 279, p. 16]. But, as her actions since leaving Collin College, (and even since the trial), show, it is unlikely that she has the drive to work until age seventy-five since she has chosen not to work at any job in some many years. As previously addressed, the law does not support such an opinion that only work of equal value will do. Plaintiff argues that she is a qualified teacher, and she repeatedly asserts her qualifications for tenure and her capacity to teach. Yet Plaintiff has apparently chosen not to pursue a career in teaching at any level, despite her self-proclaimed qualifications and capacity. It is inappropriate to award Plaintiff her requested damages, and it would amount to granting Plaintiff a windfall judgment.

***2. Firing*:**

There is no factual dispute that after leaving SEOSU, Plaintiff was hired at Collin College. There is also no factual dispute that Plaintiff was employed at College for several years, and was then terminated. Whether Collin College and Plaintiff refer

to that as a "firing," or the more gentile "non-renewal," the net effect is the same. If Plaintiff really possessed the vaunted professional skills that she and her advocates claim, then perhaps she simply did not exercise those skills during her time teaching students at Collin College. If she did not really have those skills in the first place then surely that fact would have come to light had she stayed longer at SEOSU, (just as it did at Collin College). Abrogation of a tenured professor's employment is a difficult and steep endeavor. While Defendants have consistently argued that Plaintiff did not merit tenure in the first place, Defendants have not argued that they knew that abrogation of tenure would have been undertaken had she somehow received tenure at SEOSU. Plaintiff's argument in this regard is misplaced.

***3. After acquired evidence*:**

Plaintiff conflates information presented at trial on different subjects. Plaintiff's "after-acquired evidence" argument, on page 18 of her brief, shows a fundamental misunderstanding on Plaintiff's part. After-acquired evidence is evidence that is uncovered after the adverse employment action is taken, but which a party contends would have supported the underlying action had it been known at the time the action was taken. However, Defendants do not claim that Plaintiff's failures at Collin College would have served as the basis for denial of tenure in 2010. Rather, Plaintiff's experience at Collin College serves two distinct roles in consideration of the issues at hand today. First, it shows that Dr. Randy Prus' initial assessment, and current opinion, of Plaintiff's academic promise as less than sufficient was, and is, accurate. Second, the College Collin experience shows that

Plaintiff's post-SEOSU work history is poor, and illustrates her present inability to meet the demands of her avowed profession. In short, her job performance at Collin College militates against giving her a job at SEOSU in 2018. Defendants do not contend that they acquired information or evidence subsequent to the decision to deny tenure to Plaintiff that would have proven to be the basis for tenure denial. Instead, Defendants look to the factors set forth in *Whittington* and *Abuan* to show that Plaintiff's weaknesses, ineptitude, and lack of motivation are significant factors for consideration today, all of which support Defendants' positon that Plaintiff is entitled to no front pay, or at most, a minimal amount.

4. Plaintiff seeks a windfall.

Plaintiff's situation is not one of "professional vulnerability [due to] Defendants' own making." Rather, Plaintiff's poor position today results mostly from (a) her decision not to spend the last year on campus at SEOSU looking for a job elsewhere, (b) her inability to keep a job at Collin College, (c) her poor performances in job interviews, (d) her lack of professional service and production, and (e) her unwillingness to mitigate her own damages by taking employment in roles less demanding than those to which she considers herself entitled. While the Court has discretion to award front pay to Plaintiff today, "[t]hat discretion . . . should be measured against an anti-discrimination statute's purpose to make the plaintiffs 'whole.'" *Davoll v. Webb*, 194 F.3d 1116, 1143 (10th Cir. 1999) (citations omitted). Any "front-pay award must specify an end date and take into account any amounts that plaintiffs could earn using reasonable efforts." *Id.* Further, "the district court's . . .

determination 'must be based on 'more than mere guesswork.'" *Id.* (citing *Shore v. Federal Express Corp*., 777 F.2d 1155, 1160 (6th Cir.1985)). *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 416, 95 S.Ct. 2362 (1975) ("That the court's discretion [to award Title VII back pay] is equitable in nature ... hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review."). The fact remains undisputed that Plaintiff was able to secure employment subsequent to her leaving SEOSU. She was able to keep that employment for a time, but ultimately proved unable to hold a job teaching. Any front pay award must reflect those realities.

CONCLUSION

The case law is clear: windfalls are not favored, and plaintiffs have a duty to mitigate their damages, even if that means taking jobs that they believe are beneath them or for which they might be overqualified. Plaintiff's career at SEOSU was over, but that did not mean her career in education or scholarship were over. Plaintiff's lackadaisical approach to scholarship and service, both while at SEOSU and after should not be rewarded with a license to sit around doing nothing for the next two or more decades. Encouraging people to indulge in a life of lassitude is not the purpose of Title VII.

Respectfully submitted,

/s/ Jeb E. Joseph

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Exhibit 1

From: Gonzalez, Carmen <gonzalez@seattleu.edu>
To: Gonzalez, Carmen <gonzalez@seattleu.edu>
Cc: Jennifer.gomez@wayne.edu <Jennifer.gomez@wayne.edu>; clee@law.gwu.edu <clee@law.gwu.edu>; Yolanda.niemann@unt.edu <Yolanda.niemann@unt.edu>; rachelleacjopline@gmail.com <rachelleacjopline@gmail.com>; Rachel.tudor@yahoo.com <Rachel.tudor@yahoo.com>; Stacey.patton@morgan.edu <Stacey.patton@morgan.edu>; CaseKi@uhcl.edu <CaseKi@uhcl.edu>; yesseniamanzo@gmail.com <yesseniamanzo@gmail.com>; Melissa.slocum@unlv.edu<Melissa.slocum@unlv.edu>; rileymua@gvsu.edu <rileymua@gvsu.edu>; O'Brien, Jodi <jobrien@seattleu.edu>; h.jaffa@me.com<h.jaffa@me.com>; mdeo@jtsl.edu <mdeo@jtsl.edu>; Julia.chang@cornell.edu <Julia.chang@cornell.edu>; EHaozous@salud.unm.edu <EHaozous@salud.unm.edu>; ppespinoza@utep.edu <ppespinoza@utep.edu>; michellespidermonkey@gmail.com <michellespidermonkey@gmail.com>; Wendy_Williams@berea.edu<Wendy_Williams@berea.edu>; jlavariega@callutheran.edu <jlavariega@callutheran.edu>; lbrackett@pugetssound.edu<lbrackett@pugetssound.edu>; linniss@mail.smu.edu <linniss@mail.smu.edu>; ntran@mail.sdsu.edu <ntran@mail.sdsu.edu>; Gutierrez y Muhs, Gabriella <gutierg@seattleu.edu>; phoff@ilstu.edu <phoff@ilstu.edu>; Mdc6j@virginia.edu<Mdc6j@virginia.edu>; Jamiella_Brooks@berea.edu <Jamiella_Brooks@berea.edu>; Marcia.owens@famu.edu<Marcia.owens@famu.edu>; fujiwara@uoregon.edu <fujiwara@uoregon.edu>; Amelia.ortega@gmail.com<Amelia.ortega@gmail.com>; lhasunuma@gmail.com <lhasunuma@gmail.com>; jeanette@ad.nmsu.edu<jeanette@ad.nmsu.edu>; majones@unomaha.edu <majones@unomaha.edu>; Jemimah.Young@unt.edu<Jemimah.Young@unt.edu>; savinggracee@gmail.com <savinggracee@gmail.com>; delagarza@asu.edu <delagarza@asu.edu>; JBridge@uwyo.edu <JBridge@uwyo.edu>; dhines@ku.edu <dhines@ku.edu>; Patrice.bounds@gmail.com<Patrice.bounds@gmail.com>; Betts.128@osu.edu <Betts.128@osu.edu>; Tip2017proposals@gmail.com<Tip2017proposals@gmail.com>; piyer@miis.edu <piyer@miis.edu>; lmp@cwsl.edu <lmp@cwsl.edu>
Sent: Monday, March 26, 2018, 11:35:50 PM CDT
Subject: Presumed Incompetent II -- Accepted Papers

Dear colleague,

We are delighted to invite you to submit a full-length paper for the second edition of *Presumed Incompetent*. Although we were inundated with abstracts in response to our call for papers, your abstract was one of the strongest in the collection. Congratulations! We are confident that your narrative will make an important contribution to the ongoing conversation about the challenges and injustices that pervade academia, and will provide guidance for faculty, staff, administrators and students who strive to improve their department and university climates.

You may be contacted in the next couple of weeks with further guidance regarding your full narrative. If we do not email you with further guidance, but you have questions, please do not hesitate to contact one of the editors. All final submissions will be vetted by the three editors and by the press.

Full-length papers are due **May 31, 2018** and should be submitted to all three co-editors at the email addresses set forth below. To accommodate as many contributors as possible, papers must be ***no longer than 5000 words***(including references in APA style). Please submit your papers as Microsoft Word documents (not PDFs), double-spaced, using 12-point Times New Roman font, and one inch margins.

As we explained in the call for papers, we are very pleased that we have an advance contract from Utah State University Press (an imprint of Colorado University Press) for

this second volume of *Presumed Incompetent*. Once we receive your full-length paper, it will undergo careful review by the co-editors and the press to determine whether it will be included in the final volume.

We expect to submit the completed manuscript to the press by December 1, 2018. We anticipate that the manuscript will undergo review in early 2019, copy editing in spring, 2019, and be in print in by summer or early fall, 2019. To ensure that we are able to meet this ambitious schedule, we ask for your cooperation in meeting deadlines and responding to inquiries.

By Monday, April 10, please confirm that you still plan to submit your paper to *Presumed Incompetent 2*and that you will fulfill the May 31, 2018 deadline.

Please submit your response (by April 10) and your full-length paper (no longer than 5000 words including references by May 31, 2018) to all three editors -- Yolanda Flores Niemann, Gabriella Gutierrez y Muhs, and Carmen G. Gonzalez by cutting and pasting the following E-mail addresses:

Yolanda.niemann@unt.edu
gutierg@seattleu.edu
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Please do not hesitate to contact us if you should have any questions or require additional information.

Best regards,

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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 brought the present action asserting that Defendants violated Title VII during the course of her employment as an associate professor at Southeastern Oklahoma State University ("Southeastern"). The matter was tried to a jury, which found in favor of Plaintiff. Plaintiff filed a post-trial motion requesting reinstatement. The Court denied that request, finding that the relationship between the parties was so fractured as to make reinstatement infeasible. Plaintiff then filed a motion to reconsider, re-urging many of the same arguments raised in her original motion. The Court denied that request as well. Plaintiff has now filed yet another motion requesting reconsideration of the Court's denial of her request for reinstatement. Plaintiff has also filed several motions to supplement her request. Finally, Plaintiff requests in the event reinstatement is denied that she be awarded front pay.

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED this 13th day of April, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

ORDER

If any party wishes to show cause why the judgment in this case should not measure damages in the amount awarded by the jury (in addition to the front pay award announced in the accompanying Memorandum Opinion), that party shall file an appropriate brief within 20 days of the date of this Order.

IT IS SO ORDERED this 13th day of April, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

PLAINTIFF DR. RACHEL TUDOR'S
MOTION AND INCORPORATED BRIEF
SEEKING RECONSDIERATION OF FRONT PAY

Dr. Tudor respectfully requests that the Court reconsider the front pay order (ECF No. 286) so as to correct or clarify the period for which front pay is awarded, otherwise correct a mathematical error in computation, and reconcile or reconsider conflicts between the order and the earlier issued reinstatement order (ECF No. 275).

I. PERIOD OF FRONT PAY AWARD

The front pay order grants front pay for a period of 14-months, measured by the time between Tudor's termination from Southeastern in May 2011 and the start of her job at Collin College in September 2012 (ECF

No. 286 at 4). However, that particular calendar period cannot be remedied with front pay.

Though Tudor did in fact lose compensation between the time of the adverse actions and trial (failure to promote in the 2009-10 tenure cycle *and* termination in May 2011), those losses are redressed with *back pay*, not *front pay*. *See Dalal v. Alliant Techsystems, Inc.*, 1995 WL 747442, at *3 (10th Cir. 1995) ("[F]ront pay is an alternative to the remedy of reinstatement, and thus it is an award of future damages. Compensation for the period prior to trial constitutes back pay, a matter that was already submitted to the jury and that cannot be awarded again by the court as front pay.").

Similar to the situation in *Dalal*, Dr. Tudor sought back pay from the jury, presented evidence in support thereof, and the jury was instructed to compute the appropriate compensation to her as back pay.[1] Tudor understands that the jury appropriately awarded undifferentiated back pay, subsumed in the omnibus damages award. *See* ECF No. 262 at 2 (awarding Tudor combined total damages of $1,165,000 without delineating kind). Dr. Tudor respects the jury's verdict and does not seek additional back pay.

[1] *See, e.g.*, Jury Instructions, ECF No. 257 at 24 (Types of Damages—Instruction No. 14: "Back pay damages are to compensate Plaintiff for the economic injuries or losses she sustained as a result of Defendants' illegal discrimination or retaliation."); *id.* at 26 (Back Pay Damages—Instruction No. 15: "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 [in] if her employment with Defendants had not ended.").

II. ERROR IN COMPUTATION OF FRONT PAY

In the event that the Court intended to award front pay for the 14-month period immediately *after* the trial, Dr. Tudor respectfully points out a mathematical error.

The front pay order indicates (ECF No. 286 at 4–5) that Tudor is entitled to 14-months of front pay which shall be calculated based upon the yearly salary identified in Scenario 4 of the exhibit computing front pay (ECF No. 279-8 at 6). However, the $51,463.52 figure, which the front pay order identifies as Tudor's "yearly compensation" (ECF No. 286 at 5), is actually the pro-rated projected 2017-18 term salary over a 253-day period between the jury verdict (November 20, 2017) and the end of the 2018 Summer session (July 31, 2018), not annual salary. *See* ECF 279-8 at 6 (Scenario 4 at line one, column marked "Period" reflecting date range of "11/20/17–7/31/18").

Assuming the Court intended to award Tudor 14-months of front pay at the rate indicated in Scenario 4, the proper sum is $90,080.58. This sum is arrived at by taking the pro-rated 2017-18 compensation ($51,463.52) and adding to it pro-rated 2018-19 compensation[2] ($38,617.06[3]). Under this

[2] Because it is undisputed under Southeastern's salary card (ECF No. 286 at 3) that Tudor is entitled to a slightly higher rate of pay each succeeding year of service, and a 14-month front pay period falls across two different service years, using a pro-rated portion of the 2017-18 salary card rate and the 2018-19 rate is the proper means of computing a 14-month period of front pay immediately following trial.

[3] To calculate the pro-rated salary for the 2018-19 term, one takes the total year compensation of $81,475.16, divides it by 365 to reduce it to a daily rate ($223.22), and then

calculation, Tudor is compensated for 253 days under the appropriate rate for the 2017-18 term (Nov. 20, 2017 through July 31, 2018) and 173 days under the rate for the 2018-19 term (August 1, 2018 through January 20, 2019).

III. OTHER ISSUES

A. Revisiting Front Pay

In the event that the Court did not intend to award front pay for the period *after* trial, Dr. Tudor respectfully requests the Court reassess whether front pay is necessary to make Tudor whole. In support thereof, Dr. Tudor points to the trial proceedings as well as her arguments and evidence in her merits brief (ECF No. 279), reply brief (ECF No. 285), and motions to supplement (ECF Nos. 280 and 282[4]). In addition, Dr. Tudor respectfully clarifies other issues.

Dr. Tudor's subsequent reemployment at Collin College does not bar front pay. *Contra* ECF No. 286 at 4 ("Because Plaintiff gained similar employment at Collin County, any front pay which Plaintiff is entitled must end with the beginning of her employment there."). The mere fact that Tudor found subsequent, temporary, non-equivalent employment in the same

multiplies the daily rate by 173 (the number of days between the end of the 2017-18 term and January 20, 2019, the day that falls 14 months after the jury verdict).

[4] The undersigned erroneously filed ECF No. 281 (which contained an error) and refiled a corrected version as ECF No. 282. Given the foregoing, the Court properly struck ECF No. 281 as moot in the front pay order (ECF No. 286 at 5).

sector[5] at Collin College does not bar front pay. *See, e.g.*, *McInnis v. Fairfield Communities, Inc.*, 458 F.3d 1129, 1146 (10th Cir. 2006) (front pay available where there is evidence that employee has "no prospects of attaining" similar pay to that entitled if reinstated at old job even if she is reemployed in same sector); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 382–83 (1st Cir. 2004) (separation from mitigation job, even where employee is at fault for separation, does not bar lost wages from first employer) (*citing Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999)).

Unrefuted evidence shows that Dr. Tudor did not earn more at Collin College than she would have if reinstated at Southeastern. *Contra* ECF No. 286 at 3 ("Her pay at that college exceeded what she had made at Southeastern."). The record reflects that Dr. Tudor's, year-to-year earnings at Collin College were significantly less than what she would make if reinstated at Southeastern.[6]

Dr. Tudor need not prove Defendants' Title VII violations are the proximate cause of her separation from Collin College. *Contra* ECF No. 286 at 3 ("There is no suggestion or any evidence from which the Court could

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[5] Uncontroverted evidence in the record shows that the Collin College job did not offer the security of tenure (Tudor Dec., ECF No. 279-3 at 7 n.1), it offered lower benefits than Southeastern (*id.*), it had substantially different job responsibilities than teaching at a four-year university (*id.*), and it is substantially less prestigious than teaching at a four-year university (*id.*).

[6] *Compare* ECF No. 270-6 at 6 (Defendants' evidence of Tudor's highest rate of compensation at Collin College, showing annual compensation of $58,022 in the 2014-15 term) *with* ECF No. 279-8 (showing Tudor's projected Southeastern compensation for 2017-18 term, once pro-rate adjustment is removed, as higher under scenario 1 [$82,862.72], scenario 2 [$74,245.79], scenario 3 [$82,862.72], scenario 4 [$74,245.79]).

determine that the discrimination at Southeastern, as found by the jury, ultimately led to or even played a role in Collin College's determination to terminate Plaintiff.").

"The award of future wages is designed to compensate the plaintiff for any economic loss from the date of the trial until a date certain in the future when such loss is extinguished." *Wirtz v. Kan. Farm Bureau Servs., Inc.*, 274 F.Supp.2d 1215, 1221 (D.Kan. 2003). To support a front pay award, Tudor need only prove that, without it, she will be economically harmed by Defendants' past illicit actions into the future because she will lose out on income. *Carter v. Sedgwick Cnty., Kan.*, 929 F.2d 1501, 1505 (10th Cir. 1991) ("front pay should be limited to the amount required to compensate a victim for the continuing future effects of discrimination until the victim can be made whole").

Tudor need not prove that Defendants directly caused the loss of her mitigation employment to get front pay. *See, e.g.*, *Johnson*, 364 F.3d at 382–83. The purpose of front pay, where reinstatement is denied, is to make the employee economically whole for loss of future work that, but for discrimination, she was entitled. *See, e.g.*, *Cox v. Shelby State Comm. Coll.*, 194 Fed.Appx. 267, 276–77 (6th Cir. 2006) (approving front pay award through remaining work life expectancy of professor who was not reinstated in light of evidence that he could not secure equivalent employment and

would, without front pay, suffer economic loss). "If this were not the case, an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1173 (10th Cir. 1985).

Front pay period should give Tudor time to make up difference in lost income. Whatever period of front pay is awarded, it should track the time, based on evidence in the record, the Court deems necessary for Tudor to be made economically whole in terms of future wages. The Court's inquiry should look at what Tudor would be paid if reinstated (see ECF No. 279-8 [computing earnings]), her current earning capacity, and her actual job prospects. *See Carter v. Sedgwick Cnt., Kan.*, 36 F.3d 952, 957 (10th Cir. 1994) (front pay award that does not "make whole" based on evidence in record is reversible "guesswork"); *Davoll v. Webb*, 194 F.3d 1116, 1145 (10th Cir. 1999) (rejecting flat two-year front pay period where "record does not appear to support" conclusion that employees are made whole).

Tudor stands by her proffer that, because her job prospects are so dim, it is appropriate to grant her front pay for a period between present and her retirement at age 75. *See* ECF No. 279 at 6–16 (argument and evidence in support). It is undisputed that Dr. Tudor has been unemployed since her separation from Collin College in May 2016, two years ago. All evidence

reflects that at present, Tudor has no prospect of obtaining *equivalent* employment to the tenured job she earned at Southeastern. There is no evidence showing Tudor failed to mitigate damages. Indeed, the record reflects that Tudor has diligently sought out work, attempted to improve her marketability (ECF No. 279-3 ¶ 3(d) [Tudor attesting to recent efforts]), and even resorted to directly confronting the specter of the Southeastern tenure denial head-on in cover letters to prospective employers sent after the jury's verdict (*Id.* ¶ 3(c)). Despite continuous diligent efforts,[7] the undersigned attests that Tudor still has not received a single offer of employment since her separation from Collin College.

B. Necessity of reconciling reinstatement and front pay orders.

The front pay order (ECF No. 286 at 4) construes the Collin College materials as something other than after-acquired evidence. *See* ECF No. 286 at 4 ("It is not after-acquired evidence, it is evidence of Plaintiff's mitigation of damages and evidence related to her employability following her separation from Southeastern."). But that holding is in tension with the reinstatement order, which treats the Collin materials as after-acquired evidence barring reinstatement (ECF No. 275 at 3–4).

[7] *See* **Exhibit 1** (collecting sampling of application submissions and denials and between close of discovery and present, none of which have resulted in a job offer; also collecting sampling of Tudor correspondence with Southeastern recommenders Dr. Dan Althoff and Dr. John Mischo during same period). Given the foregoing, substantial front pay should be awarded. *Cox*, 194 Fed.Appx. at 276–77 (approving substantial front pay for a non-reinstated professor where reinstatement denied).

The reinstatement order makes crystal clear that Defendants sought to use and the order treated the Collin materials as after-acquired evidence and, on that basis, reinstatement was denied. As with any other after-acquired evidence proffer, Defendants pointed to the Collin materials (see, e.g., ECF No. 270 at 16–17), which are evidence of Tudor's post-termination activities.[8] Defendants then claimed the Collin materials reveal a deficiency concerning Tudor's current qualifications to teach at Southeastern (*id.*). Defendants threaded the after-acquired evidence needle by arguing that, based on the Collin materials, Tudor should never have been given tenure at Southeastern in the first place because they purportedly prove Tudor did not meet their old qualifications[9] (*id.* at 18–19) and thus she should not be reinstated.

The undergirding logic of Defendants' reliance on the Collin materials to oppose Tudor's reinstatement is that if Defendants would not, based on what they now know of Tudor's post-termination activities at Collin College, give her tenure today, reinstatement is futile and should be denied. The reinstatement order relied on Defendants' proffer. *See* ECF No. 275 at 3

[8] The Tenth Circuit recognizes that an employer's invocation of an employee's post-termination conduct, supposedly showing non-illicit grounds to terminate today, when cited to resist reinstatement, is a form of after-acquired evidence. *Medlock v. Ortho Biotech, Inc.*, 164 F.3d 545, 555 (10th Cir. 1999); *Zisumbo v. Ogden Reg'l Med. Ctr.*, 801 F.3d 1185, 1205–06 (10th Cir. 2015).

[9] This move is critical because reinstatement cannot, absent after-acquired evidence, be denied on the premise that the employee does not meet the employer's current qualifications for the job wrongfully denied. *See Blangsted v. Snowmass-Wildcat Fire Protection Dist.*, 642 F.Supp.2d 1250, 1266–67 (D.Colo. 2009) (cannot deny reinstatement on premise that employer's new qualifications not required at time of adverse action would preclude hire of wronged employee today; reinstatement should place wronged employee in same position she was in but for violation).

("Defendants have offered substantial competent evidence demonstrating that they are convinced that Plaintiff's teaching abilities and academic pursuits do not rise to the level which would warrant a tenured professorship at Southeastern."). And, based on that proffer, reinstatement was denied. *Id.* at 4. Construal of post-termination evidence in this manner is, by definition, treating the Collin materials as after-acquired evidence.[10]

The problem with Defendants' invocation of the Collin materials at reinstatement is cast in stark relief by the front pay order, which recognizes "Defendants stipulated they would not rely on after-acquired evidence" (ECF No. 286 at 4). For the reinstatement denial to be sustained based on the Collin materials, there must be some "other purpose" for which they may be used. But there is none.

As the front pay order recognizes, the only "other purposes" of the Collin materials are to evidence Tudor's employability or mitigation (ECF No. 286 at 4). But neither is relevant to reinstatement. For obvious reasons, Tudor's prospects of employment elsewhere have no relevance to whether she has a right return to Southeastern. And, it is well-settled that evidence of mitigation efforts is irrelevant to reinstatement. *Dilley v. SuperValue, Inc.*,

[10] *See McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 361 (1995) (after-acquired allows "account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing"); *id.* at 362 (after-acquired evidence narrowly permitted after liability is proven at the remedial stage, reasoning that "It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds.").

296 F.3d 958, 967–68 (10th Cir. 2002) (failure to mitigate defense not applicable to reinstatement demand).

The Collin materials were treated as after-acquired evidence in the reinstatement order (ECF No. 275), but they should not have been considered because they cannot be used as such (ECF No. 286 at 3) and, for that reason, the decision to deny reinstatement should be reconsidered.

C. Irreconcilable holdings work an injustice.

As a matter of logic, Tudor cannot both be unqualified to be a tenured professor at Southeastern and simultaneously qualified for an equivalent tenured professorship elsewhere. Yet, the reinstatement order denies Tudor reinstatement on the finding that she is currently *unqualified* for a Southeastern professorship (ECF No. 275 at 4–5). And the front pay order finds Tudor should not get substantial front pay because she is *qualified* to obtain an equivalent life tenure professorship elsewhere. *See* ECF No. 286 at 3 (rejecting Tudor's proffer that she cannot obtain comparable employment absent reinstatement). The holdings of these two orders are irreconcilable. Tudor is either qualified to be a tenured professor—as the jury so implicitly found—or not.

The reinstatement and front pay orders also work an injustice. As a matter of equity, Tudor should be given the relief necessary to be made whole based on what the record shows is necessary to close the gap between the life

earning trajectory she would have been on but for Defendants' illicit actions and the trajectory she has been relegated to because of the Title VII violations. Denying Tudor both reinstatement and substantial front pay falls short of the making Tudor whole.

CONCLUSION

For all of the foregoing reasons, Dr. Tudor respectfully requests that the Court reconsider the front pay order (ECF No. 286) in light of the issues presented above and otherwise reconcile the findings made therein with the earlier issued order denying reinstatement (ECF No. 275).

Dated: May 2, 2018

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

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

DEFENDANTS' BRIEF ON THE MEASURE OF DAMAGES AWARDED BY THE JURY

Pursuant to the Court's April 13, 2018 Order [Doc. 287] regarding briefing on the measure of damages awarded by the jury, Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively " Defendants"), Defendants submit the following:

PROPOSITION I: THE STATUTORY CAP MUST BE APPLIED TO THE COMPENSATORY DAMAGES AWARD.

The jury awarded damages to Plaintiff in the amount of $1.165 million. This award must be reduced pursuant to 42 U.S.C. § 1981a, which dictates the types of damages recoverable for employment discrimination, as well as the statutory caps on certain types of damages.

42 U.S.C. § 1981a provides in part:

(b) Compensatory and punitive damages[1]

[1] As a government agency, Defendants are exempt from punitive damages in Title VII cases. 42 U.S.C. § 1981a(b)(1).

…

> (3) Limitations: The sum of the amount of compensatory damages awarded under this section [42 U.S.C. §1981a] shall not exceed, for each complaining party –
>
> …
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 calendar weeks in the current or preceding calendar year, $300,000.[2]

Thus, pursuant to 42 U.S.C. § 1981a(b)(3)(D), the jury award for compensatory damages must be reduced to the statutory maximum of $300,000. *Cadena v. The Pacesetter Corp.*, 224 F.3d 1203 (10th Cir. 2000). This represents a ceiling for Plaintiff's compensatory and nonpecuniary damages. As discussed in a subsequent section, the jury award would be excessive even if capped at $300,000, and thus, should be reduced below the $300,000 maximum.

Compensatory damages may include future pecuniary losses and various nonpecuniary losses, but shall not include back pay. 42 U.S.C. § 1981a(b)(2); 42 U.S.C. § 1981a(b)(3). The jury here did not specify the type of damages awarded. The jury did not categorize any damages as compensatory or back pay damages, but merely gave a lump sum damages award of $1.165 million. In light of the brief period in which Plaintiff was actually unemployed, and the lack of any substantial testimony regarding her unemployment, the jury's award appears on its face to represent

[2] For the limited purpose of this matter, Defendants acknowledge they have more than 500 employees.

compensatory damages, and nothing else.[3] Thus, the application of the statutory cap requires a reduction of the entire jury award to an amount not greater than $300,000.

A. Backpay

"Back pay is not punitive." *Comacho v. Colorado Elec. Tech. Coll., Inc.*, 590 F.2d 887, 889 (10th Cir. 1979), *citing Pearson v. Western Electric Co.*, 542 F.2d 1150 (10th Cir.). Back pay for a Title VII violation is calculated from the date of wrongful termination to the end of trial. *Wulf v. City of Wichita*, 883 F.2d 842, 871 n.37 (10th Cir.1989). In situations where a plaintiff earns wages from a subsequent employer prior to trial, the Court may consider those circumstances, and deduct those earnings from a calculation of back pay; and any amount of back pay awarded to a Title VII plaintiff is committed to the sound discretion of the district court. *Godinet v. Mgmt. & Training Corp.*, 56 F. App'x 865, 871 (10th Cir. 2003).

Plaintiff contends a portion of the jury award constituted back pay, which is not subject to the statutory cap. Defendants disagree, in light of the complete absence of any evidence to support an award of back pay. There is no evidence to support a conclusory finding that the jury decided to award back pay. The Tenth Circuit has held that where a jury was asked to make a general determination of Title VII damages, which could have included back pay, emotional pain and suffering, and loss of enjoyment of life, it is error for a court to find the jury's award included an award for back pay. Instead, the entire award should be treated as compensatory damages,

[3] Plaintiff intentionally limited evidence at trial on the topic of her unemployment, in order to conceal from the jury her employment with, and ultimate termination from, Collin College.

subject to the damages cap. *Nelson v. Rehabilitation Enterprises*, 124 F.3d 217, 1997 WL 476111 (10th Cir. 1993).

