Nos. 