However, in the event the Court speculates that the jury meant to award back pay to Plaintiff, the Court must then answer the dispositive question of what amount of the jury award was intended as back pay, and is thus not subject to the $300,000 statutory cap. If following this approach, the Court should limit Plaintiff's back pay award to no more than one year's salary, *i.e.* the one school year in which Plaintiff was not employed. This year of unemployment resulted from Plaintiff's refusal to search for a job before she concluded her employment at Southeastern, despite her knowledge for a full year that she would not be returning to Southeastern in the Fall 2011.

The Back Pay Damages instruction, Jury Instruction No. 15 [Doc. 257, p. 26] set forth the strict parameters of back pay potentially awardable to Plaintiff. The jury was instructed that it could consider the earnings Plaintiff proved she would have been entitled to 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 the Fall semester of 2012. It is undisputed that subsequent to her separation from SEOSU, Plaintiff found employment in the same field, teaching the same or substantially similar subjects and students, and at a similar or even better rate of pay. It is also undisputed that Plaintiff then ultimately lost that employment through her own job performance, and no fault of Defendants.

In its recent order awarding front pay [Doc. 286], this Court addressed and applied the factors to be considered in determining when and how much front pay should be awarded a plaintiff, as set forth by the Tenth Circuit in *Whittington v. Nordam Grp. Inc.*, 429 F.3d 986, 1000- 1001 (10th Cir. 2005). As part of its analysis, the Court calculated the potential back pay to which Plaintiff could have been entitled, and utilized this back pay calculation as a reasonable guidepost to determine an appropriate front pay award.

The Court relied upon information provided by Plaintiff, (which Defendants did not dispute), that Plaintiff's compensation, including benefits, was $51,463.52 per year at the time of her separation from Southeastern. The Court divided the annual income by twelve (12) to calculate a monthly salary of $4,288.63. The Court then multiplied that number by the fourteen (14) months Plaintiff was unemployed between her leaving Southeastern and beginning her employment with Collin College. This resulted in a calculation of front pay of $60,040.77, based on the empirical evidence of Plaintiff's demonstrated ability to secure similar or better employment in a given amount of time, coupled with her failure to stay employed.

Defendants contend that none of the jury award represents back pay, but accept, as a reasonable calculation of back pay, the methodology used by the Court in its determination of an appropriate amount of front pay to award Plaintiff. This amount represents the absolute maximum amount of the damages award that could possibly qualify as back pay. Thus, the most liberal application of the 42 U.S.C. § 1981a(b)(3)(D) statutory cap would result in a jury award of $360,040.77. However,

the complete lack of evidence to support any award of back pay also supports placing some limit on this absolute maximum, if the Court determines some award of back pay is appropriate.

PROPOSITION II: COMPENSATORY DAMAGES AWARD WAS EXCESSIVE IN RELATION TO PLAINTIFF'S INJURY.

A. Even without a statutory cap, a $1.165 million damages award is excessive and punitive because the jury found no hostile work environment and Plaintiff produced no medical evidence for vague claims of distress.

If the Court decides not to lower the $1.165 million compensatory damages award because of the Title VII statutory cap, it should still significantly reduce the amount. Cap or no cap, $1.165 million is clearly excessive and not backed by substantial evidence, essentially making it an unlawful punitive award.

In the Tenth Circuit, a district court can set aside an entire verdict if the damages awarded by the jury are "so excessive as to shock the judicial conscience and [] raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial." *Malandris v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 703 F.2d 1152, 1168 (10th Cir. 1981). Defendants do not read the Court's April 13th pre-judgment order, however, to be asking for arguments contesting the verdict; rather, the order speaks of the proper "measure" of damages, and whether or not the jury's decision warranted the awarded "amount." [Doc. 287]. Thus, Defendants will reserve arguments against the verdict itself for post-judgment motions.

Dismissing a verdict in its entirety is not the only remedy the Tenth Circuit allows in this situation, however. Where a court concludes that a damages award was

excessive, it may also order a remittitur; *i.e.* a lower damages award. *Id.* Of course, remittitur arguments can be made post-judgment, as well, but Defendants understand the Court's April 13th order to request those types of arguments now, too.

"The federal statute that authorizes punitive damages in Title VII cases expressly exempts 'a government, government agency or political subdivision.' *Livshee v. City of Woodward*, No. CIV-12-1411, 2013 WL 5942277, at *3 (W.D. Okla. Nov. 6, 2013) (quoting 42 U.S.C. § 1981a(b)(1)). Thus, against Defendants in this case, Title VII only permits compensatory damages "for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." 42 U.S.C. § 1981(a)(b)(3). Punitive damages are not allowed.

Following its verdict here, the jury awarded Plaintiff $1.165 million. To determine whether this massive amount was appropriate, the Court's "relevant inquiry is whether the compensatory award was excessive *in relation to the injury*—an injury consisting [in part] of the emotional distress suffered by the plaintiff." *Malandris*, 703 F.2d at 1169 (emphasis added). This inquiry should take into account the "whole of the evidence," including the severity of the harm and any "medical testimony" produced. *Id.* at 1170. A "review of awards granted in other comparable cases" can be helpful, but it is not dispositive. *Wulf*, 883 F.2d at 875. At the end of the day, the Court must determine whether substantial evidence supports the compensatory award. *Id.* at 874; *Hampton v. Dillard Dep't Stores, Inc.*, 247 F.3d 1091, 1114 (10th Cir. 2001). The evidence must be viewed in the light most favorable to the prevailing party. *Id.*

Two critical and undisputed facts compel the conclusion that the jury's $1.165 million award is excessive and actually punitive here: (1) the jury found no hostile work environment; (2) Plaintiff put forth no "medical testimony" or medical evidence whatsoever to support a claim of emotional or physical distress.

The Court instructed the jury that it should find a hostile work environment existed for Plaintiff if, by a preponderance of the evidence, it found that there had been, among other things, unwelcome harassment or inappropriate comments based on Plaintiff's gender that were "sufficiently severe or pervasive that a reasonable person in Plaintiff's position would find the work environment to be hostile or abusive." [Doc. 247, at pp. 14-15]. The jury found that there was no hostile work environment. This verdict—that Southeastern did *not* subject Plaintiff to a hostile environment—commonsensically counsels toward a compensatory damages award far lower than $1.165 million. A recent case in the Central District of California illustrates this point well. *See United States ex rel. Macias v. Pac. Health Corp.*, CV 12-00960, 2016 WL 8722639 (C.D. Cal. Oct. 7, 2016). There, a whistleblower was retaliated against by her employer and "became withdrawn from friends and family, suffered from anxiety and depression, had nightmares, and moved to Kansas." *Id.* at *12. As such, she requested half a million dollars for emotional distress. *Id.* The court declined to grant this exorbitant amount, explicitly contrasting her case with "[c]ases of sexual harassment and hostile work environment," which "are likely to generate much higher emotional distress damages awards [than claims of whistleblower retaliation] because of their personal and highly offensive nature." *Id.* (citation

omitted). Specifically, the court held that "$500,000 in emotional distress damages is excessive and $35,000 is more appropriate" where, among other things, "Plaintiff was never physically threatened [and] did not face sexual harassment." *Id.*

In the present case, the hostile work environment verdict is also significant because it makes Defendants the prevailing party on this issue. This means that the facts underlying the hostile work environment claim must be interpreted in the light most favorable to *Defendants*, and not Plaintiff. *See Hampton*, 247 F.3d at 1114. Unfortunately, there is no bright line that can be drawn between facts defeating Plaintiff's hostile work environment claim—which must be viewed favorably to Defendants—and the facts supporting Plaintiff's discrimination and retaliation claims. What is clear, however, is that the collective universe of facts in this case simply cannot be interpreted against Defendants across the board, as that would unjustly allow Plaintiff to recover damages on a claim Plaintiff expressly lost. If anything, something near the opposite is true. Hostile work environment claims are highly fact-intensive, by nature, and it was certainly Plaintiff's contention throughout trial that virtually *all* of the facts demonstrated a hostile work environment. The jury disagreed. Given this, Plaintiff should not be allowed to claim that the jury took Plaintiff's side on all factual disputes. It did no such thing.

To the extent that the Court deems it necessary to divide the facts relating to a hostile work environment and those relating to discrimination and retaliation, it would seem that a (blurry) line could be drawn somewhere during Plaintiff's tenure process in late 2009. Events taking place prior to that, but after Plaintiff's transition

in 2007, are plainly more related to the hostile work environment claim, whereas certain events in 2010 and 2011 specifically surrounding the tenure review process may have a more direct connection to the claims of tenure discrimination and retaliation. Thus, in supporting the damages award Plaintiff cannot rely on favorable interpretations of the facts in 2007. For example, one lynchpin for Plaintiff's hostile work environment claim was the alleged restriction placed on Plaintiff by Cathy Conway in 2007 regarding bathroom use, dress, and makeup. Given the jury's rejection of the hostile work environment claim, it is manifest that the jury did not take Plaintiff's side in this dispute. At minimum, it would be inappropriate for the Court to assume that this credibility question was resolved definitively in Plaintiff's favor, and as a result to allow alleged emotional and physical distress from these restrictions to form the basis for upholding Plaintiff's huge compensatory award.[4]

That said, even some post-2009 facts cannot be used to support Plaintiff's assertions of emotional distress, either. For instance, Mindy House's testimony that various Southeastern administrators said negative things about Plaintiff's transgender identity, outside the presence of Plaintiff, cannot be used to buttress emotional distress claims because there is simply no evidence in the record that Plaintiff was ever made aware of those statements prior to the testimony proffered by Ms. House at trial. In short, support for Plaintiff's enormous award must be found

[4] Notably, even if the Court does take into account the evidence from 2007, Plaintiff testified that before the tenure process began in 2010, "overall, it was a pretty good quality of life," (Trial Transcript Vol. I, p.125) and that Plaintiff's colleagues and students were unanimously supportive. (*Id.* at p.41, 50, 118-19). This is not indicative of emotional or physical distress.

elsewhere than Cathy Conway's telephone call or Mindy House's overheard conversations.

This leads to the second undisputed point: Plaintiff provided no medical evidence to buttress the $1.165 million damages award. Plaintiff testified to having experienced "chronic insomnia" and to being "extremely depressed," but called no medical expert or health practitioner to corroborate this. Plaintiff offered zero evidence from psychiatric or psychological health professionals, or from any kind of counselor. Indeed, aside from a brief mention of wisdom teeth being removed—which is also unsubstantiated by any medical evidence in the record—Plaintiff has never claimed to have sought treatment for anything during this process. This may not mean Plaintiff is barred from recovering emotional distress damages, *see Smith v. Nw. Fin. Acceptance, Inc.*, 129 F.3d 1408, 1417 (10th Cir. 1997) ("Such [medical] testimony is one suggested method of proving emotional damages but is not the sole dispositive requirement."), but it should factor significantly in the Court's determination of whether Plaintiff's colossal compensatory damages award was based on actual, substantial evidence. *See Malandris*, 703 F.2d at 1170-71 ("Considering the whole of the evidence, including … *the medical testimony of present and permanent mental injury to the plaintiff* … we are satisfied that the compensatory award itself is not so plainly excessive." (emphasis added)); *Fox v. Gen. Motors Corp.*, 247 F.3d 169, 180 (4th Cir. 2001) ("Given Fox's testimony as to the specific nature of his 'emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life' … *and the corroboration of his claim by medical professionals*,

we cannot conclude that the $200,000 award was 'grossly excessive or shocking to the conscience.'" (emphasis added)); *Vadie v. Miss. State Univ.*, 218 F.3d 365, 375–78 (5th Cir. 2000) ("On this record, *which is devoid of any medical evidence supporting any injury* … an award greater than $10,000 would be excessive." (emphasis added)).

In the end, the enormous damages award here is based on little more than Plaintiff's own self-serving testimony about distress and harm, testimony that was at times ambiguous, vague, and incoherent. And, again, because the jury sided with Defendants on Plaintiff's hostile work environment claim, the Court is not necessarily required to assume that the jury found Plaintiff's testimony credible in all respects. At minimum, this combination of factors should cause the Court, in exercising its wide discretion on these issues, to drastically lower the amount of compensatory damages awarded. Otherwise, if left to stand, the $1.165 million "looks like an award of punitive damages, and it is clear from the law and the record that such an award is inappropriate in this case." *Park v. Shiflett*, 250 F.3d 843, 854 (4th Cir. 2001).

B. For the same reasons, a $300,000 award is also excessive and unlawfully punitive under Title VII and prior case law.

Even if Title VII's statutory cap is enforced here, the compensatory damages award should still be reduced well below $300,000 given the lack of evidence presented by Plaintiff on mental and physical distress. *Wulf* is probably the most illustrative Tenth Circuit precedent supporting this point. *See* 883 F.2d 842.

In *Wulf*, the plaintiff (Wulf) alleged that he had been fired for exercising his right to free speech. *Id.* at 855. Like the present case, *Wulf* involved a mixed verdict: the district court found no equal protection violation or property interest deprivation,

but it did find a due process liberty interest deprivation and a First Amendment violation; it then awarded Wulf $250,000 for mental anguish and distress. *Id.* at 855-56. Much like our Plaintiff, Wulf testified "that his job loss was 'very stressful,' that he was angry, depressed, scared and frustrated." *Id.* at 875. Moreover, similar to Professor Meg Cotter-Lynch (Plaintiff's avowed personal friend) in the present case, Wulf's wife testified "he was under 'tremendous emotional strain' and that they experienced significant financial difficulties." *Id.* Wulf provided no other evidence, however, and the Tenth Circuit ultimately reversed:

> While we are aware that it is rarely appropriate for an appellate court to reduce the trial court's determination as to the proper amount of damages, and while comparisons with other cases are not dispositive, the award of $250,000 in this case is clearly excessive in view of the evidence presented. Our review of the record, informed by a review of awards granted in other comparable cases, indicates that the award should have been no *greater* than $50,000.

Id. (emphasis in original).

This holding is echoed in various decisions from other circuits. In a Title VII mixed verdict case, for example, the Fourth Circuit in *Hetzel v. County of Prince William* reversed an award of $500,000 for emotional distress allegedly caused by the defendant's retaliatory acts where the award was "based almost entirely on Hetzel's own self-serving testimony concerning stress and headaches." 89 F.3d 169, 170-71 (4th Cir. 1996).[5] In doing so, the court factored in the mixed verdict, that Hetzel was

[5] *See also Saleh v. Upadhyay*, 11 F. App'x 241, 263 (4th Cir. 2001) ("Mbagwu never sought medical or psychological care for his stress and insomnia. … Mbagwu's testimony, standing alone, simply does not support an award of $150,000.00 for emotional distress.")

not physically injured, and that she had not sought care from a physician. *Id.* at 172. Moreover, the Fourth Circuit noted that "[m]uch, if not all, of Hetzel's claimed distress was actually caused by her erroneous belief that she was the victim of invidious discrimination"—which was one of the claims that had been decided against her. *Id.* at 171-72. The same is true here, of course, in that at least some of the claimed emotional distress comes from Plaintiff's mistaken belief she was forced to endure a hostile work environment for four years, which the jury found did not actually exist.

The Fifth Circuit *Vadie* opinion, mentioned above, is yet another mixed verdict case, also involving a university professor's attempts for promotion. *See* 218 F.3d 365. There, Dr. Vadie brought a Title VII action against Mississippi State University, alleging retaliation and racial discrimination. *Id.* at 367. The jury found in his favor on both claims and awarded him $350,000 in compensatory damages for emotional distress, a number which the district court reduced to $300,000. *Id.* at 370. On appeal, the Fifth Circuit threw out the discrimination finding (thereby creating a mixed verdict) and then drastically lowered the compensatory damages award:

> In this case, Dr. Vadie's own testimony is the sole source of evidence on emotional injury. … [N]one of Dr. Vadie's testimony was corroborated by medical evidence or any other witness …. Dr. Vadie's testimony was … insufficient to support damages of the magnitude awarded here. … On this record, which is devoid of any medical evidence supporting any injury and which is devoid of any specific evidence whatsoever supporting Dr. Vadie's broad assertions of emotional injury, we find that an award greater than $10,000 would be excessive.

Id. at 377-78.

There are multiple other cases illustrating these points. *See, e.g., Delph v. Dr. Pepper Bottling Co. of Paragould, Inc.*, 130 F.3d 349, 357-58 (8th Cir. 1997) (reducing

emotional distress award from $150,000 to $50,000 where the victim of race discrimination suffered "vague and ill-defined" emotional and physical problems). As such, the import is clear: in a mixed verdict case, where the evidence of emotional distress produced was scant at best, and a hostile work environment was *not* found, it is inappropriate to award the statutory maximum of $300,000 in Title VII cases. That figure should be reserved for the most severe cases and most egregious violations, backed by the strongest evidence. *Cf. Hennessy v. Penril Datacomm Networks, Inc.,* 69 F.3d 1344, 1356 (7th Cir. 1995) ("[W]e do not think the case is so egregious that an award at 100 percent of what can legally be awarded … is appropriate. In fact, given the much more egregious nature of some sex discrimination cases—the legion of 'quid pro quo' sexual harassment cases … for example—we think the punitive damages must be reduced to a smaller figure."). This is not such a case, and the Court should lower Plaintiff's award well below $300,000 to align with the jury's finding of no hostile work environment and the actual evidence produced (or not produced) by Plaintiff.

CONCLUSION

42 U.S.C. § 1981a(b)(3)(D) requires the jury's award to be reduced *at least* to the statutory maximum of $300,000. The damage award should be further reduced, well below $300,000, given the lack of evidence presented by Plaintiff on mental and physical distress and the jury's finding that there was no hostile work environment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of May 2018, I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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

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

MEMORANDUM OPINION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

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

ROBIN J. CAUTHRON
United States District Judge

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

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

JUDGMENT

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

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

DATED this 6th day of June, 2018.

ROBIN J. CAUTHRON
United States District Judge

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
NOTICE OF PROTECTIVE APPEAL

PLEASE TAKE NOTICE that Plaintiff, Dr. Rachel Tudor, hereby appeals, to the United States Court of Appeals for the Tenth Circuit from the order denying her request for reinstatement, ECF No. 275, entered on January 29, 2018; and from the order denying reconsideration of reinstatement, ECF No. 278, entered on February 12, 2018; and from the order denying reconsideration of reinstatement, granting partial front pay, and denying motions to supplement, ECF No. 286, entered on April 13, 2018; and from the order regarding damages, ECF No. 292, entered on June 6,

2018; and from the order entering judgment, ECF No. 293, entered on June 6, 2018.

Dated: June 6, 2018

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Attorneys for Dr. Rachel Tudor

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, I electronically filed a copy of the foregoing with the Clerk of Court by using the CM/ECF system, which will automatically serve all counsel of record.

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

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

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

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

INTRODUCTION

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

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

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

I. STATEMENT OF FACTS AND BACKGROUND

On November 20, 2017, the jury in this case returned a verdict in Tudor's favor on three of four claims (ECF No. 262). At the request of Tudor's counsel, the Court delayed entry of judgment until *after* resolution of post-verdict briefing on reinstatement. At that same hearing, and in light of the Court's decision to alter the default scheduling of entering judgment, counsel for Defendants requested a deadline for the filing of any motion challenging the jury's verdict. The Court set the same deadline for both motions, with opening briefs due by December 11, 2017.[1]

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

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

> Ms. Coffey: Your Honor, is this the appropriate time, or do we submit it at some point later, for judgment notwithstanding the verdict on behalf of defendants?
>
> The Court: I would say if you want to file a written motion, the same schedule would apply. Fourteen days from Monday would be your opening brief on that.

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

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

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

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

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

On June 6, 2018, the Court granted remittitur to Defendants (ECF No. 292) and entered final judgment (ECF No. 293). Hours later, Tudor filed a timely notice of appeal to the Tenth Circuit (ECF No. 294). In the days and weeks that followed, the Tenth Circuit set numerous deadlines for Tudor's appeal, including entry of appearance of counsel, transmission of transcripts, filing of the docketing statement, a mandatory mediation conference set for mid-July 2018,[3] and proffered a July 30, 2018 deadline for Tudor to file an opening brief which also triggered the deadline for filing of amicus briefs. (All of those deadlines were set by June 28, 2018.[4])

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

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

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

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

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

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

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

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

II. ARGUMENT

A. Legal Standard

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

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

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

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

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

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

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

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

B. Defendants' Motion is Untimely

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

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

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

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

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

In a similar vein, this Court's care to sequence the other post-verdict motions by a combination of orders directing scheduling and reliance on default rules not disturbed by the Court's superseding scheduling orders—on front pay (ECF No. 275 at 4), extension on time to file motion on front pay (ECF No. 278), remittitur (ECF No. 287), and attorneys' fees and costs (triggered by final judgment, as expressly intended as of the November 20, 2017 hearing[6])—makes plain the intent was to hear motions challenging the verdict *before* entry of judgment.

[6] *See* ECF No. 262 at 873:18–21:

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

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

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

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

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> Mr. Young: I believe the cost application is due 14 days from the date you enter judgment on the verdict.
>
> The Court: Okay. Well, I'll just not enter judgment then.

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

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

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

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

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

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

D. Striking Defendants' Motion is an appropriate sanction.

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

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

CONCLUSION

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

Dated: July 18, 2018

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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. 5:15-CV-00324-C

PLAINTIFF DR. RACHEL TUDOR'S PRELIMINARY RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, NEW TRIAL

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INTRODUCTION

Out of an abundance of caution, Dr. Tudor files this Preliminary Response [1] in Opposition to Defendants' Motion for Judgment Notwithstanding the Verdict, Or, in the Alternative, New Trial (ECF No. 316) ("Motion"). For the reasons articulated in Tudor's July 18, 2018 Motion to Strike (ECF No. 318), Defendants' Motion is inexcusably untimely and should be struck.

In the event Defendants' Motion is not struck, Tudor believes it can and should be denied on the merits. Grant of renewed judgment as a matter of law is not warranted because Defendants did not preserve the arguments raised in their Motion through a proper Rule 50(a) motion at trial and, even if they had, Defendants failed to carry their hefty burden to demonstrate the presumptively valid jury verdict must be vacated. Similarly, grant of a new trial is not warranted because Defendants failed to properly object to the issues they now complain of at trial and, even if they had, Defendants fail to demonstrate entitlement to the relief sought.

[1] On July 25, 2018 the Court entered an Order (ECF No. 323) directing Defendants to respond to Tudor's pending Motion for Extension of Time (ECF No. 322) to Respond to Defendant's Motion for Judgment as a Matter of Law, Or In the Alternative, New Trial (ECF No. 316). Because the Court's Order did not expressly permit Tudor to file her Response at a later date and because Local Rule 7.1(g) permits the Court in its discretion to treat motions for which a response is not filed within 21 days without leave of Court to be deemed confessed, the undersigned quickly drafted this Response in the 24-hours following the issuance of the Court's July 25 Order. In the event that Tudor's Motion to Strike (ECF No. 318) is not granted, Tudor requests leave to amend this Brief as necessary.

ARGUMENT AND AUTHORITIES

I. RENEWED JUDGMENT AS A MATTER OF LAW UNWARRANTED

A. Legal Standard

50(b) arguments must be preserved through 50(a) motion. "Only questions raised in a prior motion for directed verdict may be pursued in a motion for judgment notwithstanding the verdict." *Perry v. Amtrak*, 2013 WL 12071665 at *4 (W.D.Okla. 2013) (*quoting Dow v. Chemical Corp. v. Weevil-Cide Co., Inc.*, 897 F.2d 481, 486 (10th Cir. 1990)). "A party may not circumvent 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict." *United Inter. Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1228 (10th Cir. 2000). The "specific grounds" requirement of 50(a) demands that a party must identify issues with specificity to preserve them for 50(b) purposes. "Merely moving for directed verdict is not sufficient to preserve any and all issues that could have been, but were not raised in the directed verdict motion." *Id.* at 1229. Moreover, "[i]n view of a litigant's Seventh Amendment rights, it would be constitutionally impermissible for the district court to re-examine the jury's verdict to enter JMOL on grounds not raised in the pre-verdict JMOL." *Wald v. Mudhopper Oilfield Servs., Inc.*, 2006 WL 2128835 at *5 (W.D.Okla. July 27, 2006) (Cauthron, J.) (cleaned up).

High bar for setting aside jury verdict. "[S]ince grant of [a motion for

judgment notwithstanding the verdict] deprives the nonmoving party of a determination of the facts by a jury, [it] should be cautiously and sparingly granted." *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 680 (10th Cir. 1981). This Court cannot weigh the evidence, consider the credibility of witnesses, or substitute its judgment for that of the jury. *Id.* at 680 n.2. Overturning a jury's verdict is permissible only when the evidence points but one way and is susceptible to no reasonable inferences sustaining the position of the nonmovant. *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988). Lastly, all evidence and inferences must be construed in the favor of the non-movant. *Bruno v. Western Elec. Co.*, 829 F.2d 957, 962 (10th Cir. 1987) (*quoting EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 763 F.2d 1166, 1171 (10th Cir. 1985)).

Sufficiency of evidence burden. The jury verdict must be "supported by substantial evidence when the record is viewed most favorably to the prevailing party." *Webco Indus., Inc. v. Thermatool Corp.*, 278 F.3d 1120, 1128 (10th Cir. 2002). Sufficient evidence can mean "something less than the weight of the evidence," and consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, even if different conclusions also might be supported by evidence." *Id.* (*quoting Beck v. N. Natural Gas Co.*, 170 F.3d 1018, 1022 (10th Cir. 1999)). Moreover, "the mere existence of contrary evidence does not itself undermine the jury's

findings as long as sufficient evidence supports the findings." *Webco*, 278 F.3d at 1128. A Rule 50(b) motion should be granted only "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1112 (10th Cir. 2004) (cleaned up).

B. Failure to Preserve

Defendants' 50(b) motion can and should be denied for the simple fact that none of the arguments raised in it were preserved in a 50(a) motion, as is required. At trial, Defendants proffered only an oral 50(a) motion on the record, arguing cryptically and without requisite specificity: "We believe the facts in evidence support a motion for directed verdict on each of plaintiff's claims." ECF No. 266, 724:18–25. This preserves nothing.

A 50(a) motion must "specify the judgment sought and the law and facts on which the moving party is entitled to judgment." Fed.R.Civ.P. 50(a)(2). Defendants' 50(a) motion did not identify any, and thus failed to preserve, legal issues for a subsequent 50(b) motion, even those arguments Defendants previously raised at summary judgment. *Wolfgang v. Mid-Am. Motorsports*, 111 F.3d 1515, 1521–22 (10th Cir. 1997). Though Defendants' 50(a) motion proffered that "facts in evidence" supported a verdict in their favor, that statement is so cryptic and vague that it fails the "specific grounds" test. To wit, Defendants did not identify which "facts in evidence"

supported their position or explain how construed such facts entitled them to judgment. Defendants cannot use such a vague statement to buttress a 50(b) motion since it does not apprise Tudor or the Court of the "specific grounds" purportedly entitling them to a directed verdict. *See Wharf*, 210 F.3d at 1229.

C. *Etsitty* Arguments

Despite past admonishments from this Court that Defendants cease arguing that Tudor is not a member of a protected class, Defendants revive that argument in their Motion. *Compare* Motion at 3–6 *with* Order Denying SJ, ECF No. 219 at 6 ("Defendants again revisit their argument that Plaintiff is not entitled to protected status. That argument warrants no further discussion.").

This Court already decided that Tudor is a member of a protected class, which is law of this case. "The law of the case doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (*citing Arizona v. California*, 460 U.S. 605, 618 (1982) (cleaned up). *See also United States v. Webb*, 98 F.3d 585, 587 (10th Cir. 1996) ("Under law of the case doctrine, findings made at one point during the litigation become law of the case for subsequent stages of the same litigation."). Defendants fail to argue why law of the case doctrine should be set aside and thus their arguments are unavailing.

Moreover, even if this Court were to entertain Defendants' arguments, Defendants identify no error of law pursuant to *Etsitty v. Utah Transit Auth.*, 502 F.3d 1213 (10th Cir. 2007) which entitles them to renewed judgment as a matter of law.[2]

D. Sufficiency of Evidence

Sufficiency generally. Defendants repeatedly delve into the warring

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[2] Defendants quote fleeting comments made by counsel and witnesses at trial, arguing that the mere use of the word "transgender" is fatal under *Etsitty*. But *Estitty* did not address statements at jury trials let alone hold that use of the word transgender is fatal. In fact, *Etsitty* implies the opposite—"an individual's status as a transsexual should be irrelevant to the availability of Title VII protection." *Etsitty*, 502 F.3d at 1222. Moreover, Defendants' contention that Tudor "put on a transgender identity" case rather than a sex discrimination case is equally nonsensical. The jury was instructed that liability for Tudor's two sex discrimination claims could only be found if there was evidence showing she experienced discrimination because of her gender or failure to conform with gender stereotypes (ECF No. 257 at 10–11). It must be assumed that the jury followed the instructions. *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir. 1978) (*citing United States v. Smaldone*, 485 F.2d 1333 (10th Cir. 1973)).

Defendants also raise a slew of arguments which they claim show either that Title VII cannot protect transgender persons from sex discrimination or that the trial itself was forbidden by *Etsitty*. Both contentions are unsound. As to the contention that the United States government does not believe transgender persons are within the protective ambit of Title VII—that is utterly ridiculous. The United States settled their portion of Tudor's case on the merits in August 2017 (ECF No. 268-3), best evidence of the government's true position. Regardless, this Court's duty is to independently interpret the law, not acquiesce to the position of the current federal administration. Additionally, Defendants' reliance upon *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984) is misplaced (Mot. at 6 n.2). The Seventh Circuit recognizes that the very language Defendants lift from *dicta* in *Ulane* is wholly abrogated by the Supreme Court's intervening decisions, including *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1998) and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1042–49 (7th Cir. 2017). This Court must abide by *Etsitty*. But, if the Court desires to follow the Seventh Circuit instead, then it should follow that Circuit's holding that "[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth." *Whitaker*, 858 F.3d at 1048

Lastly, Defendants' argument that *Etsitty* forecloses protection for transgender persons because they are not properly considered biologically "male or female" is totally foreclosed. At the November 1, 2017 hearing, Defendants stipulated that in exchange for Dr. Brown—Tudor's expert on sex—not testifying at trial, they would cease raising arguments questioning the meaning of "sex." *See* ECF No. 225 at 7 ("[W]e do not intend to dispute the definition of sex"). Moreover, the *Etsitty* Court held that construction of Title VII must be guided by the "plain language of the statute" and, if appropriate evidence about the nature of sex is presented reflecting its "plain meaning" encompasses something more than assumed in 2007 without the aid of scientific evidence on point, then *per se* protection might be found. *Etsitty*, 502 F.3d at 1222 ("Scientific research may someday cause a shift in the plain meaning of the term 'sex'."). It is Tudor's position that Dr. Brown's report (ECF No.205-1) is uncontroverted scientific evidence showing the plain meaning of sex has shifted.

evidence and claim that, because evidence was presented in support of both Tudor's and Defendants' theories of the case, Tudor must have presented insufficient evidence. Not so. Tudor need not confine her evidence to Defendants' view of the case in order to prevail at trial let alone for the verdict to survive a sufficiency challenge. *Denison v. Swaco Geolograph Co.*, 941 F.2d 1416, 1422 (10th Cir. 1991). Tudor was free to present evidence in support of her merits case that conflicted with Defendants' evidence or simply prove essential facts, like pretext, by alternative means. *Id.*

Moreover, where there is conflicting evidence on a particular issue, the jury is free to decide what weight should be given. Thus, where fact witnesses provide conflicting accounts, the jury is entrusted to make credibility decisions. *United States v. Cardinas Garcia*, 596 F.3d 788, 794 (10th Cir. 2010) ("We accept at face value the jury's credibility determinations and its balancing of conflicting evidence."). Moreover, it does not follow that conflicting evidence which the jury must make credibility decisions on proves insufficiency of evidence—weighing sharply conflicting evidence is simply what juries do. *See Schmidt v. Medicalodges, Inc.*, 350 Fed.Appx. 235, 240 (10th Cir. 2009) (jury findings on "sharply conflicting evidence" conclusively binding and not against the weight of evidence).

Lastly, Defendants must do more than lodge piecemeal attacks on discrete evidence to carry their burden. "[I]ndividual pieces of evidence,

insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." *Bourjaily v. United States*, 483 U.S. 171, 179–80 (1987).

Tudor's qualifications. Defendants' contention that Tudor failed to present sufficient evidence of her qualifications for tenure in the 2009-10 cycle is preposterous (Motion at 7–8).

As Defendants acknowledge, different witnesses at trial articulated slightly different understandings of the standard for tenure at Southeastern during the pertinent period. That admission is dispositive here. The jury need not accept Defendants' witnesses stated qualifications where there is evidence that different qualifications existed and/or were applied to other similarly situated applicants. *York v. Am. Tel. & Tel. Co.*, 95 F.3d 948, 945 (10th Cir. 1996). Additionally, the jury is "free to consider the employer's subjective hiring or promotion criteria in the mix of plaintiff's circumstantial evidence of discrimination, but it not required to accept the employer's version of its motivation." *Cortez v. Wal-Mart Stores, Inc.*, 460 F.3d 1268, 1274 (10th Cir. 2006). Thus, Parker's testimony revealing how Tudor's denial could not be reconciled with tenure granted to comparators (see, e.g., ECF No. 263 at 266–73), Cotter-Lynch's testimony regarding the same (see, e.g., *id.* at 319–21), or testimony from others claiming Tudor met the pertinent qualifications is sufficient to foreclose this issue.

Defendants' related contention that Tudor did not show she met the minimum qualifications for tenure is also infirm. To sustain the verdict, Tudor must only have proffered evidence that she does not suffer from "an absolute or relative lack of qualifications" not that she "is able to meet all the objective criteria adopted by the employer." *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1193–94 (10th Cir. 2000). *See also Edwards v. Okla.*, 2017 WL 401259, at *2 (W.D.Okla. 2017) (Cauthron, J.) (*quoting EEOC v. Horizon/CMS*, 220 F.3d at 1193 ("relevant inquiry at the prima facie stage is not whether an 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")).

Tudor made at least the minimal showing. She testified to her understanding of the qualifications in the 2009-10 cycle (ECF No. 246 at 50–52; *id.* at 55–56; *id.* at 74–78). Dr. Parker did the same and explained in detail why Tudor met those qualifications (ECF No. 263 at 227–74). Drs. Spencer (see, e.g., ECF No. 264 at 441–42) and Mischo (see, e.g., *id.* at 390), both of whom reviewed Tudor's 2009-10 portfolio, testified they believed at the time that Tudor met the standard for tenure. Dr. Cotter-Lynch did the same as well (see, e.g., ECF No. 263 at 320–21). Though Defendants dispute the weight one might give to Tudor's evidence as opposed to their evidence—

it is plain that Tudor met the requirement of presenting some evidence of her qualifications.

Pretext in 2009-10 cycle. Defendants' contention that Tudor failed to present any evidence of pretext relating to her discrimination claim for the 2009-10 cycle fails on its face. Among other things, Tudor and others testified at length about procedural irregularities in Tudor's 2009-10 tenure application experience—that alone is sufficient to support a finding of pretext. *Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1217 (10th Cir. 2002) (examples of pretext include, "prior treatment of plaintiff," "disturbing procedural irregularities (e.g., falsifying or manipulating . . . criteria); and the use of subjective criteria.")). As another example, Tudor and others also testified about subjective criteria—as one example, subjective judgments concerning the application cover letter wholly apart from qualifications in the areas of teaching, scholarship, and service—which Defendants' own witnesses claimed played a part in their decision on the 2009-10 portfolio. *See, e.g.*, ECF No. 265 at 607–09 (Scoufos testimony). That, too, is sufficient evidence of pretext. *Garrett*, 305 F.3d at 1217.

Missing Minks. Similarly, Defendants' argument that there was a total absence of pretext evidence because, they claim, no evidence of President Minks' sex stereotyping was produced at trial is also misguided (Mot. at 12–13). Defendants fundamentally misapprehend sex stereotype doctrine. Sex

stereotype is a means of explaining both the broad scope of Title VII's status coverage (see, e.g., *Oncale v. Sundowner Offshore Sers., Inc.*, 523 U.S. 75 (1998)) as well as a form of proof that a plaintiff may—but is not required to—proffer in support of her claim of discrete act discrimination (see, e.g., *PriceWaterhouse v. Hopkins*, 490 U.S. 228 (1989)). As to the latter, while stereotyped remarks from the mouth of a bad actor "can certainly be evidence that gender played a part," such evidence is not required. *PriceWaterhouse*, 490 U.S. at 251–52. Where, as is the situation here, the employer proffers a facially nondiscriminatory rationale for the adverse action, the employee can prove discrimination by showing "the proffered reason is a pretext for illegal discrimination." *Roberts v. State of Okla.*, 110 F.3d 74, 1997 WL 163524 at *5 (10th Cir. 1997).

Tudor did what was required—she proffered evidence of pretext. As one example, the April 30, 2010 McMillan Letter (attached hereto as **Exhibit 1**; marked at trial as Tudor Ex. 79) purports to set forth Mink's rationales for denial as parroted by McMillan. The jury plainly could have seen the bizarre procedural irregularities and logical infirmities in that letter as evidencing pretext attributable to Minks.

Lastly, if Defendants are so certain that Minks could himself explain why he did not harbor bias and/or why his rationales for denial were not pretextual, he should have testified at trial. Tellingly, Defendants chose not

to put Minks on the stand. That strategic choice can neither bar liability nor give rise to a right for a new trial. *See, e.g.*, *Toliver v. New York City Dep't of Corr's*, 202 F.Supp.3d 328, 341 (S.D.N.Y. 2016) (strategic and/or tactical errors of party's own counsel do not rise to level of threatening miscarriage of justice or erroneous outcome meriting new trial).

Pretext in 2010-11 cycle. Defendants make similarly disingenuous arguments purporting that Tudor failed to present any evidence of pretext relating to her discrimination claim for the 2010-11 cycle. Defendants claim there was no discrimination in the 2010-11 cycle because Southeastern's rules prohibited reapplication. Yet, Tudor presented evidence showing that was simply not true. Among other things, she introduced into evidence emails between April 2010 emails between Scoufos, McMillan, Minks, counsel, and Charles Weiner attesting to their collective understanding that the rules permitted Tudor to reapply in the 2010-11 cycle (attached hereto as **Exhibit 2**; marked at trial as Tudor Ex. 35). That alone is sufficient to show pretext since it is plain the actors in question did not always believe reapplication was barred despite saying otherwise after the fact. *See, e.g.*, *Jones v. Barnhart*, 349 F.3d 1260, 1266 (10th Cir. 2003) (pretext established by pointing to "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of

credence"); *Johnson v. Weld Cnty., Colo.*, 594 F.3d 1202, 1211 (10th Cir. 2010) (pretext established with "evidence that the employer didn't really believe its proffered reasons for action and thus may have been pursuing a hidden discriminatory agenda").

Evidence of retaliation in 2010-11 cycle. Defendants' contention that Tudor did not present evidence supporting her retaliation claim at trial totally lacks merit. As a threshold matter, Defendants' argument that Tudor has no retaliation claim because she is not a member of a protected class is infirm for the reasons explained *supra* Argument Part I-C.

Moreover, Defendants misapprehend what conduct is prohibited as retaliation. It states,

> It shall be unlawful employment practice for an employer to discriminate against any of its employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter [Opposition Clause], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter [Participation Clause].

42 U.S.C. § 2000e-3(a). By its terms, Title VII does not limit protection for opposition. *Bd. of Cnty. Comm'rs v. EEOC*, 405 F.3d 840, 852 (10th Cir. 2005) (explaining Title VII "empowers employees to report what they reasonably believe is discriminatory conduct without fear of reprisal"). Thus, once Tudor filed good faith complaints with the EEOC and at Southeastern—which happened in Fall 2010 prior and close in time to Defendants' decision to

prohibit her tenure reapplication—any retaliation against Tudor for opposing what she believed to be acts in violation of Title VII gave rise to a claim for retaliation. *Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015 (10th Cir. 2004) ("[p]rotected opposition can range from filing formal charges to voicing informal complaints to superiors"); *id.* at 1016 (employee need only show "[s]he had a reasonable good-faith belief that the opposed behavior was discriminatory"). Thus, even if Tudor is not a member of a protected class—which would be contrary to *Etsitty*—Tudor can still state a valid claim for retaliation. *See, e.g.*, *Hertz*, 370 F.3d at 1015–16 (employee not required to "convince the jury that [her] employer … actually discriminated against [her]" for retaliation claim to be viable); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 385 (10th Cir. 1984) (employee's complaint of discrimination is protected opposition even if it is mistaken, so long as the belief that discrimination occurred was objectively reasonable and made in good faith).

Lastly, the assertion that Defendants could not have retaliated against Tudor because once tenure was denied in the 2009-10 cycle she could not apply again was disputed at trial with evidence showing just the opposite. For example, Dr. Prus testified that reapplication was possible, he had in fact restarted the tenure process for Tudor in Fall 2010, and he thought she merited tenure that year (ECF No. 264 at 482–86). Additionally, the April 2010 email (**Exhibit 2**) between administrators evidences that they believed

then that the rules permitted Tudor to reapply in the 2010-11 cycle, undercutting Defendants' proffered rationale that they always believed reapplication was prohibited. Of course, McMillan's October 2010 letter to Tudor (attached hereto as **Exhibit 3**; marked at trial as Tudor Ex. 84), similarly highlighting that reapplication is not *per se* prohibited by the rules, is also probative of pretext.

II. NEW TRIAL UNWARRANTED

A. Legal Standard

Comments by counsel at trial. A movant seeking new trial on the premise that opposing counsel made prejudicial comments to the jury carries a hefty burden. First and foremost, the movant must show they timely objected to those same purportedly prejudicial comments at trial. "A party who waits until the jury returns an unfavorable verdict to complain about improper comments during opening statement and closing argument is bound by that risky decision and should not be granted relief." *Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1465 (10th Cir. 1994). "[C]ounsel [] cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238–29 (1940). Second, if the alleged comments were fleeting at best, there is an inference that they are not prejudicial. *EEOC v. Jetstream Ground Servs.,*

Inc., 2017 WL 8201623, at *8 (D.Colo. Nov. 3, 2016) (*citing Stouffer v. Trammell*, 738 F.3d 1205, 1225 (10th Cir. 2013) (declining to find prejudice in part because the challenged comments were brief)).

Admission of evidence. Evidentiary rulings are committed to the "very broad discretion" of the trial court. *Webb v. ABF Freight Sys., Inc.*, 155 F.3d 1230, 1246 (10th Cir. 1998), *cert denied* 526 U.S. 1018 (1999). An evidentiary ruling is an abuse of discretion only if based on "an erroneous conclusion of law, a clearly erroneous finding of fact, or a manifest error in judgment." *Id.* Even if an evidentiary ruling is an abuse of discretion, a new trial is still inappropriate unless the error prejudicially affected the movant's "substantial rights." *Id.* Moreover, "[e]vidence admitted in error can only be prejudicial if it can be reasonably concluded that with or without such evidence, there would have been a contrary result." *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1296 (10th Cir. 1998). Ultimately, "the burden of demonstrating that substantial rights were affected rests with the party asserting error." *Gomez v. Martin Marietta Corp.*, 50 F.3d 1511, 1518 (10th Cir. 1995).

Sufficiency of evidence. "Where a new trial motion asserts that the jury verdict is not supported by the evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the evidence." *Anaeme v. Diagnostek, Inc.,* 164 F.3d 1275, 1284 (10th Cir.) (cleaned up), *cert. denied,* 528 U.S. 814, 120 S.Ct. 50, 145 L.Ed.2d 44 (1999). Evidence

must be considered in the light most favorable to the prevailing party, bearing in mind that "the jury has the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact." *Snyder v. City of Moab*, 354 F.3d 1179, 1188 (10th Cir. 2003) (*quoting United Phosphorous Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1226 (10th Cir. 2000)) (cleaned up).

B. Sufficiency of Evidence

Defendants raise one new argument in support of their contention that evidence was so insufficient that a new trial is warranted—they argue that Tudor's 2009-10 cycle cover letter was poor and thus it would have been appropriate for tenure to be denied on the basis alone (Motion at 22). But that argument gets them nowhere. None of Defendants witnesses claimed that Tudor was denied tenure solely because of her cover letter. Indeed, they testified to the opposite at trial. *See, e.g.*, ECF No. 265 at 599–600 (Scoufos testimony on factoring in recommendation letters even though not required qualification). And, if they had claimed as much, that would be such a suspicious subjective criteria that it would itself serve as ample evidence of pretext. *See Garrett* , 305 F.3d at 1217.

C. Belated Objections to Fleeting Comments

Defendants put McMillan's religion into issue. Defendants' claim of

prejudice is infirm because the record reflects that it was Defendants—not Tudor—whom placed Dr. McMillan's religion into issue. Thus, any prejudice incurred was at Defendants' own hands and is no grounds for a new trial.

At trial, Mindy House made a fleeting comment concerning the undisputed fact that Dr. McMillan made an employment decision premised upon his religious beliefs, which she in turn found concerning (ECF No. 264 at 511). Defendants admit that they were spooked, so they both cross-examined House on that comment at length *and* tailored McMillan's direct testimony so as to exhaustively explore the same (Mot. at 22–23). The fact that Tudor's counsel made a passing comment in closing about McMillan's credibility based upon his direct testimony at trial—nearly all of which focused on his religious convictions—is unsurprising and most certainly not prejudice giving rise to a new trial. Tellingly, Defendants cite no precedent for the proposition that mere mention of a person's having (or not having) religious beliefs is grounds to warrant a new trial.

Defendants' true complaint seems to be that they now believe they made a fatal strategy decision when they elected to draw more attention to McMillan's religious beliefs at trial. But, even if Defendants' strategy choice was fatal, their failure to raise their concerns at trial rather than engaging in what they contend was harmful self-help cannot give way to a new trial. *Toliver*, 202 F.Supp.3d at 341.

Masterpiece Cake *explained.* Defendants' contention that the Supreme Court's recent decision in *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S.Ct. 1719 (2018) mandates a new trial is wholly specious. Indeed, Defendants fundamentally misunderstand the crux of *Masterpiece* let alone its proper application to this case.

Masterpiece holds that state actors cannot endorse (or counter-endorse) particular religious beliefs in the course of administering civil rights laws.[3] 138 S.Ct. at 1732. Put another way, *Masterpiece* proscribes the conduct of state actors, not private citizens like Tudor and her counsel. *Id.* at 1733 (Kagan, J. concurring) (clarifying state actor lynch-pin of majority decision). Thus, Defendants' contention that *Masterpiece* commands a new trial because one witness, Ms. House, mentioned the religion of Dr. McMillan in passing during direct testimony and Tudor's counsel—himself a devout Catholic[4]—made a passing comment about McMillan's overarching credibility

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[3] In summary, *Masterpiece* involved a private citizen's challenge to an administrative penalty imposed by a government commission tasked with enforcing state nondiscrimination laws. The citizen, a devout Christian whom owned and operated a bakery open to the public at large, refused to sell wedding cakes to gay couples. The Commission found the baker in violation of a state law expressly forbidding such practices. Though myriad points of purported error were raised to the Supreme Court, it ultimately decided the case narrowly, holding that the Commission's members' ultimate merits decision was tainted by anti-religious bias as evidenced by on the record comments from one commissioner comparing the baker's religious refusal to the conduct of Nazis.

[4] The undersigned attests that the religious views of counsel (or lack thereof) have no relevance to these proceedings. However, Defendants' Motion endeavors to paint the undersigned as harboring bigotry for persons of faith, which is patently offensive given his own faith. Indeed, the undersigned is outspoken about his faith and its relation to his work as a civil rights lawyer representing transgender persons. *See, e.g.*, Marcus Patrick Ellsworth, "Who Is My Neighbor: Some Catholics Fight for Trans Rights Even When the Church Won't," MTVNews.com (Sept. 7, 2016), http://www.mtv.com/news/2929013/who-is-my-neighbor/ ("There's a tendency to see a strict divide between people who have religious beliefs, whatever those might be, and people who are trans. […]

is simply unfounded. The evil that so concerned the Supreme Court in *Masterpiece* was that state actors whom adjudicate cases were impermissibly biased against a party because of his religious beliefs, thereby depriving the citizen of a fair hearing. 138 S.Ct. at 1729. In the case at bar, the jury was the ultimate decision-maker. Defendants have pointed to no evidence showing the jury itself harbored anti-religious bias let alone that that was determinative of the outcome, thus retrial is not warranted.

Moreover, *Masterpiece* suggests that Defendants created impermissible prejudice for Tudor. Under *Masterpiece*, state actors, in the course of civil rights proceedings like this one, are absolutely barred from expressing an opinion for or against a particular religious viewpoint because the power of the State cannot be used to endorse or counter-endorse particular views. It is undisputed that Defendants' counsel—the Oklahoma Attorneys General Office—and Defendants themselves are state actors. Thus, under *Masterpiece*, it was inappropriate for Defendants to affirmatively introduce evidence of McMillan's religious point of view in a manner that communicated to the jury a State preference for those viewpoints.

D. Parker Testimony

Defendants' argument that a new trial is necessary because Dr.

There are many trans people, myself included, who are deeply religious. I'm an observant, practicing Roman Catholic. It's not appropriate to say it's Catholics versus trans people or any other particular group of believers.").

Parker's testimony should not have been admitted at trial is also patently infirm. As a threshold matter, Defendants did seek to exclude Parker's testimony via a *Daubert* motion before trial (ECF No. 96) which was denied on the merits by this Court (ECF No. 163). But at trial, Defendants neither objected to Parker taking the stand *nor* admission of Parker's expert report.[5] Thus, Defendants waived any claim of prejudice as to Parker's testimony and his report. *McEwen v. City of Norman, Okla.*, 926 F.2d 1539, 1544 (10th Cir. 1991) ("A party whose motion in limine has been overruled must nevertheless object when the error he sought to prevent by his motion occurs at trial."). Similarly, Defendants failed to seek leave to *voir dire* Parker out of the ear shot of the jury so as to establish limits on his testimony they now claim resulted in prejudice—that failure also constitutes waiver. *See United States v. Gomez*, 67 F.3d 1515, 1526 (10th Cir. 1995).

Additionally, even if admission of Parker's testimony was erroneous, Defendants fail to prove it was sufficiently prejudicial as to warrant grant of a new trial. Typically, improper admission of expert testimony is deemed harmless error, which is insufficient grounds on which to grant a new trial. *See Kinser v. Gehl Co.*, 184 F.3d 1259, 1271 (10th Cir. 1999). To demonstrate that the error was greater than harmless, Defendants bear the burden of

[5] *See* ECF No. 263 at 212 (showing Plaintiff counsel naming Parker as next witness and Defendants not objecting to his taking stand); *id.* at 243 (The Court: "Do you have an objection to the report?" Mr. Joseph: "We don't have an objection to that admission, Your Honor, no.").

showing that the admission of Parker's testimony was dispositive of the ultimate verdict. *Lillie v. U.S.*, 935 F.2d 1188, 1192 (10th Cir. 1992).

Defendants' main gripes with Parker's trial testimony is that, in their minds, it is *possible* that the jury could have given more weight to Defendants' witnesses and/or theory of the case if Parker had not testified. But that argument falls short of Defendants' hefty burden. The jury could have returned a verdict in Tudor's favor based upon other evidence at trial—such as the testimony of Tudor, Cotter-Lynch, Weiner, Mischo, Spencer, or others. Since Parker's testimony was one of many pieces of evidence, its admission did not foreclose the jury from considering Defendants' alternative theory or evidence, and its admission was at most harmless error which is insufficient to warrant a new trial.

E. Purported "Handicaps"

Defendants also argue that a collection of events left Defendants "handicapped throughout trial," and thus a new trial is merited. Among other things, they argue they (1) did not receive marked trial exhibits and witness subpoenas until "the literal last second" (Mot. at 24); (2) one day of trial transcripts was briefly released online (*id.*); and (3) Tudor "essentially refused to answer questions on the stand" (*id.*). Defendants contend, without explanation, that failure to grant a new trial under those circumstances, stands to threaten the "integrity of the jury system itself." *Id.* at 25 (*quoting*

Tidewater Oil Co. v. Waller, 302 F.2d 638, 643 (10th Cir. 1962)).

But in order to merit a new trial, Defendants must demonstrate that they were fundamentally prejudiced by errors. New trials should not be ordered simply because things did not go a movant's way or there were minor mishaps. *Maul v. Logan Cnty. Bd. of Cnty. Com'rs*, 2006 WL 3447629, at *1 (W.D.Okla. Nov. 29, 2006) (Cauthron, J.) (Rule 59 not intended to offer a "second bite at the proverbial apple"). Defendants' argument fails because the issues they cling to did not in fact result in prejudice. *Ryder v. City of Topeka*, 814 F.2d 1412, 1425 (10th Cir. 1987) ("A showing of prejudice, however, is essential. A new trial is not to be granted simply as a punitive measure.") (cleaned up).

(1) As to trial exhibits, Defendants fail to mind their duty of candor by reminding this Court that later on in the trial the Court itself acknowledged that Defendants' argument about improperly labeled exhibits prejudicing them was infirm. That was so because Tudor provided Defendants with exhibits both marked with the case number on each page *and* in clearly labeled binders with numbered dividers by exhibit which were sufficient enough for the Court itself to follow along with exhibits as they were introduced at trial. *See* ECF No.263 at 202–04. As to trial subpoenas, Defendants' counsel can hardly claim surprise or disadvantage in this case. Tudor docketed the subpoenas on November 6, 2018, prior to them being

served. Thus, Defendants were apprised well ahead of time of the persons Tudor sought to testify, the days on which she desired them to be called, and had ample opportunity to quash the subpoenas if needed. Indeed, Defendants tried to quash several subpoenas, even for persons they did not represent though they claimed they did. *See, e.g.*, ECF No. 265 at 559 (Tudor's counsel raising issue to Court).

(2) As to mistaken release of one day of trial transcripts during the pendency of trial—that error was quickly fixed by Tudor's counsel upon notice of the issue (see, e.g., ECF No. 265 at 556–57). Moreover, Defendants do carry the burden of showing that that mishap prejudiced them, as is required. *Ryder*, 814 F.2d at 1425.

(3) As to Defendants' claimed concerns regarding Tudor's ability to directly answer a handful of questions on cross-examination on the first day of trial—Defendants do not cite any authority for the proposition that this is prejudice giving rise to a new trial. Moreover, Defendants fail to point with particularity to specific questions asked of Tudor that she did not answer which caused them prejudice, as is required. *Ryder*, 814 F.2d at 1425.

F. Remittitur

Defendants also seek a new trial on the premise that the jury's verdict should be remitted or a new trial granted (Mot. at 28–29). That argument fails on its face because the Court already considered Defendants' sufficiency

of evidence argument for remittitur and denied it. *See* ECF No. 292 at 5 ("Defendants' arguments for further reduction are rejected, as they lack sufficient evidentiary or legal support."). Under the law of the case doctrine, Defendants must present some new evidence or argument supporting disturbing this Court's prior decision on remittitur—their failure to do so means their request should be summarily denied. *Monsisvais*, 946 F.2d at 1115; *Webb*, 98 F.3d at 587. Moreover, Defendants' request fails because they present no argument, evidence, or case law in support of the contention that a jury verdict of $300,000 is excessive in this matter. Lastly, binding precedent bars this Court from remitting the jury's award below the $300,000 maximum cap threshold. *See Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000).

CONCLUSION

For the reasons articulated in Dr. Tudor's Motion to Strike (ECF No. 318), Tudor respectfully requests that the Court strike Defendants' Motion for Judgment Notwithstanding the Verdict, Or, in the Alternative, New Trial (ECF No. 316) as sanction for it being inexcusably untimely. In the event that Tudor's Motion to Strike is not granted, she alternatively requests that Defendants' Motion be denied on the merits for the reasons articulated above.

Dated: July 26, 2018

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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. 5:15-CV-00324-C

PLAINTIFF DR. RACHEL TUDOR'S REPLY TO DEFENDANTS' EXPEDITED RESPONSE TO PLAINTIFF'S OPPOSED MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANTS' MOTION FOR JUDGMENT AS A MATTER OF LAW, OR IN THE ALTERNATIVE, NEW TRIAL

Tudor proffers this Reply[1] to directly rebut the points raised in Defendants' Expedited Response (ECF No. 325) to Tudor's Opposed Motion for Extension of Time (ECF No. 322) ("Extension Motion") to Defendants' Motion for Judgment as a Matter of Law, Or In the Alternative, New Trial (ECF No. 318) ("Defendants' Motion").

[1] Tudor files this Reply so as to ensure that all is before the Court as it considers the Extension Motion. The undersigned apologizes to the extent this Reply offends judicial economy insofar as it addresses the well-settled concept of what constitutes a motion being moot.

BACKGROUND

On July 25, 2018, once this Court ordered Defendants to file their Expedited Response by August 1, 2018 (ECF No. 323), Tudor's counsel realized that Tudor's Extension Motion could not be granted prior to the deadline for her response to Defendants' Motion, which under the Local Rules fell on July 26, 2018. As a result, Tudor was forced to file *something* by July 26, 2018 lest Defendants' Motion be deemed unopposed and confessed. *See* ECF No. 324 at 1 n.1 (explaining the same). Thus, Tudor's counsel quickly drafted the Preliminary Response within the 24-hour period *after* the Court's July 25 order issued, resulting in a timely but nonetheless hastily rushed filing.[2] Moreover, a not insignificant amount of space therein was devoted to addressing arguments that are irrelevant if Tudor's Motion to Strike (ECF No. 318) is partially granted or totally denied, a core reason for the relief requested in the Extension Motion.

ARGUMENT

Extension Motion not moot. Defendants speciously argue that since Tudor filed the Preliminary Response, Tudor's Extension Motion is moot. Not so. The relief Tudor seeks from this Court can still be granted—a decision

[2] Defendants' oblique attack on the undersigned's credibility is uncalled for. As attested to in the Preliminary Response, the undersigned drafted it in the 24-hours after the Court issued its July 25, 2018 Order. *See* Preliminary Response, ECF No. 324 at 1 n.1 ("[T]he undersigned quickly drafted this Response in the 24-hours following the issuance of the Court's July 25 Order."). The fact that the Preliminary Response included a number of citations—as is typical in any legal filing—does not take away from the fact that the Response was a rush draft intended to hold the place of a proper filing to be filed at a later time if the Motion for Extension is granted.

entered first on her Motion to Strike, and if that is not granted then 14-days of additional time to formulate a response to Defendants' Motion which is (a) not hurriedly drafted and (b) which only addresses arguments necessary in light of the Court's disposition of the Motion to Strike. Because the relief Tudor seeks can still be granted, the Extension Motion is not moot. *Cf. Rezaq v. Nalley*, 677 F.3d 1001, 1008 (10th Cir. 2012) ("The crux of mootness inquiry in an action for prospective relief is whether the court can afford meaningful relief that will have some effect in the real world.").

No legitimate grounds for opposition. The only arguments that Defendants raise in opposition to the Extension Motion are that, if granted (a) scheduling would be affected and (b) they dislike Tudor's Motion to Strike and otherwise believe Tudor's rushed Preliminary Response should stand as filed. Neither ground is a legitimate reason to deny the Extension Motion.

As to the scheduling issue, Defendants' argument strains credulity. The essence of a motion for extension is that, if granted, scheduling will shift. Tellingly, Defendants cannot point to a single legitimate reason as to why they opposed the extension in the first instance. Clearly, there is none. Moreover, Defendants' gamesmanship is made plain in their Response. Therein they reveal that they opposed Tudor's legitimate request for extension so as to force a rushed response, and now ask the Court to deny the extension and lock in the rushed response that their opposition forced. Denial

of the Extension Motion is not warranted simply because Defendants' desire a tactical advantage.

As to Defendants' disdain for Tudor's Motion to Strike and desire that Tudor's Preliminary Response stand as is—those rationales also fall short of the mark. Defendants must respond to Tudor's Motion to Strike on the merits. Opposing an interrelated extension motion out of spite is improper. Requests for extension should be agreed to by counsel out of courtesy. *See* Okla. Standards of Professionalism § 3.4(c) ("We will agree as a matter of courtesy to first requests for reasonable extensions of time unless time is of the essence.").

CONCLUSION

Defendants' Response reveals they opposed Tudor's Extension Motion simply as a means to secure tactical advantage and out of spite. Such opposition is wholly inappropriate. For all of the foregoing reasons, Tudor's Opposed Motion for Extension (ECF No. 322) is neither moot nor legitimately opposed by Defendants. Tudor respectfully requests that the Court grant the Extension Motion, rule on Tudor's Motion to Strike (ECF No. 322), and if the Motion to Strike is denied, grant Tudor 14-days thereafter to amend her Preliminary Response (ECF No. 324) to Defendants' Motion for Judgment as a Matter of Law, Or In the Alternative, New Trial (ECF No. 318).

Dated: August 1, 2018

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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

ORDER

Plaintiff brought the present action asserting that Defendants violated Title VII during the course of her employment as an associate professor at Southeastern Oklahoma State University ("Southeastern"). The matter was tried to a jury, which found in favor of Plaintiff. Defendants have filed a Motion for Judgment as a Matter of Law and/or New Trial. Believing that Defendant's Motion is untimely, Plaintiff filed a Motion to Strike and a Motion for Extension of Time. The Motion for Extension of Time requests that Plaintiff's Response to the Motion for Judgment as a Matter of Law and/or New Trial be extended to 14 days after a ruling on the Motion to Strike. In the request for extension, Plaintiff noted that Defendants objected to the requested extension. Prior to the time for Defendants to respond to the Motion for Extension, Plaintiff filed a "Preliminary Response" to the Motion for Judgment as a Matter of Law and/or New Trial. Defendants have now responded to Plaintiff's request for extension. That Response offers no reasoned basis for denying Plaintiff's request. Indeed, the sole reason for the present Order is the continuing inability

of counsel for either party to conduct themselves in a manner even remotely approaching professionalism to opposing counsel. The Court grows weary of pleading after pleading consisting of more personal attacks on opposing counsel than substantive legal or factual argument. Future pleadings containing similar problems will be stricken.

Plaintiff's Motion for Extension of Time (Dkt. No. 322) is GRANTED. Plaintiff's Preliminary Response to the Motion for Judgment as a Matter of Law and/or New Trial (Dkt. No. 324) and Defendants' Reply (Dkt. No. 327) are STRICKEN to be refiled in compliance with extension of time. Plaintiff shall file her response to the Motion for Judgment as a Matter of Law and/or New Trial within 14 days of the Court's ruling on the Motion to Strike.

IT IS SO ORDERED this 8th day of August, 2018.

ROBIN J. CAUTHRON
United States District Judge

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

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

PLAINTIFF DR. RACHEL TUDOR'S REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO STRIKE[1]

Dr. Tudor respectfully replies to Defendants' opposition **RESPONSE** (ECF No. 331) to her **MOTION TO STRIKE** (ECF No. 318) Defendants' untimely **MOTION FOR JUDGMENT AS A MATTER OF LAW, OR ALTERNATIVELY NEW TRIAL** (ECF No. 316). Defendants' opposition is fatally flawed for four reasons: (1) the December 11, 2017 motion deadline is a valid oral order; (2) this Court has the power to shorten default deadlines set forth in the Fed. R. Civ. P.; (3) this Court is empowered to strike untimely

[1] Dr. Tudor makes the following correction to her Motion to Strike (ECF No. 318): Throughout that filing, the undersigned indicated that Defendants' Motion (ECF No. 316) was filed 159-days past the December 11, 2017 deadline set by this Court. That was a mistake—the Motion was filed on July 5, 2018, making it *206-days late*.

motions; and (4) the operative scheduling order was never and could not have been altered off-record and *ex parte* by Deputy Clerk Goode.

I. DECEMBER 11, 2017 DEADLINE IS VALID ORAL ORDER

Defendants misapprehend the force of the December 11, 2017 deadline. At the November 20, 2017 post-trial hearing, in response Defendants' request for a date certain to file any motions challenging the jury verdict, the Court set the December 11 deadline.[2] The Court's oral deadline order at an on the record hearing is a valid scheduling order.[3] As such, any request from a party to modify the scheduling order must be formally made to and ruled upon by the Court. *See, e.g.*, *Hughes v. Z, Inc.*, 2006 WL 290576 at *1 (W.D.Okla. Feb. 6, 2006) (Cauthron, J.) ("Once set, the scheduling order may only be modified by leave of Court upon a showing of good cause.").

The Court should reject Defendants' invitation to treat the December 11 deadline as a nullity. In their Response, Defendants imply that they orally moved for a special deadline and, *after* the special deadline was set by this

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[2] *See* ECF No. 262 at 873–74:

> THE COURT: Anything else? I don't know if I asked that or not.
>
> MS. COFFEY: Your Honor, is this the appropriate time, or do we submit it at some point later, for judgment notwithstanding the verdict on behalf of defendants?
>
> THE COURT: I would say if you want to file a written motion, the same schedule would apply. Fourteen days from Monday [December 11, 2017] would be your opening brief on that.

[3] To the extent Defendants claim an oral order is invalid, that position wholly lacks merit. *See, e.g.*, *Dreith v. Nu Image, Inc.*, 648 F.3d 779, 787 (9th Cir. 2011) ("an oral order of a district court, though perhaps imposed quickly at the conclusion of a hearing, is nonetheless binding on the parties").

Court, they realized that if they had followed the Fed. R. Civ. P.'s default deadline their motion would be due later (Resp. at 3–4). But an attorney's misapprehension of the consequences of their own motion does not make the order granted in response a nullity. "[A] party who simply misunderstands or fails to predict the legal consequences of his deliberate acts cannot later, once the lesson is learned, turn back the clock to undo those mistakes." *Yapp v. Excel Corp.*, 186 F.3d 1222, 1231 (10th Cir. 1999).

Defendants' suggestion that they were mistaken about the most prudent course of action when they requested the special deadline to file their motion is also immaterial. The Court can and must assume that when counsel makes an oral or written motion that the request is genuine and thus a party must be held to the consequences of her counsel's mistakes. Indeed, it is axiomatic that "[c]ourts will not grant relief when the mistake of which the movant complains is the result of an attorney's deliberate litigation tactics." *Federated Towing & Recovery, LLC v. Praetorian Ins. Co.*, 283 F.R.D. 644, 651 (D.N.M. 2012) (*citing Pioneer Inv. Servs. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 397 (1993)).

Moreover, it is imperative that this Court enforce its deadline in this instance. At the invitation of Defendants, the Court promulgated a special deadline for motions challenging the verdict. Not enforcing that deadline simply because Defendants now prefer a later deadline, sought without leave

of court, threatens to interfere with judicial process. *See Thomas v. Office of Juvenile Affairs*, 2006 WL 931939 at *2 (W.D.Okla. Apr. 10, 2006) (Cauthron, J.) (ignoring deadline is "substantial interference with the judicial process") (cleaned up) (*quoting Jones v. Thompson*, 996 F.2d 261, 265 (10th Cir. 1993) (ignoring deadlines "hinder[s] the court's management of its docket and its efforts to avoid unnecessary burdens on the court and the opposing party"). Indeed, "[i]f [Defendants] could ignore court orders here without suffering the consequences, then [the district c]ourt cannot administer orderly justice, and the result would be chaos." *Thomas*, at *2 (*quoting Ehrenhaus v. Reynolds*, 965 F.2d 916, 921–22 (10th Cir. 1992)).

II. COURT EMPOWERED TO SHORTEN DEFAULT DEADLINES

Defendants argue, without legal support, that this Court lacks the authority to shorten default deadlines set by the Fed. R. Civ. P. Not so. Though the Fed. R. Civ. P. set default deadlines for certain motions, those deadlines can be shortened so long as there is proper notice. *See, e.g.*, *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1153–54 (10th Cir. 2001) (no abuse of discretion where district court shortened default time for preliminary injunction hearing); *Am. Benefits Life Ins. Co. v. United Founders Life Ins. Co.*, 515 F.Supp. 800, 802 (W.D.Okla. 1980) (district court can shorten default deadlines set by Fed. R. Civ. P. so long as parties are given actual notice of new deadline). Here, there is no

question that all parties were given notice—indeed, it was Defendants who requested the special deadline in the first instance—thus shortening of the default deadline is permissible.

Defendants' contention that even if some default deadlines can be shortened, that this Court cannot shorten deadlines for motions seeking judgment notwithstanding the verdict and/or new trial is also unsound. Neither Rule 50(b) nor 59 expressly bars shortening deadlines. This silence indicates that the Advisory Committee did not intend to forbid shortening those deadlines. Where the Committee intends to bar specific modifications to default deadlines it does so expressly. For example, Fed. R. Civ. P. 16(b)(2) expressly prohibits *extensions* of the default deadline for Rule 50(b) and 59 motions. This example makes clear that if the Committee desired to impose an absolute bar on *shortening* the deadlines it would have been done expressly. *See Marx v. General Revenue Corp.*, 568 U.S. 371, 384 (2013) (*quoting Small v. United States*, 544 U.S. 385, 398 (2005) (Thomas, J., dissenting) (explaining that "Congress' explicit use of [language] in other provisions shows that it specifies such restrictions when it wants to do so")).

III. COURT EMPOWERED TO STRIKE UNTIMELY MOTIONS

As a threshold matter, Defendants' suggestion that Tudor did not point to legal authorities supporting the notion that this Court is empowered to strike motions is untrue. *See* Mot. to Strike at 6–9 (citing authorities pointing

to the Court's inherent authority). Moreover, this Court's inherent power to strike non-pleadings is well-established and not reasonably disputed.[4]

Defendants' claim that Fed. R. Civ. 12(f) implicitly prohibits this Court from striking motions lacks legal support. It is true that Rule 12 expressly addresses the striking of pleadings. However, it does not follow that the existence of a rule expressly dealing with striking of pleadings creates a silent, implicit prohibition on the striking of motions.[5] Defendants point to no express statement in the Rules nor any comment of the Advisory Committee supporting their interpretation. Given that it is the default rule that district courts may strike motions for non-arbitrary reasons, the Fed. R. Civ. P. do not prohibit the striking of non-pleadings. *See Marx*, 568 U.S. at 381–84

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[4] *See, e.g.*, *Medical Supply Chain, Inc. v. Neoforma, Inc.*, 322 Fed.Appx. 630, 633–34 (10th Cir. 2009) (unpublished) (finding no error in district court's exercise of inherent authority to strike Rule 59(e) and 60(b) motions for non-arbitrary reasons); *In re Hopkins*, 1998 WL 704710, at *3 n.6 (10th Cir. 1998) (holding that since party's "briefs were non-complying [] it was well within the discretion of the district court to strike them"); *ACLU of Ky. V. McCreary Cnty., Ky.*, 607 F.3d 439 (6th Cir. 2010) ("based on district court's power to manage its own docket, the court had ample discretion to strike Defendants' late renewed motion for summary judgment"); *McCorstin v. U.S. Dep't of Labor*, 630 F.2d 242, 243–44 (5th Cir. 1980) (finding no abuse of discretion in district court's striking of several non-pleading documents); *Original Talk Radio Network, Inc. v. Alioto*, 2014 WL 5018809 at *2 (D.Ore. Oct. 7, 2014) (striking untimely JMOL motion filed 16 days late); *Baylis v. Wal-Mart Stores, Inc.*, 2012 WL 5354540, at *2 (N.D.Miss. Oct. 29, 2012) (striking untimely JMOL motion filed 4 days late); *Thymes v. Verizon Wireless, Inc.*, 2017 3588657 at *2 (D.N.M. Jan. 9, 2017) (finding inherent power to strike non-pleading); *Davis v. Mountaire Farms, Inc.*, 598 F.Supp. 582, 590 (D.Del. 2009) (denying motion for JMOL filed 1 day late, effectively striking it). *See also Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 841 (10th Cir. 2005) (invoking court's inherent power to disregard abusive filings, an exercise of court's power to strike non-pleading); *Stump v. Gates*, 211 F.3d 527, 533 (10th Cir. 2000) (declining to rule on issues first raised in reply brief, functionally striking).

[5] *See Lowen v. Via Christi Hospitals Wichita, Inc.*, 2010 WL 4739431 at *3 (D.Kans. Nov. 16, 2010) (explaining that the "rules silence" on a particular issue "does not mean this practice is contrary to the rules or somehow prohibited by them"). *See also Marx v. General Revenue Corp.*, 568 U.S. 371, 381 (2013) ("The force of any negative implication, however, depends on context. We have long held that the *expression unius* canon does not apply 'unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it' and that the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.") (cleaned up).

(explaining in context of attorneys' fees that where traditional practice points in one direction, so long as neither Fed. R. Civ. P. nor statute expressly prohibit that course, traditional course is not barred). *See also* authorities cited *supra* note 4, collecting cases evidencing inherent power of courts to strike non-pleadings for non-arbitrary reasons.

IV. SCHEDULING ORDER COULD NOT BE MODIFIED IN MANNER DEFENDANTS CLAIM

Defendants' contention that they privately requested scheduling relief from Deputy Clerk Goode and ultimately received it off the record and *ex parte* is not supported by evidence and is otherwise legally unsound.

Defendants' claim that they mistakenly requested a deadline certain to file during an on the record hearing, then later realized it conflicted with the Fed. R. Civ. P. default deadlines, and then furtively sought "clarification" from Deputy Clerk Goode which had the effect of modifying the deadline *ex parte* and off record strains credulity. Tellingly, Defendants fail to point to evidence corroborating their version of events. To wit, Defendants proffer no sworn statements from Attorney Coffey or Goode in support. Nor do Defendants point to any evidence that they narrowly requested a deadline certain only for Rule 50(b) motions challenging a "jury issue not decided by a verdict" (Resp. at 3).[6] Defendants failure to establish the accuracy of the

[6] Moreover, Defendants do not explain how even that limit renders their Motion timely.

events giving rise to their opposition is enough reason to find their Motion is untimely.[7]

Defendants' attempts to place blame on Deputy Clerk Goode for the missed deadline are also untenable. Though court personnel do vital and important work, they are not empowered to give legal advice to counsel let alone to make binding decisions modifying scheduling orders set by the Court. Thus, even if Deputy Clerk Goode had granted scheduling relief to Defendants, that extension is a nullity. *See, e.g.*, *Midwestern Developments, Inc. v. City of Tulsa, Okla.*, 319 F.2d 53, 53 (10th Cir. 1963) ("[deputy clerk] is a ministerial officer and may not assume judicial powers [;] [t]he purported order [] is a nullity").

Moreover, even if Deputy Clerk Goode had given incorrect advice to Defendants about the interplay between the special December 11 deadline and the default deadline provided under the Fed. R. Civ. P., Defendants' reliance is no excuse. Reliance on the representations of non-judicial officers as to deadlines cannot excuse late filing. *See, e.g., Kraft, Inc. v. U.S.*, 85 F.3d 602, 609 (Fed.Cir. 1996) ("We do not find counsel's explanation compelling that its failure to file a timely notice of appeal can be blamed on the clerk's office.") (*citing Osterneck v. Ernst & Whinney*, 489 U.S. 169, 179 (1989)

[7] *Cf. Blake v. Aramark Corp.*, 498 Fed.Appx. 267, 268 (10th Cir. 2012) (Gorsuch, J.) (unpublished) (conclusory claim of filer that appeal timely filed where no sworn statement under penalty of perjury attesting to events substantiating timely filing is proffered is reason to find failure to prove timeliness).

(assurance must be given by "judicial officer")).

There are also good reasons to disbelieve Defendants' version of events. The most obvious is that Deputy Goode would not grant scheduling relief vis-à-vis *ex parte* communications let alone fail to memorialize the relief on the record. Additionally, Deputy Clerk Goode—an experienced, skilled, and thoughtful civil servant—would not have neglected to inform Tudor about a modification of a scheduling order that impacted her. After all, the deadline at issue here is one that was equally applicable to Tudor and Defendants. To wit, if Tudor had desired to file her own motion challenging the loss of her hostile work environment claim, that motion would be subject to the December 11, 2017 deadline set by the Court.

Further, Defendants' original claim that their Motion is timely because it was submitted within 28-days of entry of final judgment (Defs. Mot., ECF No. 316 at 2) is contradicted by their Response. Defendants now claim that the text of Rule 50(b) makes plain that Rule 50(b) and 59 motions may be combined *and* if the "motion addresses a jury issue not decided by a verdict" then it is due "no later than 28 days after the jury was discharged" (Resp. at 3). It is beyond dispute that Defendants' Motion raises several jury issues not expressly decided by the verdict,[8] meaning the default deadline would have

[8] *See* Fed. R. Civ. P. 50 advisory committee's note 2007 (an explicit time limit is added for making a posttrial motion when the trial ends without a verdict or with a verdict that does not dispose of all issues suitable for resolution by verdict"). Defendants' Motion seeks to challenge fact issues

been December 18, 2017—28 days after the jury's discharge. Defendants filed their combined Motion on July 5, 2018—199 days *after* the deadline Defendants now claim controls. Defendants motion is thus undisputedly and inexcusably untimely and should be struck.

Lastly, while scheduling relief is available for most motions, it must be formally requested via motion, which Defendants failed to do. *See* Local Rule 7.1(h) (requiring formal motion for extension of time and delineating requirements). Defendants' failure to seek scheduling relief via motion prior to missing the December 11 deadline is thus fatal unless they prove excusable neglect. *See* Tudor Mot. to Strike, ECF No.318 at 7–9 (explaining standard for excusable neglect). Defendants' Response does not contend the missed deadline amounts to excusable neglect let alone point to facts supporting that finding. Thus, under *Pioneer*, this Court is justified in striking Defendants' Motion.

CONCLUSION

Dr. Tudor respectfully requests that the Court strike Defendants' Motion as untimely.

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implicitly but not expressly resolved by the verdict, thus if the special deadline does not govern, it falls with the 28-day of discharge default deadline. *See, e.g.*, Defs. Mot., ECF No. 316 at 7–10 (arguing Tudor failed to present evidence supporting *prima facie* case of discrimination); *id.* at 11–16 (arguing Tudor failed to present evidence of pretext); *id.* at 16–19 (arguing some witnesses are more credible than others and some evidence should have been given more weight—both of which are matters for the jury to decide); *id.* at 19–20 (arguing Tudor failed to make a *prima facie* case of retaliation); *id.* at 25–28 (attacking credibility of Dr. Parker—a matter for the jury to decide).

Dated: August 15, 2018

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

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

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

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

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

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

ROBIN J. CAUTHRON
United States District Judge

English, Humanities, & Languages
Tenure / Promotion Guidelines

Understanding Regarding Evaluation Procedures

Applicants with one item from Category 1, High Merit, Level A, will be considered strong candidates for tenure / promotion. OR, Applicants with two or more items from Category 1, High Merit, Level B, will be considered strong candidates for tenure / promotion. Applicants with items exclusively from Category 1, Commendable Merit, may or may not be considered strong candidates for tenure / promotion. It is understood that activity in Category 2 is valuable and expected but is not sufficient in and of itself for tenure and/or promotion.

It is understood that scholarly publication by peer-review is intensely competitive and will therefore carry more weight than solicited and other categories of publication as well as more weight than conference presentations.

Category 1 Scholarly Publication

High Merit Achievement

Level A

Book Publications through Peer-Reviewed / Refereed / Blind Submission

1 scholarly monograph
2 edited collection
3 academic textbook
4 book-length scholarly translation

Level B

Periodical Publications through Peer-Reviewed / Refereed / Blind Submission

1 peer-reviewed articles
2 article-length translations
3 collections of creative work (poetry, fiction, or performance of dramatic work)
4 publication of paper in conference proceeding via competitive peer review

Editing Scholarly Journals

1 editing peer-review journals
2 editing conference proceedings

Proof of peer review will be established with copy of journal submission criteria explicitly or implicitly stating that the publication underwent peer review. An "article" will be no less than five published pages.

Commendable Achievement

Publications through Solicitation, Contract, or Short Publications

1 solicited articles
2 book reviews
3 reference book entries
4 scholarly notes (e.g., *Explicator*)
5 individual creative works of (poetry, fiction, or performance of dramatic work)
6 publication of paper in conference proceedings selected noncompetitively
Excluded from Category 1 are newspaper reviews, features, letters to the editor, in-house (including SOSU) university publications as well as any other form of publication not considered scholarly or not considered relevant to the mission of the EHL Department. Also excluded are self-published or "vanity press" publications.

Category 2 Scholarly Presentations

High Merit Achievement

1 national or international conference presentations
2 invited presentations at an academic conference or institution (not same as having conference paper accepted)

Commendable Achievement

1 regional conference presentations
2 state or local conference presentations
3 in-house (including SOSU) unofficial university presentations

Excluded from Category 2 are graduate student conferences.

Expectations Regarding Teaching in Tenure & Promotion

Candidates will be expected to excel in these five areas.

1 Align course objectives to program objectives
2 Employ a variety of instructional approaches
3 Integrate technology where/when possible
4 Maintain accessibility to students
5 Relate scholarship to course content and/or pedagogy

Evidence & Documentation of Excellence in Teaching

1 Course portfolios (syllabi, student evaluations, essay assignments, exams, etc.)
2 Peer evaluation letters
3 Student evaluations (department form)
4 SUMMA or other university evaluations
5 Documentation relating course objectives to NCATE standards
6 Gen Ed assessment results (where possible)

Category 3 Service to Department and University

1 Be accessible and accurate in advisement
2 Assume leading role on various department committees, especially the Assessment, Planning, and Development Committee
3 Assume significant role in program assessment, preferably contributing to the writing of various assessment reports or chairing Assessment, Planning, and Development Committee
4 Provide significant input in general education assessment
5 Assume significant role in departmental Program Review
6 Volunteer for extra-curricular service (e.g., driving to airport for candidates, manning booths for recruitment, Sigma Tau Delta or Sigma Delta Pi advisor, working with Honors Program, Green Eggs & Hamlet advisor, etc.)
7 Represent department on university committees
Mentor new faculty (for promotion for tenured faculty only)

Evidence of Service to Department and University

1 Regular advisement activity
2 Activity on Assessment, Planning & Development committee
3 Activity on Composition or Humanities committee
4 Activity on other department committees (e.g., hiring) where assigned
5 Activity on university committees as evidenced by committee request sheet
6 Activity as teacher education liaison (supersedes numbers 2-5)

Revised May 2, 2005

4.0 FACULTY PERSONNEL POLICIES

Revised 08-1998

4.1 Employment

To indicate institutional compliance with the various laws and regulations that require a Nondiscrimination, Equal Opportunity and Affirmative Action Policy, the following statement is intended to reflect that Southeastern Oklahoma State University is, in all manner and respects, an Equal Opportunity Employer, and offers programs of Equal Educational Opportunity. This institution, in compliance with Title VI and VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and other federal laws and regulations, does not discriminate on the basis of race, color, national origin, sex, age, religion, handicap, or status as a veteran in any of its policies, practices or procedures. This includes, but is not limited to, admissions, employment, financial aid, and educational services.

Southeastern Oklahoma State University makes every effort to ensure that each applicant who is offered a position at the University is selected on the basis of qualification, merit, and professional capability.

It is further the policy of the University to be in voluntary compliance with any and all statutes, regulations, and executive orders which deal with equal opportunity and discrimination, regardless of whether such statutes, regulations, or executive orders are of federal or of state origin.

The University subscribes to the principle of the dignity of all persons and of all their labors. In order to ensure complete equal opportunity, the University actively recruits applicants from all segments of the population of our state and nation.

It is the policy of all universities under the jurisdiction of the Regional University System of Oklahoma Board of Regents to provide equal employment opportunity on the basis of merit without discrimination of race, sex, ethnicity, religion, or national origin. This applies to every aspect of the employment, promotion, retention, and retirement of the total work force of the University.

The University's Personnel Office is responsible for coordinating and monitoring the employment process. Vacancies to be filled are reported to the Personnel Office by the appropriate supervisor. In the context of University policy, the screening committee determines the type of screening, interviewing, and selecting process to be used.

4.1.1 Appointment to Regular (Ranked) Faculty

The Regional University System of Oklahoma Board of Regents specifies the types and lengths of faculty appointments as follows:

4.1.1.1 Types of Appointments

The regular faculty holds one of five types of appointments: (a) Tenured; (b) Tenure Track (non–tenured, on tenure track); (c) Non–Tenure Track (non–tenure earning); (d) Temporary (one academic year or less); (e) Administrative.

a. Tenured.

A tenured appointment is reserved for those regular faculty members who have been granted tenure by the Board. Tenured faculty members are on continuous appointment and, therefore, are not notified of their appointment status for the following year unless their appointment is being terminated. The procedures for non–reappointment of tenured faculty are covered in the Policy Manual of the Regional University System of Oklahoma Board of Regents.

b. Tenure Track.

Tenure track appointments are for one (1) year, renewable annually at the option of the University. A person will be given written notification of non–reappointment by March 1, prior to the termination of the current contract.

c. Non–Tenure Track.

A non–tenure track appointment is one in which the faculty member is appointed to the regular faculty but is not eligible to receive tenure and is classified as on a non–tenure track. All faculty with the rank of instructor will hold non–tenure track appointments. Faculty with this type of appointment will be given written notification of non–reappointment by March 1, prior to the termination of the current contract. A faculty member on non–tenure appointment may be continued for a period of seven (7) years. Thereafter, the appointment must be approved by the Board of Regents on an annual basis.

d. Temporary.

A temporary appointment is one in which the faculty member is appointed to the regular faculty for a period of one year or less. Upon termination of the current contract, the position will be reopened and re–advertised.

e. Administrative.

A tenured faculty member appointed to an administrative position retains the tenure and rank that were previously granted when he/she was a regular faculty member. An administrator may not hold tenure by virtue of an appointment to an administrative position but may hold tenure as a member of the regular faculty.

4.1.1.2 Faculty Degree and Transcript Verification

Southeastern Oklahoma State University follows the recommended policies and procedures for verification of faculty credentials as set forth by The Higher Learning Commission (HLC): A Commission of the North Central Association of Colleges and Schools, and the Regional University System of Oklahoma Board of Regents and the Oklahoma State Regents for Higher Education.

The HLC policy has its roots in the General Institutional Requirements (GIR) that pertains to faculty. It states:

It employs faculty that has earned from accredited institutions the degrees appropriate to the level of instruction offered by the institution.

This General Institutional Requirement integrates with that part of Southeastern's Mission Statement that says:

Southeastern Oklahoma State University provides an environment of academic excellence that enables students to reach their highest potential.

In the Regional University System of Oklahoma Board of Regents Policy and Procedures Manual, Chapter 3 – Academic Affairs, page 3–5, the following guidelines are set forth:

3.2.2 Principal Academic Ranks of the University

The principal academic ranks of the University shall be Professor, Associate Professor, Assistant Professor, and Instructor. Educational qualifications for the rank of Professor and Associate Professor shall be an earned doctorate degree awarded by a regionally accredited or internationally recognized institution. For the rank of assistant professor it shall be an earned doctorate degree awarded by a regionally accredited or internationally recognized institution and/or individuals who have completed all requirements in a doctoral program except the dissertation from a regionally accredited or internationally recognized institution. An instructor must also have a degree from a regionally accredited or internationally recognized institution.

3.2.3 Education Requirements

The doctoral granting institution must meet the standards of the Carnegie Classification System. The earned degrees or graduate work should be in a field relevant to the individual's assignment.

Verification Procedures

In conjunction with the HLC's GIR, the Institution's mission, and the guidelines from the Regional University System of Oklahoma Board of Regents, Southeastern uses the following criteria to verify academic credentials of full–time faculty, and temporary full–time faculty.

1. All faculty must have on file an official transcript, or transcripts that provide documentation as to degrees earned from a *regionally accredited or internationally recognized institution*.
2. Official transcripts are provided to the Office of Academic Affairs in sealed envelopes from the granting institution(s).

3. Transcripts are opened by the Director of Student Learning and Research and verified as to its authenticity.
4. If there are any questions as to the validity of the transcript(s), the Vice President of Academic Affairs is involved at this point.
5. A visual search is undertaken using the Higher Education Directory, or if necessary, the appropriate accrediting agency is contacted for verification of accreditation.

4.1.1.3 Length of Appointments

Because of the budget balancing amendment of the Oklahoma Constitution, the Board cannot obligate funds in excess of the unencumbered balance of surplus cash on hand. Consequently, the Board may not obligate itself by binding contracts beyond a current fiscal year for salaries or compensation in any amount to its employees. The Board does, however, recognize the intent to reappoint tenured personnel to the faculties of the universities under its control within existing positions that are continued the next year when doing so is compatible with the annual budget for that year.

In most instances, the length of the regular faculty contracts are for a nine–month period with payment in 10 or 12 months. Some regular faculty contracts are for a twelve–month period.

4.1.1.4 Initial Appointments to the Regular Faculty

Appointments to the regular faculty are made by the Board. Consideration for appointment by the Board is made after recommendation by the President and a letter of invitation has been signed by the appointee designate. Following approval by the Board, a letter of appointment for the specified period will be issued.

4.1.2 Appointments to the Supplemental Faculty

At Southeastern, supplemental faculty consists of adjunct and volunteer faculty. An adjunct appointment to the supplemental faculty is made by the President. These appointments (except volunteer appointments) are limited to specific duties and a specific period of time. Supplemental faculty are not entitled to notification of non–reappointment.

4.1.3 Appointments to the Summer Teaching Faculty

An appointment to the summer faculty is limited to the specific summer for which the appointment is made. Summer faculty appointments from regular faculty are made by the President and reported to the Board quarterly.

4.1.4 Full– and Part–Time Appointments

Full–Time Appointments:

Full–time faculty have instructional and non–instructional duties as assigned by the University. Instructional duties include but are not limited to the teaching of assigned classes, evaluating the students in the classes, and meeting with those students who require assistance in their classes. Non–instructional duties include but are not limited to conducting research and other scholarly activity, advising students, serving on committees, sponsoring organizations, and participating in professional organizations. A full–time teaching load is twelve (12) hours per semester.

Part–Time Appointments:

Part–time faculty are generally employed only for the purpose of teaching classes. The assigned responsibilities are to provide instruction, evaluate students pertaining to that instruction, and to meet with those students who require assistance in their classes. The load of a part–time faculty member who does not have additional duties will be fifteen (15) hours per semester.

4.1.5 Hiring Procedures and Guidelines

The hiring procedure of the University for administrative, professional staff, and faculty is summarized as follows:

1. To initiate the process, a department chair/supervisor submits an employment request form, with current position description and job ad through appropriate channels.
2. Upon authorization, the Office for Academic Affairs initiates a search for applicants by the following means:
    a. Internal announcement of vacancy — notices are posted on institutional bulletin boards.
    b. External announcement of a vacancy — notices are published in area newspapers and appropriate specialized publications.
3. Applicants will be directed to submit information to the position screening committee c/o the dean.
4. A screening committee is appointed for each position. For faculty positions, the committee is appointed jointly by the dean and department chair; for other positions, by the appropriate vice president. It is recommended that a member from outside the school be appointed to the committee. All applications are screened based on job related qualifications as outlined in the position description. During the screening process the committee must record the reasons for not recommending unsuccessful applicants.
5. Finally, candidates are interviewed by members of the screening committee; members of related units/departments; the dean; the appropriate vice president, and, when possible, the president.
6. Following interviews, the screening committee will submit a recommendation for employment to the department chair/supervisor. The employment transaction form, complete transcripts, vita, and a statement of the department chair's recommendation, is attached and forwarded to the dean/supervisor for approval. Routing for the employment transaction form is designated on the form. The presidents or their designees are solely responsible for employment, discipline and termination of all faculty, administrators and staff and are required to report to the Board on the hiring, promotion, rank and salaries of faculty personnel, and as to matters pertaining to the operation of the institution.
7. It is the responsibility of the department chair/supervisor to notify the selected applicant as soon as the department chair/supervisor's copy of the recommendation form is returned. It is also the department chair/supervisor's responsibility to direct a new employee to the Human Resources

Office for payroll and benefit purposes. The salary card serves as the guide to salary for newly hired faculty (see Appendix B).

8. For each applicant not selected, the department chair/supervisor completes a de–selection form and forwards it, with the resume, to the Human Resources Office.
9. The Human Resources Office notifies each unsuccessful applicant.

Guidelines for the selection of screening committees, the screening procedure and appropriate forms are available from the academic dean. The President shall recommend employment of faculty to the Board of Regents before completion of the employment process.

Contact the Human Resources Office for a copy of the current hiring policy.

4.1.6 Nepotism

Source: Policy Manual of the Regional University System of Oklahoma Board of Regents (General Policies, 5.12)

Except as prohibited by the laws of the State of Oklahoma, relationship by consanguinity or by affinity shall not, in itself, be a bar to appointment, employment or advancement in universities governed by the Regional University System of Oklahoma Board of Regents nor (in the case of faculty members) to eligibility for tenure of persons so related.

But no two persons who are related by affinity or consanguinity within the third degree shall be given positions in which either one is directly responsible for making recommendations regarding appointment, employment, promotion, salary or tenure for the other; nor shall either of two persons so related who hold positions in the same internal budgetary unit be appointed to an executive or administrative position for said internal unit. Waivers may be granted by the President, but performance evaluations and recommendations for compensation and promotion will be made by one not related to the individual being evaluated. The Regional University System of Oklahoma Board of Regents shall be notified of any such waivers at its next meeting.

Relatives that are within the third degree of relationship to an employee by blood or marriage are as follows:

Spouse; parent; grandparent; great–grandparent; parent, grandparent or great–grandparent of spouse; uncle or aunt; uncle or aunt of spouse; brother or sister; son or daughter; son–in–law or daughter–in–law; grandson or granddaughter or their spouse; and great–grandson or granddaughter or their spouse.

4.2 Endowed Chair Policy

OKLAHOMA STATE REGENTS FOR HIGHER EDUCATION POLICIES

House Bill No.1581 of the 1988 Oklahoma Legislature appropriated $15 million to the Oklahoma State Regents of Higher Education for the purpose of establishing an endowment program to support the establishment of faculty chairs and professorships. and to carry out other related activities to improve the quality of instruction and research at colleges and universities of The Oklahoma State System of Higher

Education. Examples of instruction related projects eligible to participate in the endowment program upon approval of the State Regents are visiting professorships, artist in residence, lectureships and other such support activities.

In 70 OS. Supp. 1989, Sections 3951,3952, and 3954, the Oklahoma Legislature provides the statutory framework for the endowment program that includes the fiduciary responsibility of the trustees and permissible investments for the endowment.

Purpose of the Oklahoma State Regents' Endowment Program

Endowed chairs and distinguished professorships should be established in academic areas which will contribute to the enhancement of the overall cultural, business. scientific, and/or economic development of Oklahoma. Endowed chairs and professorships must be established in areas for which the institution has ongoing, approved academic programs.

Regents' Endowment Trust Fund

The Endowment Trust Fund shall be administered by the State Regents in their role as trustees. The Endowment Fund shall be a permanent fund and shall be used for the purposes of establishing and maintaining endowed chairs and professorships at institutions in The Oklahoma State System of Higher Education. and for any other related activities approved by the State Regents to improve the quality of higher education instruction at State System institutions.

Upon authorization of the Stare Regents. an endowment hind will be established in the State Regents' Agency Special Account or in a custodian bank or trust company to receive monies appropriated by the Legislature. as well as any monies or assets contributed from any source. public or private.

No earnings of the trust fund shall be used for the administrative expenses of the office of the State Regents for Higher Education: expenses incurred by the State Regents in the administration of the trust fund and of the endowment program shall be paid from monies appropriated for the general operating budget of the coordinating board.

Establishment and Operation of Endowment Accounts

A. Principal. The principal held in the Regents' Endowment Fund shall be used for the establishment of and allocated to endowment accounts within the Regents' Endowment Fund for the benefit of public institutions of higher education within the State of Oklahoma.
B. Investment Return. The investment return on the principal of the Regents' Endowment Fund shall be allocated for the benefit of individual institutions for which the accounts are respectively designated and shall be remitted to such institution for the support of endowed chairs and professorships approved by the State Regents, together with other activities approved by the State Regents to improve the quality of instruction and/or research at State System institutions. The investment income approved by the State Regents for distribution to an institution shall be deposited in the institution's operating revolving fund (Fund 290).

Any investment income not designated for remittance to an institution shall become part of the principal of the Endowment Fund.

C. Account Levels. The levels indicated for each category are the amounts of private donations required to establish an account. The private donation will be matched dollar for dollar with public monies.

Endowed chair accounts may be established at the comprehensive universities with a minimum private donation of $500,000; at other institutions, the minimum required is $250,000. Thus, when fully funded with both private and public matching monies. chairs at comprehensive universities will be endowed with a minimum of $1,000,000 and chairs at other institutions will be endowed with a minimum of $500,000.

At the comprehensive universities. professorship accounts may be established with a minimum private donation of $250.0O0. At other institutions, professorships may be established with a minimum private donation of $125,000. Thus, when fully funded with both private and public matching monies, professorships at comprehensive universities will be endowed with a minimum of $500,000 and professorships at other institutions will be endowed with a minimum of $250,000.

Lectureships, artist in residence. and similar accounts may be established with a minimum private donation of $25,000 only at regional and special purpose universities and two year colleges. Thus, when fully funded with both private and public matching monies. said accounts will be endowed with a minimum of $50,000.

To be initially eligible for an endowment account within the Regents' Endowment Fund an institution must request an account and must have on deposit as provided in Section F of this policy and amount equal to at least one half (50%) of the requested account with a written commitment that the balance will be contributed within a thirty six (36) month period.

D. Time Limitations. The total matching requirements shall be equal to the amount of the requested endowment account in each instance and shall be deposited within a period of thirty six (36) months from the date of approval of the account by the State Regents. Provided, and institution may deposit in an endowment account matching funds in an amount which exceeds the required matching amount. Any endowment account for which the institution fails to provide the hill matching amount within the time established shall be available to be awarded to another public institution of higher education. No investment return shall be remitted to any institution from an endowment account before the institution has deposited the total required match for the endowment account as provided in Section F of this policy.

E. Private Sources of Matching Monies. Funds which an institution provides for matching purposes must originate from monies contributed to the institution after July 1, 1988, from private sources specifically designated by the donor to be used for purposes specified in this program. Monies provided for matching purposes may not be drawn from regularly allocated funds from the Oklahoma State Regents for Higher Education, proceeds of fees or charges authorized by the

State Regents of Higher Education, or from federal grants or reimbursements. In instances where the qualifications of all or a portion of the amount of matching monies are questionable, the institution shall request express approval of the State Regents to apply that amount toward the matching requirement. Monies for matching purposes may be contributed to and retained by a foundation for which the sole beneficiary is the respective institution. The foundation must demonstrate that the hinds are being held on behalf of the institution as outlined in Section F of this policy: provided. monies contributed by a foundation whose sole beneficiary is an institution may quality as private matching monies only if the monies are transferred from the foundation to the State Regents for deposit in the State Regents' Endowment Fund. Private matching monies contributed by the foundation may not be retained in that foundation, but must be deposited in the State Regents' Endowment Fund.

F. Deposit of Private Matching Monies. Any institution which provides matching monies shall deposit the matching funds to one of the following:
   1. The State Regents' Endowment Fund
   2. The institution's endowment matching hind
   3. A fund of a foundation whose sole beneficiary is that institution If such matching monies are not deposited in the Regents' Endowment Fund the net investment return on matching monies shall be retained in the fund.

G. Ownership of Private Matching Monies. Ownership of private matching monies transferred by an institution to the State Regents' Endowment Fund for investment shall remain with the institution. Upon request. the monies may be returned to the institution for deposit in Item F.2 above.

Report on Activities Supported by the State Regents' Endowment

Each participating institution shall submit an annual report to the State Regents in which the investments of the matching hinds earned interest income (including capital gains and losses) and the costs of managing the investments are presented in detail. The report shall also include a full accounting of the expenditures of earnings of both the public monies and the private matching monies. Diminution of the original private matching amount may, at the discretion of the State Regents, constitute a forfeiture of the Regents' Endowment Funds which the institutional monies were to match.

Application Procedures

All institutions in The Oklahoma State System of Higher Education are eligible to apply for an endowed chair, professorship, or other related projects under the Regents' Endowment Fund Program. State System institutions desiring to participate in the Regents' Endowment Fund Program shall make application to the State Regents upon meeting requirements for establishing an endowment account as set forth in this policy.

The application shall include certification of deposited private matching monies by the president of the institution, including the date of receipt, the repository, and the name of the donor (s). Names of donors will be held in confidence by the State Regents, upon request.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY POLICIES

A. Donor's intent will be honored in accordance with applicable law, policies and procedures of the University.
B. Endowed chairs are intended to recognize the distinction of the chair holder. An individual selected to occupy an endowed chair may be a current member of the faculty or a new appointee.
C. Candidates nominated to fill endowed chairs may hold the same tenured status as previously held except in those instances where the endowment allows visiting appointments. The position held by the endowed chair should be one allocated to the relevant department through the regular budgetary process. The policy will not be used to replace tenured or tenure track faculty in good standing.
D. An endowed chair may be filled by one individual for an indefinite period or successively by a series of individuals appointed for prescribed periods, unless otherwise provided in the terms of the gift.

   The terms of the endowment also may support visiting chairs or designate that temporary chairs may be named pending completion of a search for a permanent chair.

E. Income from the endowment supporting the chair will be expended in conformance with University and Board policies at the request of the chair holder.
F. In addition to salary supplement, allowable uses of endowment income by the chair holder include, but are not limited to, the following:
   1. Summer research stipends.
   2. Research salary support. Research proposals involving release from teaching during the regular academic term require the approval of the department chair, the dean, and vice president of academic affairs.
   3. Research assistantships.
   4. Expenses of computation and data collection.
   5. Secretarial salaries and/or expenses.
   6. Travel expenses.
   7. Research equipment and expense of professional materials.
   8. Financial aid for graduate students working with the chair holder.
   9. Expenses of special seminars and conferences.
   10. Support for visiting professorships and lectureships in the fields of the chair holder, subject to regular appointment procedures.
   11. Donor intents.
G. Income available to the endowed chair in any given year will not exceed the amount available from the endowment. This does not exclude the chair from attaining monies through the normal budget process.
H. The endowed chair and the income from its endowment will be used for the designated area of study for as long as that area is part of SOSU's academic program. The terms of acceptance of a gift will state:

   "Should the designated area of study no longer be a part of SOSU's academic program. The income from the endowment will be used to support an endowed chair in an area related as closely as possible to the original."

The above policies are subject to the provisions of The Regents' Policy on Endowed Chairs.

PROCEDURES

University procedures concerning academic appointments, as well as all other relevant regulations and procedures (such as those governing purchasing and accounting) shall be observed. The procedures for the Endowed Chairs are listed below:

A. The President shall be contacted whenever there is a prospective donor to endow a chair.
B. All contacts and discussions with prospective donors shall be coordinated with the President's office.
C. Each recommendation to establish, name, fill an endowed chair must involve the appropriate Department Chair, Dean, the Vice President of Academic Affairs, and the President; the President (or designee) shall seek advice concerning the proposal from the Executive Committee of the Faculty Senate.
D. A search committee, normally with multi–department representation, will be appointed by the President after consultation with the appropriate Department Chair (s), Dean, Vice President of Academic Affairs, and Faculty Senate.

   The search committee shall recommend a slate of candidates to the President; the President, following consultation with the appropriate Department Chair, Dean, and Vice President of Academic Affairs, will make the final decision. No appointment of an endowed chair can be made prior to Regent's approval to establish an endowed chair.

   The search committee shall provide sufficient information about the candidates to allow the President to make a decision.

E. An endowed chair performance will be reviewed by the tenured members of the Department, Department Chair, appropriate Dean and Vice President of Academic Affairs. This review will be done every five years unless the tenured members of the Department and the Department Chair request that it be done sooner. The outcome of the review will be sent to the President with a recommendation for reappointment or removal from the chair.

ADMINISTRATIVE GUIDELINES FOR CAMPUS IMPLEMENTATION OF THE REGIONAL POLICY ON ENDOWED CHAIRS

The written procedures of each endowed chair shall be consistent with the policy of The Regents and with the following guidelines.

1. Minimum Corpus

   A minimum corpus shall be established and maintained, which may vary by academic field. but in no case shall be less than the minimum specified in the Regent's policy.

2. Appointment to the Chair

   An endowed chair may be filled by one individual for an indefinite period or successively by a series of individuals appointed for prescribed periods, unless otherwise provided in the terms of the gift. A person who is a tenured faculty member of the department to which the chair is

assigned may be appointed by the President on the advice of the Faculty Senate. If a person outside that unit is to be appointed, appointment policies and procedures shall be in accordance with University policies and regulations for regular tenured appointments or for visiting appointments, as appropriate. In carrying out the search for candidates, attention shall be paid to the campus' affirmative action goals, and candidates from outside the University should be considered as well as those from within the University.

3. Use of the Endowment Income

   In addition to salary income made available to holders of endowed chairs may be used to support their teaching and research activities, in accordance with University regulations and according to a budget recommended annually by the chair holder to the department Chair and approved by the appropriate Dean and/or Vice President in the normal budgetary process.

4. Annual Reporting

   Each chair holder shall annually submit a brief narrative to the Department Chair along with a budget request. These narratives should be retained by the Chair or Dean for use in preparing special reports on endowed chairs that may be needed from time to time.

4.3 Academic Freedom and Responsibility

Source: Policy Manual of the Regional University System of Oklahoma Board of Regents (Academic Affairs, 3.3.1 and 3.3.2)

The faculty member is entitled to freedom regarding research and in the publication of the results, subject to the adequate performance of instructional and non–instructional duties. Patent and copyright ownership will vest consistent with Regional University System of Oklahoma Board of Regents policy.

The faculty member is entitled to freedom in the classroom in discussing their subject, but s/he shall be objective in teaching of a controversial matter which has relation to that subject and of controversial topics introduced by students. The faculty member should not introduce controversial matters which have little or no relation to the subject of instruction.

University faculty members are individuals, members of a learned profession, and representatives of a University. When faculty members speak or write as individuals, they should be free from institutional censorship or discipline, but faculty position in the community imposes special obligations. As persons of learning and education representatives, the faculty members should remember that the public may judge the profession and the University by extramural utterances. Hence, each faculty member should mat all times, be accurate, should exercise appropriate restraint, should show respect for the opinions of others and should make every effort to indicate the faculty do not speak on behalf of the University.

Academic Freedom should be distinguished clearly from constitutional freedom, which citizens enjoy equally under the law. Academic Freedom is an additional assurance to those who teach and pursue

knowledge and, thus, pertains to rights of expression regarding teaching and research within specific areas of recognized professional competencies.

The concept of Academic Freedom must be accompanied by an equally–demanding concept of academic responsibility. The concern of the University and its members for Academic Freedom safeguards must extend equally to requiring responsible service, consistent with the objectives of the University.

Faculty member has responsibilities to their discipline and to the advancement of knowledge generally. Their primary obligation in this respect is to seek and to state the truth as they see it. To this end, they shall devote their energies to developing and improving their scholarly competence. They shall exercise critical self–discipline and judgment in using, extending, and transmitting knowledge and they shall practice intellectual honesty.

Faculty members have responsibilities to their students. They shall encourage in students the free pursuit of learning and independence of mind, while holding before them the highest scholarly and professional standards. Faculty members shall show respect for the student as an individual and adhere to their proper role as intellectual guides and counselors. They shall endeavor to define the objectives of their courses and to devote their teaching to the realization of those objectives. A proper academic climate can be maintained only when the faculty member meets their fundamental responsibilities regularly, such as preparing for and meeting their assignments, conferring with and advising students, evaluating fairly and participating in group deliberations which contribute to the growth and development of students and the University. All faculty members also have the responsibility to accept those reasonable duties assigned to them within their field of competency, whether curricular, co–curricular, or extracurricular. Faculty members make every reasonable effort to foster honest academic conduct and to assure that their evaluations of students reflects their true merit. They do not exploit students for private advantage and acknowledge significant assistance from them. They protect students' academic freedom.

Faculty members have responsibilities to their colleagues, deriving from common membership in a community of scholars. They shall respect and defend the free inquiry of their associates. In the exchange of criticism and ideas, They should show due respect for the opinions of others. They shall acknowledge their academic debts and strive to be objective in the professional judgment of their colleagues. Faculty members accept a reasonable share of faculty responsibilities for the governance of the University.

Institutions of higher education are committed to open and rational discussion as a principal means for the clarification of issues and the solution of problems. In the solution of certain difficult problems, all members of the academic community must take note of their responsibility to society, to the institution, and to each other, and must recognize that at times the interests of each may vary and will have to be reconciled. The use of physical force, harassment of any kind, or other disruptive acts which interfere with ordinary institutional activities, with freedom of movement from place to place on the campus, or with freedom of all members of the academic community to pursue their rightful goals, are the antithesis of academic freedom and responsibility. So, also, are acts which, in effect, deny freedom to speak, to be heard, to study, to teach, to administer, and to pursue research. It is incumbent upon each member of the academic community to be acquainted with his/her individual responsibilities, as delineated by appropriate institutional statements found in the institution's policy manuals.

Faculty members have responsibilities to the educational institution in which they work. While maintaining their right to criticize and to seek revisions, they shall observe the stated regulations of the institution. Faculty members shall determine the amount and character of the work done they do outside their institution with due regard to the paramount responsibilities within it. When considering the interruption or termination of his or her service, the faculty member recognizes the effect of such a decision upon the program of the institution and gives due notice of the decision.

Faculty members have responsibilities to the community. As a person engaged in a profession that depends upon freedom for its health and integrity, the faculty members have a particular obligation to promote conditions of free inquiry and to further public understanding of academic freedom.

Administrators must protect, defend, and promote Academic Freedom.

4.4 Faculty Development and Evaluation Policies

4.4.1 Introduction

Teaching, research, and service are the triad of professional responsibilities at the University. While this is primarily a teaching University, it is a basic principle of higher education that scholarly research informs effective teaching. At the same time, the University faculty contributes richness to the culture of the community at large through their unique skills and talents. Evaluation of faculty performance considers these three areas and provides a critical process for continuous improvement of the University and faculty.

Both the importance and the imperfection of a faculty development and evaluation system are duly considered in the Southeastern Oklahoma State University scheme. It is designed within the following guidelines:

- The Faculty Development and Evaluation System is designed to improve faculty performance.
- The Faculty Development and Evaluation System will provide important information for promotion and tenure decisions.
- The System utilizes several sources of data, and these sources are clearly communicated.
- Evaluation procedures are individualized and flexible.
- Individualization considers the institution's nature, directions, and priorities, the administrative unit's needs, and the individual's interests.

An annual academic performance review (Faculty Development and Evaluation Summary) is submitted for each full–time faculty member. A formal evaluation is conducted for each non–tenured faculty member each year and for each tenured faculty member at least each third year.

4.4.2 Faculty Evaluation System

The Regional University System of Oklahoma Board of Regents has specified five basic categories upon which academic rank and promotion in rank are based: (1) education and experience, (2) effective classroom teaching, (3) research/scholarship, (4) contributions to the institution and profession, and (5) performance of non–teaching or administrative duties.

The Faculty Development and Evaluation System of Southeastern Oklahoma State University is designed to promote faculty development and to assess faculty performance on those prescribed criteria. Instrumentation of the system consists of four documents:

- Faculty Development and Evaluation Criteria (see Appendix D)
- Catalog of Faculty Development and Evaluation Criteria (Appendix E)
- Faculty Development Agreement (Appendix F)
- Faculty Development and Evaluation Summary (Appendix G - includes G1 and G2)

The document entitled "Faculty Development and Evaluation Criteria" lists criteria for evaluating faculty performance in the four categories. The document "Catalog of Faculty Development and Evaluation Criteria" presents exemplars for each criterion. The exemplars are not all–inclusive, but do provide examples and extend the definitions of the criteria.

The document "Faculty Development Agreement" is an agreement for areas of emphasis for the forthcoming year. It is not an implicit evaluation of criteria not listed, however. Refer to Point 1 in the section entitled "Procedural Principles and Guidelines."

"The Faculty Development and Evaluation Summary" provides for listing the education and experience of the faculty and then a rating of the faculty member's performance in the categories of (1) effective classroom teaching, (2) scholarship, (3) service to institution, profession, and public, and (4) performance of non–teaching/administrative duties/assignments. It also provides for a rating of overall performance. Provision is made for commentary and signatures on the back.

Category 4, performance of non–teaching/administrative duties/assignments, is interpreted to include those duties or assignments which result in a reduced teaching load such as serving as department chair, project director, coach, and band director.

4.4.2.1 Procedures

The "Catalog of Faculty Development and Evaluation Criteria" is utilized for establishing individual faculty development plans and for guiding individual faculty evaluations. Performance in each category is weighted by negotiation between the faculty member and the department chair within limits set by the institution and the administrative unit.

Institutional emphases define the weights of each category as follows:

- Category 1 (Teaching) +
- Category 4 (Non–Teaching)
- 50–70% of Overall Performance
- Category 2 (Scholarship)
- 15–25% of Overall Performance
- Category 3 (Service)
- 15–25% of Overall Performance

All faculty are rated on Categories 1, 2, and 3. All also are rated on all criteria in Category 1 and on negotiated criteria in Categories 2 and 3. Only those with duties or assignments which result in a

reduced teaching load are rated in Category 4. Weighting in Category 4 is calculated on an individual basis and combined with the weight of Category 1 so that the combined total is within the 50–70% range.

The rating on overall performance is a composite of the ratings in the categories.

Administrative units may also set limits for each category within the institutional parameters.

Completion of the "Faculty Development and Evaluation Summary" is based upon a conference of the department chair and the individual faculty member during which the relevant criteria for each category are rated. Not all criteria for each category apply to every faculty member. Relevancy of individual criteria is negotiated by the department chair and the individual faculty member.

Commentary is provided on the backside of the "Faculty Development and Evaluation Summary" instrument as indicated. The "Faculty Development and Evaluation Summary" is signed by both the department chair and the individual faculty member. The faculty member's signature denotes that the evaluation has been conducted according to approved procedures. It does not necessarily mean agreement with the ratings.

A completed "Faculty Development and Evaluation Summary" for each full–time faculty member is submitted by the department chair to the respective dean of the school for review.

The dean of the school reviews the evaluation, provides comments, and signs the instrument. The dean of the school keeps a copy in the dean's office and sends a copy to the department chair and a copy to the faculty member.

4.4.3 Procedural Principles and Guidelines

The Faculty Development and Evaluation System of Southeastern Oklahoma State University will be administered within the following procedural principles and guidelines.

1. Each faculty member will be evaluated on all Category 1 criteria and on criteria from other categories as determined in negotiation with the department chair. However, the development plan to be composed at the beginning of the development–evaluation cycle will specify only areas the faculty and chair identify for development. These areas may be ones from Category 1 in which the faculty needs improvement as well as special tasks in other categories. It is assumed that performance on required criteria not listed in the development plan will remain stable over the evaluation cycle. Cycle–end evaluation will address both the areas listed in the development plan and the other required criteria.
2. The department chair assumes that the faculty member is functioning at a level of "proficient" unless there is evidence to the contrary. For a rating lower than proficient, the chair has the responsibility of presenting evidence; and for a rating higher than proficient, the faculty member has the responsibility of presenting evidence.
3. Faculty development and evaluation criteria are generally stated in minimum terms. Ratings on criteria vary according to the fruitfulness of efforts.
4. The ratings on the evaluation scale are as follows:

Outstanding

Performance is among the best of colleagues in similar appointments in similar institutions in the respective field nationwide. On applicable criteria faculty member has recognition beyond the state.

Commendable

Performance is among the best of colleagues in similar appointments in similar institutions in the respective field statewide. On applicable criteria faculty member has statewide recognition.

Proficient

Performance is productive, effective, and consistent with the achievement of the emphases, objectives, and interests of the institution, the administrative unit, and/or the individual.

Needs Improvement

Performance is less than adequate for achieving the emphases, objectives, and interests of the institution, the administrative unit, and/or the individual.

Critical

Performance fails to contribute to the achievement of the emphases, objectives, and interests of the institution, the administrative unit, and/or the individual.

5. The "Faculty Development and Evaluation Summary" covers a year of performance except in certain instances; i.e., new faculty, faculty on leave, etc.
6. Only activities, contributions, and involvements directly related to the University or to the faculty member's educational field are considered in the evaluation.
7. While formal evaluations of tenured faculty are required at least each third year, formal evaluations may occur more frequently at the request of either the faculty member of the department chair. In years when a complete evaluation is not done, a continuation form will be submitted (Appendix G–Part II).

4.4.4 Faculty Development and Evaluation Process

The faculty development and evaluation process for the year includes the following three steps:

1. By September 15, the faculty revises and updates the previous year's "Faculty Development Plan" as outlined in the following section entitled "Faculty Evaluation Guide." It should list any activities completed the preceding year and not previously included in the "Faculty Development Plan". The faculty forwards the revised plan to the department chair.
2. By October 1, the faculty and the department chair meet for a year–end evaluation. The chair should send the completed "Faculty Evaluation Form," "Faculty Development Plan," and documentation (if applicable) to the dean of the school.

3. By November 1, the faculty and the chair complete the current year's "Faculty Development Plan."

4.4.5 Faculty Evaluation Guide

1. The following documents should be used: Faculty Development and Evaluation System (see department chair)

   Faculty Development Plan

   Faculty Evaluation Form (see department chair)

2. The evaluation for the preceding year should be made during September of the current year on the basis of the "Faculty Development Plan" completed in the fall of the preceding year and revised in August/September of the current year.
   a. Before the conference with the department chair, the faculty should conduct a year end self–evaluation and succinctly describe progress for each exemplar listed in the preceding year's "Professional Development Plan." A brief statement indicating whether the exemplar was fully accomplished, partially accomplished, or not addressed is appropriate.
   b. As the faculty formulates an overall self–rating in the area of teaching, s/he should analyze progress on several exemplars and accurately combine these to give an overall rating. Overall self–evaluation with only one exemplar is not acceptable. Citing marks from a student evaluation, for example, is not adequate evidence for a rating in the area of teaching. The results from the student evaluations represent only one dimension of teaching effectiveness. Multiple methods need to be used to formulate an overall self–rating. For example, results from peer–evaluations, student evaluations, ETC Major Field Achievement Tests, and other exemplars should be combined to support the rating for teaching effectiveness.
   c. In the areas of research/scholarship and service, again evidence from several exemplars needs to be combined to formulate the rating in each area.
   d. The faculty should write a summary paragraph that combines various activities to give an overall rating for performance. If the standard evaluation form is used, the faculty should mark it to show her/his self–evaluation.
3. Both the faculty member and the chair should have copies of each of the basic documents.
4. When the self–evaluation is complete, the chair and the faculty member should schedule a conference.
5. In the conference, the chair should review the faculty member's self–evaluation and make his/her own evaluation of the faculty member and mark it on the evaluation form. Documentation is required for ratings above or below proficient and should be attached to the evaluation forwarded to the dean.
6. By October 1, the chair should send a copy of the completed "Faculty Evaluation Form," the "Faculty Development Plan," and documentation (if any) to the dean of the school.
7. By October 31, the dean should write comments about the evaluation and return the copy to the chair.

4.4.6 Faculty Grievance Policy

The University recognizes the right of faculty to express their grievances and seek a resolution concerning work–related disagreements that might arise between University and its faculty. The purpose of the faculty grievance policy is to provide an avenue for the resolution of informal and formal grievances without fear of coercion, discrimination, or reprisal because of exercising rights under University policy.

a. Informal Grievances

Faculty members having complaints are encouraged to seek informal resolution. The University maintains an open–door–policy and administrators encourage faculty to communicate issues of concern to their department chair, academic dean, or administrative supervisor.

If the grievance cannot be resolved informally, the formal procedure is available. It provides for a prompt and impartial review of all factors involved in the grievance.

b. Formal Grievances

A formal grievance may be made when informal processes have not resolved a work–related issue and when a faculty member believes that he or she has been discriminated against on the basis of race, national origin, age, sex, disability or status as a veteran or that a violation of policy has occurred concerning working conditions, employment practices, individual rights, academic freedom, or due process (in matters not related to promotions and tenure). Complaints regarding promotions and tenure are addressed in the Faculty Personnel Policies section of this manual. Issues relating to salary increases, fringe benefits, and non–renewals of non–tenured track appointments are excluded from the formal grievance definition.

The Faculty Appellate Committee (FAC) is elected by the Faculty Senate and is a standing body that responds to grievances unresolved through administrative or informal procedures. The FAC on the Southeastern campus is described in detail in The Right of Appeal of Tenured Faculty, within the Tenure section of this manual.

PROCEDURES

Filing of Grievance:

Complaints unresolved administratively solely involving harassment based on race, ethnicity, sex, or discrimination because of race, national origin, sex, color, age, religion, disability or status as a veteran must be filed with the Affirmative Action Officer (AAO). (See University Policies, subsections Sexual Harassment and Racial and Ethnic Policy.) All other grievances must be filed with the Vice President of Academic Affairs or President's designee in the event that the Vice President is the grievant or respondent, who will then notify the Faculty Appellate Committee (FAC).

The grievance must be filed with the FAC Chair (through the Vice President of Academic Affairs' office or President's designee in the event that the Vice President is the grievant or respondent) or AAO as

soon as possible, but not more than one year from the date on which the faculty member knew or reasonably should have known of the violation giving rise to the grievance.

1. The grievant shall state fully in writing the facts upon which the complaint is based.

   A written complaint must contain the following:

   a. a. A clear and detailed, signed statement of the grievance,
   b. b. The specific remedial action or relief sought,
   c. A summary outlining with whom the points of dissatisfaction were discussed and with what results, and
   d. A summary of any evidence upon which the charges or complaints are based.
2. Where more than one type of complaint is present (i.e., sexual harassment and violation of due process), a copy of the harassment or discrimination complaint must be sent to the AAO for investigation. A grievance with multiple grounds is heard by one hearing committee. The FAC Chair and AAO will discuss and determine the appropriate appeals process under which such a grievance will be heard.
3. The Chair of the Faculty Appellate Committee immediately will notify the respondent(s) of the grievance. The respondent will have 15 calendar days from receipt of the complaint to respond in writing to the FAC Chair or AAO.

Confidentiality of Proceedings and Records:

Members of the FAC and other University officials are charged individually to preserve confidentiality to the extent appropriate with respect to any matter investigated or heard. A breach of the duty to preserve confidentiality is considered a serious offense and will subject the offender to appropriate disciplinary action. Parties and witnesses also are admonished to maintain confidentiality with regard to these proceedings.

All records of grievance investigation will be held by the Vice President for Academic Affairs or President's designee in the event that the Vice President is the grievant or respondent as confidential records.

Selection of the Hearing Committee:

1. The FAC Chair will schedule a meeting within 5 classroom days to select three members to serve on the Hearing Committee.
2. Any Hearing Committee member who cannot provide a fair and impartial hearing or consideration shall not serve.

Formal Hearing Process: All hearings shall follow these procedures:

1. Within 30 calendar days after reviewing the respondent's written response, the Committee shall set a hearing date.
2. The Hearing Committee will evaluate all available evidence provided by the parties and base its recommendation upon the evidence in the record.
3. The hearing shall be closed.

4. Length of hearing sessions may be established in advance, and reasonable rest periods may be allowed for all participants throughout the duration of the hearing.
5. The Committee shall proceed by considering the statement of grounds for grievances already formulated and the response written before the time of the hearing. If any facts are in dispute, the testimony of witnesses and other evidence concerning the matter shall be received.
6. Only evidence relevant to the grievance may be introduced into the hearing. Questions of relevance shall be decided by the committee chair.
7. A confidential recording of the hearing will be made. The recording and transcription, if any, will be arranged by the Hearing Committee Chair. The tape or transcript will be accessible to the faculty members involved, to members of the committee, and to the Vice President for Academic Affairs (or President's designee in the event the Vice President is the grievant or the respondent). The AAO will keep the original recorded tape. The grievant or respondent may request a copy of the tape provided that he or she supplies a blank tape to the AAO.
8. Either faculty member may request that the Hearing Committee Chair provide a written transcript of the testimony. The cost to prepare the transcript shall be paid by the faculty member making the request.

Disposition of Charges:

The Hearing Committee normally will communicate its findings, conclusions, and recommendations in writing to the grievant and respondent and the Vice President for Academic Affairs (or President's designee in the event the Vice President is the grievant or the respondent) within 15 workdays of the conclusion of the hearing. If the Vice President for Academic Affairs (or President's designee) concurs in the recommendation of the Hearing Committee, that recommendation shall be put into effect. The Vice President for Academic Affairs (or President's designee) must report to the grievant, respondent, and the Hearing Committee his/her decision within 10 workdays of receipt of the Hearing Committee's recommendation.

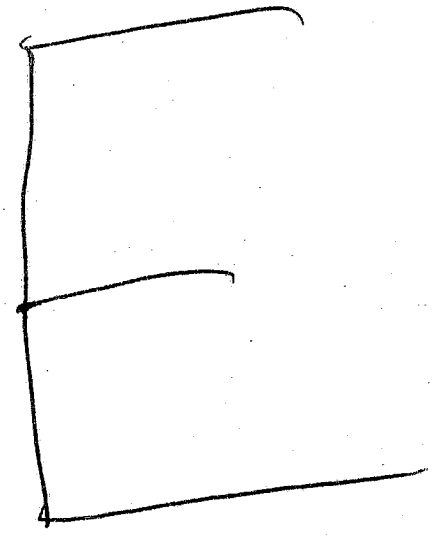
If the Vice President for Academic Affairs (or President's designee) does not concur in the recommendation, he/she must meet with the committee to reach a final decision. The work of the Hearing Committee is finished when the Vice President for Academic Affairs (or President's designee) communicates this joint decision in writing to the grievant and respondent, the Hearing Committee, and necessary University officials.

Appeal:

Either faculty member has the right to appeal this determination. The appeal is made by a written request to the President of the University for review of the decision and must be made within 10 workdays of the date of the final decision. If no appeal is delivered to the President within the 10 workday period, the case is considered closed. The decision of the President shall be delivered to the appellant within 10 workdays and the President's decision shall be considered final and binding.

Disposition of Records:

At the conclusion of the hearing, and after the final report of the Hearing Committee is submitted (and appeal completed), the tapes, and all other relevant material will be maintained by the Office of Human Resources.



4.5 Rank and Promotion

4.5.1 Academic Rank

The academic community recognizes educational achievements, experience, and meritorious contributions to higher education by awarding academic rank to faculty who perform with distinction in these areas. Academic rank is granted by the Regional University System of Oklahoma Board of Regents to teaching faculty on the basis of Regents' and the institution's faculty personnel policies.

The academic ranks of the University are professor, associate professor, assistant professor, and instructor. The senior ranks of professor and associate professor are granted as a result of exemplary teaching, scholarship, leadership, and service achievements. Faculty holding the senior ranks provide academic and scholarly leadership to developing faculty and provide advice and counsel to the department chairs, deans, and administration. For these reasons, serious attention is given to the scholarly, intellectual, and ethical stature of individuals selected for the senior ranks. The ranks of assistant professor and instructor are for faculty in the developmental stages of their teaching careers.

4.5.2 Promotion in Rank

The Regional University System of Oklahoma Board of Regents have specified five basic categories upon which academic rank and promotion in rank are based:

1. Education and experience,
2. Effective classroom teaching,
3. Research/scholarship,
4. Contributions to the institution and profession, and
5. Performance of non–teaching or administrative duties.

Education and experience alone are not adequate for granting promotion in rank. The following general guidelines shall be applied in the appointment and promotion of faculty to rank.

4.5.2.1 General Guidelines (Rev. 9/03)

For academic ranks of Instructor an earned master's degree or sixty (60) graduate hours in a relevant teaching field awarded by a regionally accredited or internationally recognized institution.

Assistant Professor one of the following (Option A, B, or C):

Option A.

An earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution.
Academic credentials which indicate the potential for effective classroom teaching, research/scholarship, contributions to the institution and profession, and, in appropriate instances, successful performance of non–teaching or administrative duties.

Option B.

Completed all requirements in a doctoral program relevant to the teaching field, with the exception of the dissertation. (NOTE: Faculty who wish to begin a doctoral program must have written approval of the program from the Department Chair, Dean, and Vice President for Academic Affairs, in order to qualify for promotion in rank or salary increases resulting from completion of the degree program.
Academic credentials which document effective classroom teaching and indicate the potential for research/scholarship, contributions to the institution and the profession, and, in appropriate instances, successful performance of non–teaching or administrative duties.

Option C.

Sixty (60) graduate hours relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher education. (NOTE: Graduate hours taken while on the faculty at Southeastern must be approved in advance by the Department Chair, Dean, and Vice President for Academic Affairs in order to qualify for promotion in rank or salary increase.)
Four (4) years of successful higher education teaching experience in full–time appointment(s).
Academic credentials which document effective classroom teaching and indicate the potential for research/scholarship, contributions to the institution and the profession, and, in appropriate instances, successful performance of non–teaching or administrative duties.

Associate Professor.

- An earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher education.
- Five (5) years of successful higher education teaching experience in full–time appointment(s).
- Five (5) years of experience at the assistant professor rank.
- Demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession, and, in appropriate instances, successful performance of non–teaching or administrative duties.
- Noteworthy achievement in classroom teaching, research/scholarship, and contributions to the institution and profession, or, in appropriate instances, performance of non–teaching or administrative duties.

Professor.

- An earned doctorate relevant to the teaching field awarded by a regionally accredited or internationally recognized institution of higher education.
- Ten (10) years of higher education teaching experience in full–time appointment(s).
- Five (5) years of experience at the associate professor rank.
- Demonstrated record of effective classroom teaching, extensive research/ scholarship, extensive contributions to the institution and profession, and, in appropriate instances, exemplary performance of non–teaching or administrative duties.
- Commendable or outstanding achievement on all of the categories: effective classroom teaching, research/scholarship, contributions to the institution and profession, and, in selected instances, performance of non–teaching or administrative duties.

4.5.2.2 Effective Classroom Teaching

Effective classroom teaching is demonstrated through mastery of a current knowledge base in subject matter taught at an appropriate student level. Such teaching stimulates achievement and practical personal applications by students. A continual review of current literature, research, and strategies for classroom application is necessary to effective teaching. An effective teacher evidences mastery in the classroom by thoroughly integrating skills and knowledge, sensitivity, and perception with the presentation of subject matter.

Effective classroom teaching is characterized by (1) subject matter mastery, (2) curriculum development, (3) course design, (4) delivery of instruction, (5) assessment of instruction, (6) availability to students, and (7) fulfillment of instructional administrative responsibilities.

Effectiveness will be documented by student evaluation of instruction; peer, department chair and/or dean evaluations; performance evaluation of program graduates by employers; and other applicable available information, including standardized assessment of majors.

4.5.2.3 Research/Scholarship

Scholarship is a state of mind that is demonstrated by the active involvement of a faculty member in the pursuit of new knowledge in his/her academic field or discipline. While the scope and nature of faculty scholarship will vary among departments, University faculty shall be involved in scholarly activities, individually or collaboratively, which advance the knowledge base and performance levels of their respective fields. Both the pursuit of new knowledge or techniques and the application of knowledge or techniques in creative ways are valued. Both the quality and the quantity of productivity are considered in assessing the contributions and performances.

Examples of research/scholarship are adaptations of knowledge to the learning environment, development of marketable instructional materials, creative artistic works evaluated by juries or panels, invitation for professional presentations or performances, articles in refereed or editor–evaluated publications, successful grantsmanship, selected unpublished research, books, monographs, inventions, patented or copyrighted products, etc.

4.5.2.4 Contributions to the Institution and Profession

Contributions occur when a faculty member applies his/her professional expertise beyond the classroom and research/scholarship responsibilities to advance the institution and profession. These contributions should be correlated with the educational needs of the student body and the objectives of the University.

Institutional contributions may consist of, but are not limited to academic advisement of students, sponsorship of student organizations, membership on ad hoc and standing committees, consultation to other areas of the University, participation in institutional or program self–study activities, and special assignments or responsible participation in activities which advance the academic programs of the University.

Professional contributions include involvement in various professional organizations in a manner that accrues favorable notice to the individual and the University. Evidence of such contributions may consist of, but are not limited to, memberships in professional organizations appropriate to a faculty

member's teaching field or area of responsibility, attendance at meetings, holding of offices, and serving on committees at local, state, regional, and national levels of said professional organizations.

4.5.2.5 Performance of Non–Teaching or Administrative Duties

These duties include, but are not limited to student advisement; departmental management; public relations; classroom, studio, office or other physical facility management; personnel management; equipment and supplies management; fiscal management; and time management.

The performance of such duties is carried out in a timely manner with efficiency and dispatch in a spirit of cooperation and sensitivity to the needs of students, staff, peers, and supervisors. These duties are carried out in full awareness of both legal and personal responsibilities and limitations concomitant to a state–supported educational institution.

Documentation of performance of non–teaching or administrative duties might include formal and informal observations and evaluations from students, peers, supervisors, and the public.

4.5.3 Promotion Process (Rev.9/03)

It is the responsibility of the individual faculty member to initiate the request for a promotion in rank and to prepare the portfolio of materials. The department chair will advise the faculty member in preparation of this request. The following steps outline the procedures in the promotion process. A Portfolio Transmittal Form (see Forms) to certify the receipt dates and transmittal dates at each step of the promotion process must accompany the request and is available from the department chair. Failure to forward the portfolio and recommendation by the specified date will constitute de facto approval at that step.

It is the responsibility of the individual faculty member to monitor the flow of materials through the process. At any step in the process, the faculty member may withdraw a request for promotion in rank.

4.5.4 Concepts and Understandings Regarding Rank and Promotion Policies

1. The highest interests of the University will best be served through a spirit of cooperation and a sense of mutual confidence among the faculty, the chairs, the academic deans, the chief academic officers, and the president of the University. The procedure for recommending promotion in rank is designed to systematize as well as to encourage such cooperation and mutual confidence.
2. The determination of professional training and/or experience to meet the criteria for assignment of rank will be the responsibility of the appropriate academic officer (or officers) on campus. They will consult with peers or supervisors of those who are being considered for changes in rank.
3. No person presently employed shall suffer reduction in rank as a result of the operation of these policies.
4. Instructional personnel who are not subject to assignment of rank may be classified by titles such as special instructors, lecturers, graduate assistants, adjunct teachers, and part–time teachers.

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

4.6 Tenure

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

4.6.1 Academic Tenure

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

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

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

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

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

4.6.2 Periods of Appointment and Tenure

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

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

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

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

Step 1–

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

Step 2–

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

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

the review, a poll by secret ballot of the Promotion and Tenure Review Committee will be taken to determine whether a recommendation for the granting of tenure will be made. A simple majority rule shall prevail. The Promotion and Tenure Review Committee shall then send the portfolio, the committee's vote, and their recommendation to grant or to deny to the department chair. All ballots are to be retained by the chair of the Promotion and Tenure Review Committee until a final decision is reached concerning the request. The ballots shall then be destroyed.

Step 3–

By December 1: The department chair shall review the Promotion and Tenure Review Committee's vote, critique the portfolio, evaluate each performance criterion, and decide whether to recommend the granting of tenure. The department chair will then forward a recommendation concerning the request and all documentation to the dean of the school. The chair will also provide in writing a statement of his/her action to the Promotion and Tenure Review Committee and faculty member.

Step 4–

By January 15: The dean of the school shall review the department chair's recommendation, the Promotion and Tenure Review Committee's vote, critique the portfolio, evaluate each performance criterion, and decide whether to recommend the granting of tenure. The dean will then forward a recommendation concerning the request and all documentation to the Vice President for Academic Affairs. The dean will also provide in writing a statement of his/her action to the department chair, Promotion and Tenure Review Committee, and faculty member.

Step 5–

By February 15: The Vice President for Academic Affairs shall review the dean's recommendation, the Promotion and Tenure Review Committee's vote, critique the portfolio, evaluate each performance criterion, and decide whether to recommend the granting of tenure. The Vice President for Academic Affairs will then forward a recommendation concerning the request and all documentation to the President. He will also provide in writing a statement of his/her action to the dean, department chair, Promotion and Tenure Review Committee, and faculty member. If the Vice President for Academic Affairs recommends that promotion or tenure be denied and the faculty member believes that the request has not been accorded "due process," s/he may request of the Faculty Appellate Committee a hearing pertaining solely to due process. Such an appeal must be filed by March 1. Pertinent testimony from all parties involved may be heard. If the Faculty Appellate Committee rules that due process was violated, the committee may then recommend that the procedure be renewed at the point where violation occurred. The Vice President for Academic Affairs shall be responsible for monitoring the subsequent procedures to assure that due process is accorded. The Faculty Appellate Committee must complete action on an appeal by March 20.

Step 6–

By May 1: Upon receiving a recommendation from the Vice President for Academic Affairs, the President decides either to approve or disapprove the request for tenure. If the President approves the request for tenure, s/he submits it to the Regional University System of Oklahoma Board of Regents, normally at the April meeting. The President then reports the Regents' action to the Vice President for Academic Affairs, the dean of the school, the department chair, and the faculty member.

If the President disapproves the request for tenure, s/he notifies the Vice President for Academic Affairs, the department chair, the Promotion and Tenure Review Committee, and the faculty member.

4.6.4 Concepts Regarding Tenure

The highest interests of the University will be served through a spirit of cooperation and a sense of mutual confidence among the faculty, the chairs, the academic deans, the Vice President for Academic Affairs, and the President of the University. The procedure for recommending tenure is designed to encourage such cooperation and confidence.

The Regional University System of Oklahoma Board of Regents recommends that not more than sixty–five percent (65%) of the full–time faculty at a University receive tenure. Once the sixty–five percent limit is reached, there will be no additions to the tenured faculty at Southeastern. However, the tenure process on campus will continue. Faculty members recommended for tenure will be placed in a priority–hold status by year pending tenure vacancies.

Under exceptional circumstances, a new faculty member may be recommended for tenure by a department chair, an academic dean, the Vice President for Academic Affairs, or the President without going through the normal process.

In the event that one of the deadlines in the tenure process falls on a weekend or holiday, the deadline becomes the next working day at the University.

After the process is completed, the following action should be taken:

a. The results of all balloting and recommendations from the dean, department chair, and Vice President for Academic Affairs will be placed in the personnel file of the candidate.
b. The portfolio and a copy of all recommendations will be returned to the candidate.
c. Other confidential, relevant records leading to tenure shall then be destroyed.

Once the tenure process has been initiated, it must be completed.

Any exception to the policy on tenure is the domain of the president of the University in conjunction with the Regional University System of Oklahoma Board of Regents.

4.6.5 Guidelines for Achieving Tenure

The following guidelines apply in decisions regarding the awarding of tenure:

Five (5) years of service at Southeastern Oklahoma State University in a tenure–track appointment as an assistant professor, associate professor, and/or professor.

Demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession, and, in appropriate instances, successful performance of non–teaching or administrative duties.

Demonstrated ability to work cooperatively to strengthen the academic quality of the institution.

Noteworthy achievement in classroom teaching and on at least one other criterion: research/scholarship, contributions to the institution and profession, or, in appropriate instances, performance of non–teaching or administrative duties.

4.6.6 Evaluation of Tenured Faculty

The academic and professional performance of each tenured faculty member may be reviewed annually and must be reviewed at least every third year.

The results of the review will be placed in the personnel record of the tenured faculty member. The tenured faculty member should be given a copy of the review and an opportunity to respond before it is placed in the personnel folder. An unsatisfactory review will require another review within one year. An unsatisfactory review at that time will be grounds for dismissal as listed under Sections 4.6.7 and 4.6.8 below.

4.6.7 Causes for Dismissal or Suspension of Tenured Faculty (rev. 02/05 by BOROC)

No tenured member of the faculty shall have his or her appointment terminated in violation of the principles of tenure adopted by the Regional University System of Oklahoma Board of Regents except for one or more causes which may include, but are not limited to, the following.

a. Committing a felony or other serious violation of law that is admitted or proved before a competent court, preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities, or violation of a court order which relates to the faculty member's proper performance of professional responsibilities.
b. Moral turpitude.
c. Insubordination.
d. Professional incompetence or dishonesty.
e. Substantial or repeated failure to fulfill professional duties or responsibilities or substantial or repeated failure to adhere to Board or University policies.
f. Personal behavior preventing the faculty member from satisfactory fulfillment of professional duties or responsibilities.
g. An act or acts which demonstrate unfitness to be a member of the faculty.
h. Falsification of academic credentials.
i. Two consecutive unsatisfactory post–tenure performance evaluations.
j. Bona fide lack of need for one's services in the University.
k. Bona fide necessity for financial retrenchment.

The President shall have the authority to suspend any faculty member formally accused of a, b, c, d, e, f, g, h, or I (listed above). The President shall immediately notify the Board of Regents of the terms and conditions of any such suspension. A faculty member should be suspended only if harm to the faculty or students is possible or disruption of proper conditions for teaching and learning are threatened by the faculty member's continuance. During the suspension period, compensation for the suspended person should be continued. If during the suspension period the faculty member is convicted of or admits to the commission of a felony or a crime involving moral turpitude or other serious violation of law referenced above, the institution shall not continue compensation.

4.6.8 Dismissal of Tenured Faculty for Program Discontinuance or Financial retrenchment

A faculty member with tenure whose position is terminated based on genuine financial retrenchment, bona fide discontinuance of a program, or a lack of need for one's services will be given five (5) months' written notice unless an emergency arises.

Before terminating an appointment because of discontinuance of a program or department, or because of other lack of need of services, the institution will make reasonable efforts to place affected members in other suitable positions.

If an appointment is terminated because of financial retrenchment or because of discontinuance of a program, the released faculty member's position will not be filled by a replacement within a period of two years, unless the released faculty member has been offered reappointment at the previous status.

4.6.9 Dismissal of Tenured Faculty Member for Cause

Dismissal proceedings shall begin with a conference between the faculty member and the appropriate dean/department chair. The conference may result in agreement that the dismissal proceedings should be discontinued or that the best interest of the tenured faculty member and the institution would be served by the faculty member's resignation. If so, the faculty member shall submit a resignation in writing, effective on a mutually agreed upon date. If this conference does not result in mutual agreement, the dean/department chair will submit a recommendation in writing with rationale to the faculty member and to the Vice President for Academic Affairs. Within fourteen (14) days, the Vice President for Academic Affairs should have a conference with the faculty member.

The conference with the Vice President for Academic Affairs may result in agreement that the dismissal proceedings should be dropped. On the other hand, the conference may result in mutual agreement that the best interest of the tenured faculty member and the institution would be served by the faculty member's resignation. If so, the faculty member shall submit a resignation in writing, effective on a mutually agreed upon date. If this conference does not result in mutual agreement, the Vice President for Academic Affairs will submit his/her decision in writing with rationale to the faculty member and forward his/her decision to the President. If the President concurs in the recommendations for dismissal, the President shall send a written statement to the faculty member within ten (10) school days of his/her receipt of the Vice President for Academic Affair's recommendation. Copies of this written statement should be sent to the Vice President for Academic Affairs, the appropriate dean, and department chair. When the President notifies a tenured faculty member of the intention to recommend dismissal for cause, the tenured faculty member must be informed in writing in detail of the specific charges against him/her and be informed of the procedural rights that will be accorded to him/her. Every reasonable effort must be made by the President to ensure that the communication of this action is received by such faculty members without delay. Such notification must be made by registered or certified mail with return receipt requested.

4.6.10 Suspension of a Tenured Faculty Member (rev. 2/05 by BOROC)

The President shall have the authority to suspend any faculty member formally accused of a, b, c, d, e, f, g, h, or I (listed above). The President shall immediately notify the Board of Regents of the terms and conditions of any such suspension. A faculty member should be suspended only if harm to the faculty or students is possible or disruption of proper conditions for teaching and learning are threatened by the faculty member's continuance. During the suspension period, compensation for the suspended person should be continued. If during the suspension period the faculty member is convicted of or admits to the commission of a felony or a crime involving moral turpitude or other serious violation of law referenced above, the institution shall not continue compensation.

4.6.11 Disciplinary Action Other Than Dismissal or Suspension

Disciplinary action affecting the terms of employment taken by the University against a tenured faculty member must be based upon causes stated in this chapter, or any other adequate cause which related directly and substantially to the fitness of the tenured faculty member to perform professional duties. Disciplinary action shall begin with a conference between the tenured faculty member and the appropriate department chair. If, as a result of the conference, the departments chair finds that disciplinary action is warranted, a written recommendation for action and rationale for the recommendation for action should be forwarded to the appropriate dean. If, after review, the dean decides not to proceed with further disciplinary action, both parties should be notified in writing. If the dean determines that additional action is warranted, then s/he should arrange a conference with the tenured faculty member. The dean may determine that no further action is necessary. If, however, the dean believes additional action is warranted, s/he shall notify in writing the faculty member and forward his/her recommendation for action to the Vice President for Academic Affairs within fourteen (14) days. The Vice President for Academic Affairs should arrange a conference with the faculty member. The Vice President for Academic Affairs may determine no additional action is necessary. However, the Vice President for Academic Affairs may determine a plan of disciplinary action, in which case s/he should notify the faculty member in writing and place a copy of the disciplinary action in the faculty member's personnel file.

4.6.12 The Right of Appeal of Tenured Faculty

Each of the six state universities under the jurisdiction of the Regional University System of Oklahoma Board of Regents shall institute an Appellate Committee on Dismissal of Tenured Faculty Members. The committee shall not exceed nine (9) tenured faculty members, eight (8) of whom shall be elected by the faculty governing body of the University and one member appointed by the President of the University. A quorum shall be five (5) members or a majority of qualified members of the committee. Initially, one–half of the elected members shall be elected for twelve (12) months and one–half for twenty–four (24) months; thereafter, one–half shall be elected each year. No member may serve more than two consecutive terms. One or more alternate members of the committee shall be elected to serve in the event a regular member is unable to serve. If any member of the committee is an interested party in a case which comes before the Appellate Committee on Dismissal of Tenured Faculty Members, said committee member shall not serve on that case.

The incumbent committee shall serve until the completion of any case pending at the time their term of service expires.

The decision of the committee will be based on majority vote. The committee will elect its own chair, who will have the right to vote.

If a faculty member receives notice of a pending dismissal and so desires, he may request and shall be accorded a hearing before the Appellate Committee on Dismissal of Tenured Faculty Members. Failure to make a request in writing to the President within fourteen (14) days after receipt of notification shall constitute a waiver by such faculty member of his/her right to a hearing before the Appellate Committee on Dismissal of Tenured Faculty Members.

At Southeastern, this committee has been designated to serve as the grievance committee in the promotion process (see Section 4.5.3, Step 4).

4.6.13 Appeal Procedures for Tenured Faculty

a. After a faculty member has requested a hearing before the Appellate Committee on Dismissal of Tenured Faculty Members, service of notice of hearing with specific charges in writing will be made at least twenty (20) days prior to the hearing. The faculty member may respond by waiving the hearing and filing a written brief or the matter may proceed to a hearing. If the faculty member waives a hearing, but denies the charge or asserts that the charges do not support a finding of adequate cause, the Appellate Committee on Dismissal of Tenured Faculty Members will evaluate all available evidence, including testimony and documentary evidence presented by the University, and make its recommendation upon the evidence in the record.
b. If the faculty member requests a hearing, the Appellate Committee on Dismissal of Tenured Faculty Members shall, with due diligence, and in keeping with the Administrative Procedures Act, considering the interests of both the University and the faculty member affected, hold a hearing and report its findings and recommendations to the President and to the involved faculty member.
c. At hearings before the Appellate Committee on Dismissal of Tenured Faculty Members, faculty members and the University shall be permitted academic advisors and/or counsel. A court reporter will be retained by the University to record the proceedings. Each party will pay the entire cost of his or her copy of the transcript. The committee will determine whether the hearing should be public or private.
d. The faculty member will be afforded an opportunity to obtain necessary witnesses and documentary or other evidence, and the administration of the University will attempt to secure the cooperation of such witnesses and will make available necessary documents and other evidence within its control. No employee of the institution, regardless of position, should be excluded or excused from appearing before the committee, if available.
e. The faculty member and the University will have the right to cross examine all witnesses present. Depositions are admissible whenever a witness cannot appear.
f. The committee may conclude: (a) that adequate cause for dismissal has been established by the evidence; (b) that adequate cause for dismissal has not been established by the evidence; or (c) that adequate cause for dismissal has been established, but an academic penalty less than dismissal, including removal of tenure, would be more appropriate. The committee may make any other recommendations it determines are appropriate. The committee's findings and recommendations shall be made to the President of the University. The committee shall send a copy of its findings and recommendations to the affected faculty member.

g. The President shall notify the affected faculty member of his recommendation to the Board of Regents. The faculty member shall have the right to request the Board of Regents to review adverse findings and recommendations of the President. The request must be in writing and filed within fifteen (15) days after final notification by the President at the office of the Regional University System of Oklahoma Board of Regents. If the affected faculty member does not timely request that the Board of Regents review the President's findings and recommendations, the President's determinations become final and binding.
h. In the event the faculty member submits a timely request to the Board of Regents to review adverse findings and recommendations of the President, the faculty member must indicate whether s/he desires a hearing of all of the evidence of the case; otherwise, the review will be a review of the record of the case. The Board of Regents has the discretion to determine whether the review will be a de novo hearing or a review of the record.
i. Public statements and publicity about the case by the University will be avoided until the proceedings, including consideration by the Regents, have been concluded.

4.6.14 Non–tenured Faculty

Non–tenured faculty shall be afforded the same rights of academic freedom as tenured faculty.

4.6.14.1 Annual Evaluation

Following institutional guidelines, the performance of non–tenured faculty members shall be evaluated annually by March 1 by the appropriate department chair and/or dean, and the results of the evaluation placed in the personnel record of the non–tenured faculty member. The non–tenured faculty member shall be given a copy of the evaluation.

4.6.14.2 Non–Reappointment

The Board of Regents delegates to the President or the President's designee the authority to reappoint or not to reappoint non–tenured faculty members. A non–tenured faculty member whose appointment is not renewed will be given written notice from the University by March 1, prior to termination of the current appointment. Failure to reappoint may be without specific causes. Reappointment or non–reappointment by the University is subject to ratification by the Board of Regents.

4.6.14.3 Termination for Cause or Suspension

The termination of employment for cause or suspension of a non–tenured faculty member within an existing contract period shall follow the same procedures and be limited to the same reasons as provided for tenured faculty members who are terminated for cause or suspended. A failure to reappoint may be without specific or stated cause.

4.6.15 Procedures for Amending These Regulations

The Regional University System of Oklahoma Board of Regents may amend these regulations at any time, or a requested amendment to these regulations may be initiated by the Appellate Committee on

Dismissal of Tenured Faculty Members or the administration of any of the institutions governed by the Board.

4.7 Faculty Load

University faculty have responsibilities in four areas: (1) instruction, (2) research/ scholarship, (3) service to the institution, profession, and public, and (4) various non–teaching or administrative duties. While instruction and research/scholarship are expected of all faculty, the scope and variety of service and non–teaching or administrative assignments will depend upon the needs of the departments, schools, and University at large.

Faculty load assignments will be monitored each semester by the department chair, reviewed by the dean of the school, and approved by the Vice President for Academic Affairs.

4.7.1 Teaching

Instructional assignments are based upon the expertise of the faculty member and needs of the academic department. They are made by the department chair in collaboration with the faculty member.

In the fall and spring semesters a full–time teaching load is twelve (12) semester hour units per semester.

In the summer term a full–time teaching load is eight (8) semester hour units per term.

4.7.2 Research/Scholarship

Individual faculty research and scholarly activities are defined by the professional interests of the faculty member. While the scope and nature of faculty scholarship will vary among departments, University faculty shall be involved in scholarly activities, individually or collaboratively, which advance the state of knowledge or performance levels of their respective fields. Both the pursuit of new knowledge or techniques and the application of knowledge in creative ways are valued.

4.7.3 Service to the Institution, Profession, and Public

4.7.3.1 Student Advisement

Academic advisement is a very important service responsibility for faculty. Advisors are expected to assist students with enrollment, to counsel them about career options, to provide them information about deadlines and checkpoints, and to monitor their progress through programs. The department chair selects faculty to serve as advisors. A recommended maximum advisement load is thirty (30) students.

4.7.3.2 Committees and Advisory Service

Institutional service activities include sponsorship of student organizations, membership on ad–hoc and standing committees, consultation to other areas of the University, and participation in activities which advance the academic programs of the University.

4.7.3.3 Professional Activities

Membership in selected professional organizations appropriate to a faculty member's assignment is a basic responsibility. Involvement in professional organizations at local, state, regional, and national levels consists of attendance of meetings, holding offices, and serving on committees.

4.7.3.4 Public

Service to the community at large occurs when a faculty member contributes professional expertise to the activities of governmental, public schools, or other public and service agencies. The contribution may be in, but is not limited to the following roles: consultant, program participant, member of a board or task force, or advisor.

4.7.4 Non–teaching or Administrative Duties

These assignments are based upon the needs of the department, school, and University. Such assignments will be developed cooperatively between the faculty member and department chair or appropriate administrative officer.

4.7.5 Revised Interim and Summer School Policies

Effective Spring, 2005

1. Summer Teaching Loads and Salary Formula. Regular faculty who teach one course (3 or 4 credit hours) will receive 1/9 of their base (9 month) salary. Faculty who teach two courses will receive 2/9 of their base salary. Two 3 or 4 cr. courses constitute a full summer load, and represent the maximum teaching load normally allowed. For example, a faculty member with a base salary of $45,000 would receive $45,000/9 = $5,000, for teaching one 3 or 4 cr. course, or $10,000 for teaching a full summer load of two 3 or 4 cr. courses). Because adjunct faculty do not have a base salary, they will continue to be paid at the prevailing adjunct rates for summer teaching.
2. Interim Classes. Courses taught during the May interim will be considered summer classes, and will count towards the summer teaching load. August interim classes will normally count as part of the fall teaching load. Exceptions to this must be justified, and approved by the department chair, dean and vice president for academic affairs. The January interim period will be utilized only for Continuing Education classes.

3. Exceptions to the Summer and Interim Policies.
    - Continuing Education classes. Continuing Education classes are contracted separately by the Office of Continuing Education, and are not counted as a part of regular teaching loads. Salary for Continuing Education classes is also contracted directly with the Office of Continuing Education.
    - Grant-funded salary. Summer salary that is paid by a grant is not counted as part of the summer load. Faculty who teach a full summer load (2/9 of base salary) may receive an additional 1/9 of base salary from grant funds. Faculty who do not teach in the summer are eligible to receive up to 3/9 of their base salary from grant funds. Summer salaries received from grant funds are also subject to the approval of the granting agency.
    - Emergency overloads. Emergency overloads must be justified and specifically approved by the department chair, dean, and vice president for academic affairs.

4.8 Department Chair Load

The department chair has the dual role of faculty member and chief administrator of the department. It is important that a proper balance be achieved between the chair's faculty assignment (teaching, research/scholarship, and service) and administrative duties (instructional program management, personnel management, department development, financial and facilities administration, and academic leadership).

4.8.1 Teaching

The teaching load for department chairs is defined by the scope of their duties which varies among the departments. Factors which must be considered in assigning the chair's teaching load include: (1) the number of students majoring in the programs offered by the department, (2) instructional functions of the department (size of service offerings relative to size of major programs), (3) size and nature of the departmental facilities (classrooms, laboratories, etc.), (4) inventory of instructional equipment and instrumentation, (5) size and nature of the instructional faculty (tenured relative to adjunct), (6) state and federal regulations that impact on the department and its operations, (7) ancillary activities associated with the department, (8) support staff available in the department, (9) number and size of externally supported programs initiated and managed within the department, (10) number of programs offered by the department, and (11) nature of programs offered by the department.

After careful review and documentation of the above factors, the teaching load of each chair will be negotiated on an individual basis. The department chair assignments will be reviewed each semester by the dean of the school and be approved by the Vice President for Academic Affairs.

4.8.2 Research/Scholarship

The individual chair's research and scholarly activities are defined by his/her professional interests. While the scope and nature of faculty scholarship will vary among departments, University chairs shall be involved in scholarly activities, individually or collaboratively, which advance the state of knowledge or performance levels of their respective fields. Both the pursuit of new knowledge or techniques and the application of knowledge in creative ways are valued.

4.8.3 Service to the Institution, Profession, and Public

4.8.3.1 Student Advisement

Academic advisement is a very important service responsibility for faculty and chairs. Advisors are expected to assist students with enrollment, to counsel them about career options, to provide them information about deadlines and checkpoints, and to monitor their progress through programs. The department chair coordinates advisement in the department and selects faculty as needed to serve as advisors. A recommended maximum advisement load is thirty (30) students.

4.8.3.2 Committees and Advisory Service

Some institutional service activities are sponsorship of student organizations, membership on the Academic Council and other ad–hoc or standing committees, consultation to other areas of the University, and participation in activities which advance the academic programs of the University.

4.8.3.3 Professional Activities

Membership in selected professional organizations appropriate to a chair's assignment is a basic responsibility. Involvement in professional organizations at local, state, regional, and national levels consists of attendance of meetings, holding offices, and serving on committees.

4.8.3.4 Public

Service to the community at large occurs when a department chair contributes professional expertise to the activities of governmental, public schools, or other public and service agencies. The contribution may be in, but is not limited to the following roles: consultant, program participant, member of a board or task force, or advisor.

4.8.4 Administrative Duties

The department chair is directly responsible to the dean of the respective school and has the charge of providing collegial leadership to the faculty of the academic department. This leadership is in five primary areas.

4.8.4.1 Instructional Program Management

Plans departmental course offerings to serve the department majors and to provide appropriate service to other clientele (general education, other majors, higher education centers, and continuing education).

Prepares the departmental course schedule each semester and each summer term; identifies and recommends qualified instructors.

Coordinates the preparation and revision of syllabi and instructional objectives of the course of study.

Provides appropriate coordination of student teachers, entry–year teachers, and/or interns.

Coordinates requests to the library and media center for the purchase of books, periodicals, and media materials that support the instructional and research/scholarship needs of the department.

Coordinates advisement of students in the department, including assigning advisors, distributing materials for the placement of graduates from the department programs, and assisting graduates in finding appropriate placement and in obtaining letters of recommendation.

Evaluates learning in the department through student evaluations of instruction, program review, and assessment of students.

Solves problems and resolves conflicts between students and instructors.

Solves problems related to closed classes during enrollment and manages enrollment in courses offered by the department.

Approves substitutes to cover classes when faculty have to be absent during emergencies.

Coordinates orders with the bookstore for textbooks and required student supplies.

4.8.4.2 Personnel Management

Coordinates the recruitment and selection of new faculty to maintain a balanced and diversified pool of instructional faculty.

Coordinates the annual faculty evaluation procedures for tenure and promotion and assists faculty in preparing the portfolio of materials requesting promotion.

Assigns faculty responsibilities in the areas of instruction, advisement, and department service (facilities and equipment management, recruitment, etc.)

Fosters faculty development by providing appropriate feedback and assistance in obtaining professional developmental activities.

Acts as a communication link between the faculty and administration.

Maintains good morale in the department through a positive outlook and positive relations among the members of the department.

Advocates appropriate rewards and recognition of faculty in the department.

Supervises and evaluates support staff.

Recruits and supervises student workers and processes time sheets.

4.8.4.3 Financial and Facilities Management Prepares and submits an annual department budget.

Manages and controls the department budget by allocating funds as needed, prepares requisitions, and verifies purchase receipts.

Supervises the use of department space and requests maintenance of space.

Supervises the equipment and instrumentation facilities of the department and maintains the equipment in working order.

Conducts an annual inventory of the equipment and instrumentation assigned to the department.

Coordinates resources used jointly with other departments.

4.8.4.4 Department and Program Development

Coordinates the establishment of faculty and departmental goals.

Coordinates department planning for developing quality instruction, research/scholarship, facilities, equipment, personnel, and general progress.

Develops and recommends curricula for majors and minors in disciplines represented in the department.

Fosters good teaching by providing feedback from instructional evaluations.

Recruits students by collaborating with High School Relations, by corresponding with prospective students, by hosting visiting students, and by preparing recruitment materials.

Coordinates regular program review and assessment activities in the department.

Supervises periodic follow–up studies of students.

4.8.4.5 Academic Leadership

Stimulates research/scholarship activities among the faculty.

Encourages requests for appropriate external funding for the department.

Establishes and monitors standards of achievement in the department.

Communicates departmental needs within the University.

Engages in positive public relations by communicating information that improves the department's image and reputation on campus, in southeastern Oklahoma, and at community colleges from which transfer students come.

4.9 Regulations Affecting Faculty and Chair Load

4.9.1 Calculation of Teaching Load

Lecture
Undergraduate—1 Carnegie clock hour per week = 1 semester hour unit
Graduate—1 Carnegie clock hour per week = 1.333 semester hour units
Laboratory
2 Carnegie clock hours per week = 1 semester hour unit
Applied Lessons
1.5 clock hours per week = 1 semester hour unit
Teacher Education Practicum
(Education 2000, 3000, 4000)
20 students = 1 semester hour unit
Special Assignments
Negotiated with appropriate administrators.
Arranged Classes
These will not contribute to semester load unless adequate enrollment is obtained to be counted as a regular class (normally, 15 for undergraduate, 12 for graduate).

The load status of classes listed as directed readings, research, independent studies or departmentally specific courses will be evaluated by the department chair and the dean. Such courses will be judged by the same enrollment considerations applied to other courses.

4.9.2 Office Hours (update

A full-time faculty member is required to schedule ten office hours per week and it is recommended at least one (1) office hour be scheduled each day Monday through Friday. In addition, a faculty member is expected to be available additional hours by appointment. Faculty members teaching online or blended classes may negotiate with the department chair to substitute up to five online office hours for five physical office hours.

4.9.3 Absences from Duty

Revised 07-01-2006

When a faculty member is to be absent from an assigned responsibility, he/she must file a Faculty Absence Notification Form (see Forms). In the case of sick leave, this form is filed with Department Chair only. In the case of personal leave or leave due to Professional/University business, the form is filed with both the Department Chair and the Dean.

4.9.4 Outside Employment

As a general rule, full–time faculty are not to be engaged in regular remuneration–producing activities (operating a private business or working as an employee for others) from 8 a.m. through 5 p.m. Monday through Friday. Exceptions must be approved by appropriate administrative personnel.

4.10 Selection and Retention of Department Chairs

The procedure for selecting chairs of academic departments takes into consideration the roles of the academic departments and the responsibilities of the chairs.

4.10.1 The Role of Academic Departments

Southeastern Oklahoma State University recognizes the importance of vigorous, independent academic departments for two reasons:

1. Departments provide an effective framework for instructing students, communicating with students, and making professional decisions about curriculum, class schedules, and teaching loads. An independent departmental structure provides stability for these functions even when changes in academic organization occur. Strong academic departments provide institutional integrity and accountability.
2. Since most faculty members think of themselves as instructors of a particular discipline, departments are their chief bases of group identity and loyalty.

4.10.2 The Qualifications and Role of Department Chairs

Ordinarily, the minimum educational requirement of a chair is an earned doctorate or a terminal degree in one of the disciplines represented in the academic department. In addition, leadership and management abilities are required.

A department chair is responsible to the dean of the school and is charged with providing leadership to the faculty of the academic department. This leadership is in five primary areas: (1) instructional program management, (2) personnel management, (3) financial and facilities administration, (4) department and program development, and (5) academic leadership. (See Section 4.8.4)

4.10.3 Departmental Chairs' Selection Process

Both departmental faculty and academic administration are involved in the process of selecting chairs. A department chair may be appointed from within the University and from the result of a search and interview process. The steps for appointment within the University are as follows:

1. The faculty and dean will develop a written description of the qualifications necessary for a chair of that department.
2. The dean will ask the faculty to submit nominations of candidates.
3. The dean will interview the nominees to ascertain their willingness to serve and their leadership philosophies.
4. The faculty will nominate a candidate for its chair by a process established as departmental policy. The decision will be reported in writing to the dean.
5. The dean will submit a recommendation for chair to the Vice President for Academic Affairs.
6. Within two weeks of receipt of the dean's recommendation, the Vice President for Academic Affairs will submit a recommendation to the President.

7. Within three weeks after receipt of the Vice President's recommendation, the President will notify the dean and the Vice President for Academic Affairs of his/her decision.
8. If the recommendation is not approved, the process will be repeated, beginning with Step 4.
9. Any situation not covered in this selection procedure will be handled cooperatively by the departmental faculty and the dean.

4.10.4 Evaluation of Chairs

1. Department chairs will be evaluated annually, and a comprehensive evaluation will be completed every fourth year. Results of each evaluation will be communicated to the chair orally and in writing by the dean.
2. The incumbent chair will declare his/her intention by September 1 of the fourth year to request consideration for reappointment. Departmental faculty, the dean, the Vice President for Academic Affairs, and the President will participate in this evaluation. The dean, the Vice President, and the President, with advice from faculty, will decide whether to retain or to replace the current chair. If the decision is to replace the chair, the departmental chairs' selection process will be initiated.
3. The criteria and instruments for evaluation of chairs will be approved by the faculty, chairs, deans, Vice President for Academic Affairs, and President.

4.10.5 Replacement of Chairs for Cause

If the dean, the Vice President for Academic Affairs, or the President believes that a chair should be removed at some time other than during the comprehensive evaluation year, the evaluation process may be initiated without delay. If the departmental faculty believe a chair should be replaced, a request containing the signatures of fifty percent of the full–time faculty may be submitted to the dean. After consultation with departmental faculty, the dean will determine whether or not the request is in the best interest of the department. If the dean disagrees, the decision and justification will be submitted in writing to the faculty, the Vice President for Academic Affairs, and the President. If the dean agrees, he/she will, with the written approval of the Vice President for Academic Affairs and the President, initiate the evaluation process immediately.

4.11 Personnel Files

This policy is intended to provide guidelines for access to employee records, while maintaining the security necessary to protect the privacy of University employees and the interests of the University. An employee has access to his/her permanent personnel file, which is maintained in the Human Resources Office. In addition, a faculty member has access to his/her personnel file relative to academic progress and qualifications, which is maintained in the Office of Academic Affairs. Access to all appropriate records shall be in accordance with the provision of this policy and the Oklahoma Open Records Act.

4.11.1 Contents

The Human Resources Office, as custodian of personnel files, shall determine information to be placed in the files. Only such information as is germane to the person's employment with the University shall be retained in these files. Examples of this type of information are:

a. Information pertaining to bona fide occupational qualifications.
b. Behavior and discipline matters.
c. Personnel actions, such as appointment and change of status.

Individuals may ask that material relevant to their employment be included in their personnel file by written request to the Human Resources Officer. An individual may not remove or add any records to his/her personnel file at the time of inspection.

Files related to academic progress and qualifications for faculty are maintained in the Office of Academic Affairs.

4.11.2 Open Records Act

The following personnel records shall be deemed confidential and may be withheld from public access:

Those that relate to internal personnel investigations including, without limitation, examination and selection material for employment, hiring, appointment, promotion, demotion, discipline, or resignation.

Those where disclosure would constitute a clearly unwarranted invasion of personal privacy such as, but not limited to, employee evaluations, payroll deductions, and employment applications submitted by persons not hired by the University.

Those which are specifically required by law or University policy to be kept confidential.

All personnel records not specifically falling within the exceptions provided above shall be available for public inspection.

4.11.3 Correction of Records

An employee may dispute the accuracy of any material included in his/her personnel file. Such questions should be directed to the custodian of the file in writing. If the questions are not resolved by mutual agreement, the employee may initiate a complaint.

Academic Policies and Procedures

6/1/2007
3:45 pm
Called Dr. Rachel Tudor
580-931-9743

Advised Dr. Tudor of SOSU Policies:

1.8 Nondiscrimination, Equal Opportunity, Affirmative Action Policy;

7.4 Sexual Harassment Policy

Advised Dr. Tudor that he should:

- discuss with chair and dean your gender presentation at SOSU

-you should seek any advice or opinion about which gender presentation to use from your counselor or psychologist

-handicap restroom 2nd floor Morrison Hall is available but it is not mandatory

-this is all new to us, too, and the best option for you may be to use this restroom

- in addition there is a family restroom in the new Student Union.

Dr. Tudor thanked me for my professionalism.

Cathy Conway

From: Doug McMillan
Sent: Tuesday, June 05, 2007 12:36 PM
To: Cathy Conway
Cc: Bridgette Hamill
Subject: RE: Data Sheet w/Name Change for Dr. Tudor

Cathy,

Please give the form directly to Bridgette. I am not a reliable pass through. I would like for you to meet with C.W. and Dr. Mischo to discuss this further. I will ask Bridgette to schedule a meeting for us as soon as possible.

Thanks,

doug

From: Cathy Conway
Sent: Mon 6/4/2007 2:36 PM
To: Doug McMillan
Subject: Data Sheet w/Name Change for Dr. Tudor

Hi Dr. McMillan,

I have a data sheet form with the name change for Dr. Tudor. Should I give this to you to give to Bridgette?

If you are planning to discuss Dr. Tudor with the department chair and dean, would you like me to be there and advise them about the two university policies I discussed with Dr. Tudor about last week?

Thanks,

Cathy

Cathy Conway, Human Resources Director

Southeastern Oklahoma State University

Pho: (580)745-2162

FAX: (580)745-7484

6/5/2007

Cathy Conway

From: Cathy Conway
Sent: Monday, June 04, 2007 2:37 PM
To: Doug McMillan
Subject: Data Sheet w/Name Change for Dr. Tudor

Hi Dr. McMillan,

I have a data sheet form with the name change for Dr. Tudor. Should I give this to you to give to Bridgette?

If you are planning to discuss Dr. Tudor with the department chair and dean, would you like me to be there and advise them about the two university policies I discussed with Dr. Tudor about last week?

Thanks,

Cathy

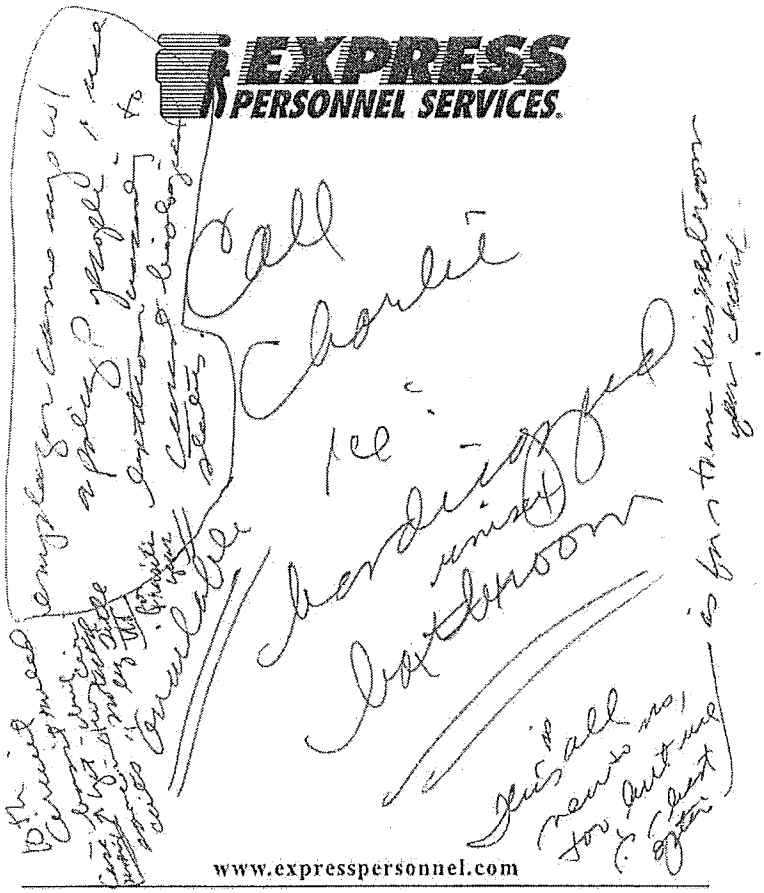
Cathy Conway, Human Resources Director

Southeastern Oklahoma State University

Pho: (580)745-2162

FAX: (580)745-7484

6/4/2007


EXPRESS
PERSONNEL SERVICES
www.expresspersonnel.com
2702 Line Avenue
Shreveport, LA 71104
(318) 226-8777 Fax (318) 227-8811
1914 N. Grand
Sherman, TX 75090
(903) 893-1122 Fax (903) 893-9131

6/1/07 3:45 Dr. Tudor 580-931-9743

EXPRESS PERSONNEL SERVICES.

2 policies in place
1.8. nondiscrimination eeo/affirm action policy
7.4. sexual harassment policy
Discuss w/ chair & dean

- your gender presentation @ SOSU.
- advice/opinion - seek from your counselor or psychologist (i.e. Ms. Porter)

[illegible] no for [illegible] professional [illegible]

handicapped restroom
This is all new to us, too, but we [illegible] best
Mansion Hall

www.expresspersonnel.com
2702 Line Avenue
Shreveport, LA 71104
(318) 226-8777 Fax (318) 227-8811
1914 N. Grand
Sherman, TX 75090
(903) 893-1122 Fax (903) 893-9131

opinion is for you to use this [illegible] answered

[illegible] handicapped facilities
ask psychologist/psychiatrist for opinion
living as female for a year
we would [illegible] would include looking with your gender presentation female - male.

RACHEL TUDOR
931-9743

6/19/07 1:30
Met w/ Doug, Dr. Margum
& Dr. Nisebo
cc

SOSU Policies

1.8 Nondiscrimination, Equal Opportunity & Affirmative Action Policy;

7.4 Sexual Harassment

Discuss w/ Chair & Dean

Name change from T. R. Tudor, III to Rachel Jona Tudor

Advise what his gender presentation will be at SOSU

Advice/Opinion about which gender presentation to choose

Dr. Tudor should seek from his counselor or psychologist

SOSU should not advise

Restroom

Handicap restroom 2nd floor Morrison Hall is available but not mandatory

This is all new to us, too, but we think that the best option is for Dr. Tudor to use this restroom.

In addition, there is also a family restroom in new Student Union

Claire Stubblefield

From: Claire Stubblefield
Sent: Friday, September 03, 2010 9:47 AM
To: Cathy Conway
Subject: RE: Most Recent Issue and Prima Facie

Thank you so much for such a direct reminder for investigating a case. I have shared these questions with Dr. McMillan.

From: Cathy Conway
Sent: Friday, September 03, 2010 7:39 AM
To: Claire Stubblefield
Subject: Most Recent Issue and Prima Facie

Claire,

I attended an employment law seminar yesterday and was reminded of Prima Facie, and I thought of the disgruntled faculty member. This is a great place to start with any inquiry or formal investigation – and Charlie always asks questions like this. I'm sure I've heard this before, but it is always good to be reminded.

The Prima Facie case – this is the burden shifting test by which most discrimination cases are judged.

1. Is the employee part of a protected class, and did he or she suffer an adverse employment action?
2. Can the employer articulate a legitimate non-discriminatory and non-retaliatory business reason for making the adverse employment decision?
3. Can the employee prove that the business reason given by the employer is a mere pretext (cover-up) for a discriminatory motive

Hope that this helps,
Cathy

Cathy A. Conway
Director, Human Resources
Southeastern Oklahoma State University
1405 N. 4th Avenue
Durant, OK 74701-0609
Pho: 580.745.2162
FAX: 580.745.7484
Email: *cconway@se.edu*

REINSTATE DR. RACHEL TUDOR

PETITIONS START A PETITION BROWSE

log in / Join

PETITION CLOSED

This petition is now closed. You can still make a difference in the Care2 community by signing other petitions today..

BROWSE PETITIONS ▸

Reinstate Dr. Rachel Tudor

4,080 SUPPORTERS

BY: concerned citizens and colleagues

TARGET: Sheridan McCaffree and Regents of the Regional University System of...

4,080 / 5,000

we've got 4,080 supporters, help us get to 5,000 by October 22, 2011

overview | petition

Dr. Rachel Tudor has been denied tenure at Southeastern Oklahoma State University and informed that her employment will be terminated effective May 31, 2011. It appears that this denial and dismissal are connected to discrimination against her for being transgender.

For nearly two years, the administration at Southeastern has repeatedly and egregiously violated established policies and procedures in the review of Dr. Tudor's application for tenure and promotion. The Faculty Appeals Committee has found in favor of Dr. Tudor twice, and the Faculty Senate has passed a resolution in support of her. Meanwhile, the administration arbitrarily re-wrote the Academic Policies and Procedures manual in the midst of the process, in order to facilitate Dr. Tudor's dismissal.

Given the egregious administrative misconduct and implication that Dr. Tudor is being dismissed due to her gender, rather than her excellent professional qualifications, we hereby request that the State Regents reinstate Rachel Tudor and ensure that her tenure case is fairly evaluated on the quality of her work as a teacher and scholar.

you have the power to create change.

START SHARING AND WATCH YOUR IMPACT GROW

686 79 Email embed

other urgent petitions need your help

TAKE ACTION NOW

Tell Ellen DeGeneres to Remove Leather From Her Clothing Line!

88,033 SUPPORTERS

sign petition

URGENT Signatures Needed to Stop OC Animal Control From Killing Karma The Husky

280,812 SUPPORTERS

sign petition

End Commercial Aerial Hunting of Wild Hogs

77,749 SUPPORTERS

sign petition

MAKE A DIFFERENCE

start a new petition

the #1 petition site in the world

site feedback

WE SIGNED: REINSTATE DR. RACHEL TUDOR

Severine Stockling, France — 4 years ago
SEND

Molly Merryman, OH — 4 years ago
Kent State University
SEND

Name not displayed, United Kingdom — 4 years ago
Not affiliated

LeAndra T jburg, OK — 4 years ago
Student
SEND

Lucy Frost, TX — 4 years ago
SEND

Stuart Snow, TX — 4 years ago
SEND

Stephiane Stovall, OK — 4 years ago
I am a current English major at Southeastern Oklahoma State University.
SEND

Wanda Walker, AR — 4 years ago
SEND

Name not displayed, CA — 4 years ago

celia biggs, OR — 4 years ago
SEND

Carmen Santos, CA — 4 years ago
SEND

Heavin Taylor, OK — 4 years ago
Student
SEND

Thomas Earle, MA — 4 years ago
SEND

OFFICE OF ACADEMIC AFFAIR

SOUTHEASTERN OKLAHOMA STATE UNIVERSIT
1405 N. FOURTH AVE., PMB 413
DURANT, OK 74701-060

580-745-222
FAX 580-745-747
WWW.SE.ED

April 29, 2010

Dr. Rachel Tudor
Assistant Professor of English
Department of English, Humanities
and Languages

Dr. Tudor:

You recently received from President Minks a letter informing you that your request for tenure and promotion was denied. In President Minks' letter he formally instructs Dr. McMillan to provide you with the reason(s) as to why tenure and promotion were denied.

As my email of March 31, 2010, indicated, the Faculty Appellate Committee did meet and rendered a decision in regard to your appeal. Upon examination of the facts as presented the Faculty Appellate Committee recommended that your request for a detailed written explanation that clearly delineates the factors that led to Dr. Scoufos and Dr. McMillan decision to deny tenure and promotion be provided; however, it needs to pointed out that there is no policy that stipulates that the Vice President and/or the Dean is compelled to provide reasons as to why tenure and promotion were denied. The President's authority, as delegated to him from the RUSO Board of Regents, is clearly spelled out in section 3.7.3 in the Policies and Procedures Manual. This section, and I quote, states that it is: "the duty of the president to see to it that the standards and procedures in operational use within the college or university conform to the policy established by the governing board and to the standards of sound academic practice."

I also took the additional step of consulting with the University's legal counsel in regard to this issue. He reviewed all the pertinent facts and also noted that in section 3.7.4 there is no requirement for anyone, including the President, to state their reasons if their recommendation is different than the recommendation of the Department Tenure and Promotion Committee. The policy only suggests that after the President makes his decision, if different than the recommendation of the Committee, he should state the reasons. Despite not being required to state his reasons, in this case the President has instructed Dr. McMillan to provide you with the information you requested. Dr. Minks' decision, in my view, moots your appeal and has brought this process to an end.

In accordance with section 4.4.6 in the Academic Policies and Procedures Manual you do have the right to appeal this decision to the President of the University. You will have 10 workdays from April 29, 2010, in which to do so. If no appeal is delivered to the President within the 10 workday period, the case is considered closed.

Respectfully,

Charles S. Weiner, Ed.D.
Assistant Vice President for Academic Affairs

pc: President Larry Minks
Interim Vice President Douglas McMillan
Dean Lucretia Scoufos

OFFICE OF ACADEMIC AFFAIRS

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
1405 N. FOURTH AVE., PMB 413
DURANT, OK 74701-0609

580-745-2222
FAX 580-745-7471
WWW.SE.EDU

I, Rachel Tudor, received on April 29, 2010, from Dr. Charles Weiner, Assistant Vice President for Academic Affairs, a letter in regard to the decision rendered by the Faculty Appellate Committee.

Rachel Tudor 4/29/10

Rachel Tudor Date

TO: Dr. Weiner

FROM: Dr. James Knapp (chair of committee), Dr. Larry Prather, Dr. Jon Reid

DATE: March 25, 2010

RE: Appeal of Dr. Rachel Tudor

On February 26, 2010, Dr. Rachel Tudor issued a formal request to President Larry Minks for a hearing before the Faculty Appellate Committee (FAC). The basis of Dr. Tudor's appeal is that due process has not been followed in regard to her application for promotion and tenure. Specifically, Dr. Tudor is asserting that Dr. Scoufos (Dean of the School of Arts and Sciences) and Dr. McMillan (Interim Vice-President for Academic Affairs) have declined her request for promotion and tenure without providing a detailed explanation of their rationale despite the fact that the English, Humanities, and Languages Promotion and Tenure Review Committee voted to approve her application.

Three members of the FAC (Dr. James Knapp, Dr. Larry Prather, and Dr. Jon Reid) met on Monday, March 22, 2010 to consider the appeal of Dr. Tudor. The FAC supports Dr. Tudor's position that due process has not been followed based on section 3.7.4 of the Policies and Procedures manual of Southeastern Oklahoma State University. In particular, the FAC has referred to the following portion of section 3.7.4:

> "The governing board and president should, on questions of faculty status as in other matters where the faculty has a primary responsibility, concur with the faculty judgment except in rare instances and for compelling reasons which **should be stated in detail"** (emphasis added by Dr. Knapp).

It is the recommendation of the FAC that both Dr. Scoufos and Dr. McMillan provide a detailed, written explanation that clearly delineates the factors that have led to their decision to decline Dr. Tudor's application for promotion and tenure.

SOUTHEASTERN
A CENTURY OF BUILDING FUTURE

To: Rachel Tudor, Assistant Professor, Department of English, Humanities & Languages
From: Claire Stubblefield, Affirmative Action Officer
Date: 1/19/11
Re: Findings and Conclusions on Gender Discrimination Complaint

On August 30, 2010, this office received your charge of discrimination stemming from alleged "egregious breaches of policy and law in reference to discrimination in promotion and tenure." You assert that you were discriminated against based on your race and gender, Native American female. You assert that your tenure process was different than that for Dr. Mark Spencer, a white male in your department. On October 28 you amended your complaint to expand the demographic to include Drs. Cotter-Lynch and Parrish, white females who are not transgendered.

Grievance

On Thursday, September 9, 2010, the formal discrimination complaint process began. To determine the merit of your complaint, it was necessary to identify whether different treatment was afforded another similarly situated faculty member engaged in the tenure and promotion process. Your six page complaint outlines 7-8 points of grievance. Consequently, as you and I discussed each claim, commonality was cited, and you agreed to establish three (3) priority items for illumination. You identified the following priority items with your requested resolution:

Complaint 1: You indicated that on April 6, 2010 you were involved in an intimidating, coercive and demanding meeting with Dean Scoufos. You state Dr. Scoufos demanded you withdraw your application for Tenure and Promotion (hereinafter referred to as T&P), and if you did not, you would not be allowed to reapply for reappointment during the 2010-2011 academic year. The T & P policy states tenure-track faculty has six years to apply for tenure. In April 2010, you were in the sixth year of affiliation with the University.

You further allege Dr. Scoufos stated, "You may think you are safe because the date for non-renewal of your contract without cause has passed, but you may still be non-renewed with cause if you don't withdraw your application." You asked her if she was speaking on her own authority or on behalf of the Vice President of Academic Affairs, Dr. Douglas McMillan (hereinafter referred to as McMillan). You allege Dean Scoufos said that she was speaking on behalf of Dr. McMillan and President Minks and that Dean Scoufos, said, "They (McMillan and Minks) met and decided to demand that I (Rachel Tudor) withdraw my application, and to inform me of the consequences of refusing to comply with their demands."

The resolution you requested: 1) An acknowledgement of the maltreatment by the administration, and 2) Improvement of the review process e.g.

review process; the documentation should allow the applicant to correct and/or clarify any misunderstood or erroneous information that may have caused the non-recommendation.

Complaint 2: You reported that differential access/treatment was extended by Drs. McMillan and Jesse Snowden (then Interim President) to Dr. Mark Spencer, a white male. You allege that Dr. Spencer was given informal processes that were not afforded to you which you believe to be based on your status as a Native American female. Specifically you assert that Dr. Spencer was given additional time to add to his portfolio and that you were not given additional time. In your amended complaint you further alleged that Dr. Cotter-Lynch and Dr. Parrish were similarly situated but that you were treated differently. Your requested resolution was that all candidates receive equal information, access and opportunity for modification of the process without the appearance of double standards.

Complaint 3: You indicate senior administration failed to provide a satisfactory explanation of their reasons for not recommending tenure and promotion until the process was complete and that when you petitioned for a hearing you were not informed of the results in a timely manner. Named members of the administration include: Drs. Larry Minks, S.E. president; Doug McMillan, acting executive vice-president for Academic Affairs; Lucretia Scoufos, Dean of Arts and Sciences; and Charles Weiner, assistant vice-president for Student Learning and Institutional Research. Your requested resolution was for the university to provide clearly articulated and consistent criteria for T & P, and to adhere to it.

Complaint 4: On October 13th alleged that McMillan's decision to not allow your T & P application to progress was "not based on fact but prejudice and that his memo to you [Rachel Tudor] lacks knowledge, thought and reason.-vital against bigotry." You state McMillan's sister and counseling center director, Jane McMillan, disclosed that McMillan considers transgender individuals as a grave offense to his "Baptist sensibilities" thus preventing him from tolerating, much less accepting or welcoming, transgender people to Southeastern.

Findings

I have reviewed all the materials you have provided to me. You and I have had several conversations and I have had conversations with Drs. Prus, Scoufos, Cotter-Lynch, Parrish, Mischo, Spencer, Weiner, Snowden and McMillan regarding the allegations contained in your grievance. I have also viewed the portfolios of Drs. Cotter-Lynch and Parrish. After this review, and in accordance with policy, my findings are as follows:

Findings for Complaint 1: Dean Scoufos denied speaking or treating you with any disrespect. She believed she was merely relaying what she considered a generous "gift" of time to strengthen your portfolio. However, since you were in your final year in your probationary period, only two options were identified: proceed with the

material you submitted or withdraw your portfolio and accept the offer of an additional year to supplement or improve areas of deficiency. Scholarship as demonstrated by publication was not the only area of deficiency. You were asked for your decision and you declined the offer of additional time.

You indicated Dr. John Mischo, prior chair of English, Languages and Humanities, was present when you and Dr. Scoufos met, and that he could substantiate your claim the Scoufos meeting was intimidating, coercive and demanding. Dr. Mischo, explicitly said, "It appeared to be a serious discussion but matter of fact and not personal...I cannot determine how someone feels but I would not use any of those terms to describe the meeting."

Your requested resolution, "An acknowledgement of the maltreatment by the administration", I do not find is warranted based on these characterizations of the meeting by Drs. Scoufos and Mischo.

Your second suggested resolution, "Improvement of the review process; provide written reasons/feedback for non-recommendation at each level of the review process; the documentation should allow the applicant to correct and/or clarify any misunderstood or erroneous information that may have caused the non-recommendation", is acknowledged, however, neither the RUSO policy nor the Southeastern policy require this resolution. There is a process whereby suggested amendments to these policies may be presented for consideration; however, the Southeastern grievance process is not the proper method. If you are interested in pursuing these policy changes, contact the Faculty Senate Chair for assistance.

Findings for Complaint 2: You have cited Dr. Mark Spencer, a white male, as being similarly situated but treated differently. Dr. Spencer states he was aware that the scholarship component of his portfolio might be border-line so he approached Dr. Snowden, then Interim President. Dr. Spencer informed Dr. Snowden that he, Dr. Spencer, believed that his scholarship was border-line and inquired whether it was possible to be granted additional time to add to his portfolio a decision for publication of, at the least, one refereed journal article which decision was pending at the time of the request. The additional time would allow for notification to the T&P committee if a submitted article was accepted for publication to a refereed journal before a non recommendation letter was given. The bolldays and a heavy workload were factors in considering the request. Dr Snowden would not be inconvenienced by a late addition.

Dr. Snowden requested Dr. Spencer send the particulars of the articles and proceed in a timely fashion. A two month period was extended to Dr. Spencer; however, Dr. Spencer provided the information in approximately one month.

Dr. Snowden, Emeritus Interim President and retired VPAA, provided his recollection surrounding the tenure and promotion of Dr. Spencer. Dr. Snowden's

recollection corroborates the fact that Dr. Spencer submitted a paper for publication after his portfolio was tendered and that he had one or two additional manuscripts completed and ready to submit for publication. Against this backdrop and since it was still relatively early in the T & P process, Dr. Snowden agreed to give Dr. Spencer some additional time to get the additional manuscripts submitted, and to learn of the fate of the one he had submitted.

On February 4, 2010, you informed Dr. Mischo, your department chair, that you received notification that an article to a refereed journal had been accepted for publication. You asked that he, Dr. Mischo, assist with having the article inserted into the previously submitted portfolio. Dr. Mischo contacted Dean Scoufos and the dean contacted Dr. McMillan. Dr. McMillan agreed and on February 11, the article was inserted. This addition was three months after the official deadline for complete portfolio submission. Thus, your assertion that Dr. Spencer received preferential treatment is unfounded.

With regard to Dr. Cotter-Lynch, it is my opinion that you were not treated differently than her in that her portfolio was stronger in all the areas of consideration in the T&P process. The same is true regarding Dr. Parrish. In my opinion Dr. Parrish met the standard for scholarship and exceeded the standard in service and classroom teaching. Your community service was episodic and without long term commitment. Thus, your portfolio was substandard when compared to the two similarly situated female faculty members.

Dr. Randy Prus, current chair of English, Languages and Humanities and former member on your departmental T & P was privy to the portfolios of Drs. Cotter-Lynch, Parrish and Spencer. Dr. Prus indicated that, in his opinion, a comparison of your portfolio with that of the tenured faculty members mentioned resulted in your portfolio falling "short." This was the reason for the non recommendation.

Based on the above reasons I do not find that race or gender were factors in the consideration of your application for Tenure and Promotion. Nor do I find that you were treated differently on the basis of race or gender. I find that the reason given for the non-recommendation is that your portfolio did not meet expectations.

Findings for Complaint 3: A review of RUSO policy 3.3.5 and Southeastern policy 4.6.3 provides detail of the procedure of review in the tenure process and the criteria which an application is to be evaluated. The review of the application and portfolio is to be made first by the T&P committee of each department; next by the department head; then by the dean of the respective school; next by the vice president of academic affairs and finally the president of the university makes a review.

At each level of review the applicant's application and portfolio are reviewed on several criteria including: (1) effective classroom teaching, (2) scholarly or creative achievement, (3) contribution to the university or profession and (4) performance of

non-teaching and administrative duties. Following the review at each level a recommendation is made to the next level of approval or disapproval for advancement in Tenure and/or Promotion. If the president recommends tenure then that recommendation goes to the Board of Regents for the Regional University System of Oklahoma for final action. If the president recommends promotion or recommends denial of tenure and/or promotion, that decision is final.

Your request for written reasons/feedback for non-recommendation at each level is not provided for or required within RUSO and Southeastern policies. There is no provision for notification to the candidate of each recommendation, non-recommendation or rationale for non-recommendation at each round of evaluation. As indicated in response to Complaint number 1 above, there is a process to amend the Southeastern and/or RUSO policies.

During the spring, following the non-recommendation by Dr McMillan, you petitioned for a hearing alleging a violation of due process in the T&P process. Dr. Charles Weiner convened the Faculty Appellate Committee, which responds to grievances which are unresolved through administrative or informal procedures. You contend that the committee rendered a judgment on March 22 and that Dr. Weiner did not send the written response within ten days, as policy dictates. Instead you received the decision of the committee on April 29, 2010. You feel that the reporting was not timely and points to evidence of collaboration between parties and hinder your rights of due process. Dr. Weiner concurs that your dates are accurate. However, I do not find that you were harmed by the delay. Further I do not find that the delay was based on gender or race.

Findings for Complaint 4: On October 18, Jane McMillan issued this written statement, "If anything in our conversations left her [Dr. Tudor] with the conclusion, then it is incorrect. I regret it if she had that impression." I also discussed these allegations with McMillan and he denied having such a conversation with Jane McMillan or anyone else. The April 30, 2010 letter from McMillan lists the deficiencies of your portfolio. Based on the above reasons, I find that the alleged retaliation was unfounded and neither race nor gender was a factor.

The university takes all claims of alleged sexually harassing behaviors as serious. Your description of the alleged comments regarding transgender individuals is unsubstantiated. Therefore, the sexual harassment policy has not been violated.

Conclusion

After considering all the evidence, it is my decision as the Affirmative Action Officer for Southeastern Oklahoma State University that neither discrimination nor retaliation is evident and your claim is denied. You have the right to appeal this determination. The appeal is made by a written request to the President of Southeastern for review of the decision and must be made within 10 workdays of the date of the final decision. If no appeal is delivered to the President within the 10 workday period, the case is considered closed. The decision of the President shall

be delivered to you within 10 workdays and the President's decision shall be considered **final and binding.** This decision concluded the university's due diligence.

Bryon Clark

rom: Bryon Clark
Sent: Monday, January 31, 2011 2:37 PM
To: Rachel Tudor; Doug McMillan
Cc: Ross Walkup; Charla Hall; James Knapp; Larry Prather
Subject: Tudor Grievance dated 11 October 2010
Attachments: Grievance Policy Section 4.4.6 APPM.docx; Addition to Grievance Policy 24 Jan 2011.docx

Dr. Tudor and Vice President McMillan:

As both of you already have been informed, the President's Designee and the Hearing Committee have met but could not reach a final/joint decision regarding the grievance dated 11 October 2010. Because the Grievance Policy (Section 4.4.6) of the Academic Policies and Procedures Manual does not address this contingency (see attachment titled "Grievance Policy"), the attached procedures/protocols were drafted to allow the grievance to proceed (see attachment titled "Addition to Grievance Policy"). These procedures/protocols were reviewed and approved by legal counsel for RUSO.

I wish to provide both of you time to review these new procedures/protocols before starting the timeline. Therefore, please peruse the procedures/protocols and contact me by no later than **5:00 p.m. on Wednesday, 2 February 2011** if you have questions.

If I do not receive any questions by the deadline listed above, both of you will have **15 working days** to prepare and submit a written appeal to respond to any statements in the written decisions rendered by the Hearing Committee and/or the President's Designee—I must receive your written appeal by **23 February 2011.** The grievance process will proceed regardless of whether or not you submit an appeal.

I will then submit the following written materials to the President within 5 working days of receiving both appeals or at the conclusion of the 15 workday period (2 March 2011): (1) grievance, (2) letter from respondent, (3) recommendation by the Hearing Committee, (4) decision by the President's Designee, (5) appeal by grievant [if one is submitted], and (6) appeal by respondent [if one is submitted]. The President of the University has 10 working days from receipt of these documents to review and render the final decision regarding the grievance. Please note that this step represents your opportunity to appeal the decision rendered by the Hearing Committee and/or the President's Designee. The President's decision shall be considered final and binding; the case shall then be closed and the President's decision shall be put into effect.

Please contact me if you have any questions.

Cordially,

Bryon

PS—Please note that the attachment "Addition to Grievance Policy" is written for inclusion in the APPM; there is only a single respondent (and letter) in the grievance being addressed.

SOUTHEASTERN
A CENTURY OF BUILDING FUTURES

To: Dr. Scoufos

From: Dr. Tudor

Re: Offer

Date: 6 April 2010

Dr. Tudor fails to mention in this letter that at Dr. McMillan's request that I do so, she was made the offer to not only withdraw her application, as she states here, but the offer also extended to her applying again on or by October 15, 2011 for reconsideration & promotion and tenure — being given 18 months more to meet the criteria for advancement. 04/07/10

This letter is in reference to the offer that was made this afternoon to withdraw my application for tenure and promotion. I composed and posted this letter today, April 6th, in response to your request for an immediate reply. I have decided to stand by the decision of my colleagues on the Tenure and Promotion Committee. I hope the administration will respect the fact that my colleagues, as noted in Southeastern's Policy and Procedures Manuel (3.7.4 Role of the Faculty), are competent and bear the primary responsibility for awarding tenure and promotion. Please note that I have yet to be informed of any "rare or compelling reason" (*see* 3.7.4) for you or Dean McMillan to dissent from the faculty's judgment. If you or Dean McMillan would care to provide a written explanation for your disagreement with the judgment of the faculty in my case, I would be happy to reconsider the offer to withdraw my application for tenure and promotion. I hope my decision to affirm my colleagues' judgment and the spirit of shared governance will not be construed as being uncooperative with the administration and that no extreme punitive measures, such as not allowing me to apply next year in case my application this year is eventually denied, are enacted.

Rachel Tudor

Cc: Dr. Minks, Dr. McMillan, Dr. Mischo

COPY

RECEIVED
APR 07 2010
Dean's Office
School of Arts & Scien

DEPARTMENT OF ENGLISH, HUMANITIES & LANGUAGES
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
1405 N. FOURTH AVE., PMB 4127 • DURANT, OK 74701-0609 • 580-745-2066 • FAX 580-745-7406 • WWW.SE.EDU

EEOC000914

Defendants' Exhibit 59
USA/Tudor v. SEOSU/RUSO - 15-cv-324-C

MEMORANDUM

TO: Dr. Rachel Tudor

FROM: Douglas N. McMillan, Ph.D.
Interim Vice President of Academic Affairs

RE: Denial of Application for Tenure and Promotion

DATE: April 30, 2010

It is my understanding that you have been informed by President Minks of his decision to deny your request for tenure and promotion to associate professor. This authority to communicate the reasons for denial of tenure and promotion rests with the president as suggested in the Academic Policy and Procedures Manual Section 3.7.4. However, the President may delegate this authority under the RUSO Board Policy if he so desires. Dr. Minks has delegated the authority to me, as acting chief academic officer, to communicate the reasons for the denial of your application for tenure and promotion.

After careful review of your portfolio, it was determined that you do not currently meet the policy requirements for tenure and promotion in the areas of research/scholarship and contributions to the institution and/or profession. The Academic Policy and Procedures Manual stipulates that in order to be granted tenure and promotion your body of work in these areas should be both excellent and noteworthy.

An examination of the research/scholarship portion of your portfolio listed eight activities during your employment at Southeastern. These eight activities include two publications, one presentation at a regional symposium, one presentation at a local symposium, two editorships of the proceedings papers at a local symposium, and two "open-mic Chapbooks". The first three activities (the two publications and the presentation at the regional symposium) do appear to be examples of work which meet the excellent and noteworthy standard. However, the remaining activities fail to meet these standards. For example, the two Open-mic Chapbooks appear to be self-collected unpublished works which certainly do not reach the noteworthy and excellent standard. Finally, in trying to verify your contribution as editor to the proceedings of the 2006 and the 2008 Native American Symposium, some confusing information was found. In fact, the link you provided to the 2006 symposium did not identify you as an editor and the link you provided for the 2008 symposium did not lead to any proceedings. Just as an aside, editing the proceedings at a local symposium does not meet an excellent and noteworthy accomplishment for a university faculty member. In summary, your efforts in scholarship and research appear to have yielded some appropriate work; however, the body of your work, since being employed at Southeastern, is either unverifiable or falls below the policy requirement for tenure and promotion.

The Academic Policy and Procedures Manual also requires that your service reach the noteworthy and excellent standard. A review of your university service reveals that since your employment at Southeastern began, until 2009 your service has primarily been limited to serving on internal

departmental committees, such as, a program review committee, an assessment committee and a hiring committee, that clearly do not reach the policy requirement for tenure or promotion. In fact, out of eight activities you listed on your vita, four were internal departmental committees. Two of the remaining examples of service were not begun until 2009. This does not establish a record of service that is either noteworthy or excellent.

Subsequently, the reasons delineated in this memorandum formed the basis for the denial of your application for tenure and promotion.

OFFICE OF ACADEMIC AFFAIRS

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
1405 N. FOURTH AVE., PMB 4137
DURANT, OK 74701-0609

580-745-2220
FAX 580-745-7474
WWW.SE.EDU

MEMORANDUM

TO: Rachel Tudor

FROM: Douglas N. McMillan,
Interim Vice President for Academic Affairs

RE: Application for Tenure and Promotion during the 2010-2011 Academic Year

DATE: October 5, 2010

I have been informed by the Dean of the School of Arts and Sciences that you plan to submit a portfolio for tenure and promotion again for this academic year of 2010-2011. You will recall that during the review of your 2009-2010 academic year application you were extended an offer which would have allowed you an additional year to strengthen your portfolio and hopefully obtain tenure and promotion. Pursuant to policy, academic year 2010-2011 is your seventh year of tenure probation and therefore your terminal year at Southeastern. In my letter of April 30, 2010 I outlined certain deficiencies in scholarly activity and service which needed correcting in your portfolio. You were offered the opportunity to teach at Southeastern during the 2010-2011 and 2011-2012 academic years and then reapply for tenure and promotion during the 2011-2012 academic year if you would withdraw your 2009-2010 application. This offer, in effect, would have given you two years to correct the deficiencies in scholarly activity and service, which were outlined in my letter to you on April 30, 2010. To my astonishment, you declined this offer. At the time the offer was made it was my opinion that one year was insufficient for correcting the deficiencies in your portfolio. This is still my opinion.

After reviewing the Academic Policy and Procedure Manual, I find no policy that allows for an application for tenure in a subsequent year after being denied tenure and promotion in the previous year. The policy states that an application for tenure may occur in the fifth, sixth or seventh year. I recognize that the policy does not proscribe a subsequent application, however, since there is no specific policy, which addresses this issue, I believe the administration is charged with the responsibility of making a decision which is in the best interests of the university I believe that allowing you to reapply for tenure and promotion so soon after your most recent denial is not in the best interests of the university This is especially true given the nature and extent of needed improvement and the short amount of time which has passed since the portfolio deficiencies were enumerated. It is my opinion that allowing you to reapply will be disruptive to the School of Arts and Sciences, create unnecessary work for both your department and the administration, and will potentially inflame the relationship between faculty and administration. It is my decision as acting chief academic officer that your application/request and portfolio will not be accepted for review for the 2010-2011 academic year.

FILE COPY

Claire Stubblefield

From: Legako, Jana K. <jlegako@rose.edu>
Sent: Sunday, January 09, 2011 1:48 AM
To: Claire Stubblefield
Subject: FW: Tudor-Discrimination Case
Attachments: Tudor(timeline).docx; TudorConfidential (2).docx; Discrimination complaint-Tudor.docx; Tudor129.docx

Claire,

Please accept my apology for the delay in getting to you my conclusions. My mother who had total knee replacement on October 8, 2010, broke her hip. It has been a very hectic and stressful December and January.

The documents provided above have been reviewed. In addition, the policies and procedure relevant to this issue have been studied.

The policies and procedures support that a written statement of the action taken be submitted to the previous decision makers and faculty member by each decision maker (i.e. department chair, dean, vice president and president) after the Promotion and Tenure Review Committee's secret ballot. The policy is silent as to the content of the statement and one could reasonably assume a general statement such as "I do not concur with the decision of the Promotion and Tenure Review Committee and Department Chair" would suffice.

The policy only requires the President to state in detail the reasons he/she does not concur with the Promotion and Tenure Review Committee's decision. And, provide this written explanation to the Vice President for AA, the department chair, the Promotion and Tenure Review Committee, and the faculty member.

From our conversation, it is my understanding the Professor was provided this written notification by the President or his designee. In addition, since the Professor did request a hearing before the Faculty Appellate Committee, it is assumed the Professor received written notification from the Vice President for Academic Affairs. You may want to substantiate that the Dean and Department Chair forwarded their statements to the listed parties – if they omitted this step in the policy, confirm that they omitted this step for all tenure applicants. This consistent omission will show that at this step in the process all were treated the same.

Normally with a race discrimination claim I run this query. In addition, with a little tweaking, this query will work with sex discrimination claims.

(1) Does the claimant belong to the racial minority; (2) She/he applied for tenure and was qualified for tenure; (3) Despite qualifications she was rejected; and, (4) Similar qualifications got tenure.

Your request to have a qualified, unbiased, and objective third party review the portfolios of all tenure applicants was "textbook perfect." The third party's comments as to how the Professor's portfolio lacked in the required areas as outlined in the President's letter should assist in showing how the Professor does not meet #2 and #4 of her prima facia case. Focus on the legitimate nondiscriminatory reason for the Professor's rejection listed in the President's letter and bolstered the reasons by the third party review of the portfolios.

In addition, being transgender is not a protected status. However, harassment due to a person's sexual orientation would be a violation of the sexual harassment policy. You may want to take into consideration drafting a paragraph that states, "The University takes all claims of alleged sexually harassing behaviors as serious. And, after a thorough investigations you found the Professor's description of the alleged comments regarding transgender individuals to be unsubstantiated. Therefore, the sexual harassment policy has not been violated."

Please remember that in most sexual harassment claims and race/sex discrimination claims the claimant may have additional internal processes to request if he/she does not agree with your findings. For example, at the College that I am employed, the claimant may request a hearing in front of a panel of her peers. I always include this right in the letter that is mailed to them of my findings.

Furthermore, you may want to address that retaliation from any of the parties involved will not be tolerated.

Please do not hesitate to call. It was a pleasure reviewing your documents and discussing this case with you.

Best regards,

Jana Legako, J.D., PHR

Office: (405) 733-7933
Fax: (405) 733-7443

From: Claire Stubblefield [mailto:CStubblefield@se.edu]
Sent: Wednesday, December 15, 2010 11:25 AM
To: Legako, Jana K.
Subject: Tudor-Discrimination Case

Thank you so much for agreeing to lend a legal eye to a very interesting case. My mobile number is 580-504-0050. I will take the case and documentation home for the holiday. Please give me a call at your earliest convenience. Thanks again.

OFFICE OF THE PRESIDENT
SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
1405 N. FOURTH AVE., PMB 4236
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580-745-2500
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February 21, 2011

Dr. Rachel Tudor
1124 North 10th
Durant, Oklahoma 74701

RE: Appeal of the Findings and Conclusions on Gender Discrimination Complaint

Dear Dr. Tudor:

I am in receipt of the documents filed by you regarding alleged gender discrimination as well as Dr. Stubblefield's January 19, 2011 document. After a thorough review, I concur with Dr. Stubblefield's findings and conclusions that neither discrimination nor retaliation has been shown in this matter.

Sincerely,

Larry Minks

Larry Minks,
President

cc: Dr. Claire Stubblefield

Lucretia Scoufos

rom: Randy Prus
Sent: Friday, April 30, 2010 11:54 AM
To: Lucretia Scoufos
Subject: RE: RE:

Lucretia,
I don't know of an "Open Mic" publisher. I take the term to mean "unpublished" or "self-collected." Poetry generally circulates in communities of mostly small journals and presses. Often the journals/presses are ephemeral, but the important aspects of poetry are the communities in which they circulate. "Open Mic" is somewhat dubious, to me.

Randy Prus
English, Humanities and Languages
Southeastern Oklahoma State University
580-745-2582

From: Lucretia Scoufos
Sent: Friday, April 30, 2010 11:49 AM
To: Randy Prus
Subject: Fwd: RE:

Because you you are the expert, could you tell me if these are usually published, unpublished, refereed? Please educate me, Randy.
Lucretia

)ent from my iPhone

Begin forwarded message:

> **From:** Lisa Coleman <LColeman@se.edu>
> **Date:** April 30, 2010 11:25:09 AM CDT
> **To:** Lucretia Scoufos <LScoufos@se.edu>, John Mischo <JMischo@se.edu>, Randy Prus <RPrus@se.edu>
> **Subject: RE:**
>
> These terms relate to poetry presentations. Randy is the expert on this.
>
> Lisa
>
> -----Original Message-----
> From: Lucretia Scoufos
> Sent: Friday, April 30, 2010 11:24 AM
> To: John Mischo; Randy Prus; Lisa Coleman
> Subject:
>
> What is an "open mic chapbook"? I am not familiar with this and believe it to be in the English discipline.
> Lucretia
>
> Sent from my iPhone

From: **Charles Weiner** CWeiner@se.edu
Subject: FW: Rachel Tudor
Date: April 01, 2010 at 10:37 AM
To: "Doug McMillan" DMcMillan@se.edu

Let me put an addendum on to my previous email. Records indicate that she started at SE in 2004 so this is not her terminal year. Next year will be her terminal year. The two options are still viable. Dismiss her without cause or let her reapply. In either instance she will need to be notified by March 1 st that she is not being reappointed or if she doesn ' t get tenure, than she will not be rehired.

Chip

Charles " Chip " Weiner, Ed.D.
Assistant Vice President for Academic Affairs
Director of Student Learning and Institutional Research
Coordinator, HLC/NCA Accreditation
Southeastern Oklahoma State University
1405 N. 4th Ave., PMB 4145
Durant, Oklahoma 74701-0609
580.745.2202
800.435.1327 x2202
580.745.7504 (fax)
cweiner@se.edu

Southeastern Oklahoma State University

From: Charles Weiner
Sent: Thursday, April 01, 2010 9:28 AM
To: Doug McMillan; Larry Minks; Lucretia Scoufos
Cc: 'Babb, Charlie'
Subject: Rachel Tudor
Importance: High
Sensitivity: Confidential

Good Morning All:

I had the most interesting conversation with Charlie Babb yesterday in regard to the Tudor appeal. I will try and enumerate everything that we talked about but there are places my handwriting is hard to read. First I will start off with the Fridley appeal. Charlie said everything there was fine, no problem. The Tudor appeal however has many different angles to it. First of all he concurred that the policies in question were conflicting. In this appeal there are four different policies at play. They are:

3.7.3 – Role of the President
3.7.4 – Role of the Faculty
4.4.6 – Faculty Grievance Policy
4.6.3 – Procedure for Granting Promotion and Tenure

Each one of these policies played a role in this appeal. She filed her grievance under section 3.7.4 focusing on the part about reasons having to be provided if there was an adverse action taken. She requested that Drs. McMillan and Scoufos provide her with reasons as to why their recommendation was to deny granting tenure and promotion. The fallacy here is that the faculty member is provided an opportunity to request a due process hearing before any adverse action has been taken. According to Charlie this really isn ' t a due process issue but an administrative policy issue; however, it is stated that way in our Policies and Procedures Manual. She requested a due process hearing and based upon her complaint, the Faculty Appellate Committee met on March 22, 2010, and agreed with her grievance that reasons must be provided. I will admit that I had difficulty writing the letter and was very appreciate of Charlie ' s comments in regard to it. Here are the things that Charlie and I talked about in regard to this appeal:

- The policy does not require the dean or the VP to provide reasons
- The authority is vested in President and if he chooses to do so, he may provide reasons as to why
- Since this was her terminal year in the process Charlie wanted to know if we gave her that information in writing before March 1 st
- If we did not provide her with written notice by March 1 st than we are in violation of that policy (our policy is pulled directly from the RUSO policy)
- Our options are twofold – at this point we can give her written notice that next year will be her last year at SE. If we give it to her now than we meet the March 1, 2011, deadline and we don ' t have to provide her any reason at all for anything. She is just being dismissed without cause. The second option would be to let her reapply for tenure and promotion next year, provide her with the reasons as to why she was denied this year, and inform her that if she does get tenure next year than she will not be reappointed. In this way we also meet the March 1 st deadline.

If I understood Charlie correctly it would be in our best interest, and RUSO ' s best interest, to provide her with another year at Southeastern based upon the options presented above.

Charlie – I hope I have stated everything correctly. I am sure that President Minks and Drs. McMillan and Scoufos will have questions for you. If I have misspoke in anyway please correct me by providing them with the correct information.

Chip

Charles " Chip " Weiner, Ed.D.
Assistant Vice President for Academic Affairs
Director of Student Learning and Institutional Research
Coordinator, HLC/NCA Accreditation
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cweiner@se.edu

Southeastern Oklahoma State University

CERTIFICATE OF SERVICE

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.

/s/ Marie Eisela Galindo
MARIE E. GALINDO
TX BAR NO. 00796592

Marie Eisela Galindo
Law Office of Marie E. Galindo
Wells Fargo Building
1500 Broadway, Suite 1120
Lubbock, Texas 79401
(806) 549-4507
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Attorney for Dr. Rachel Tudor,
Plaintiff-Appellant/Cross-Appellee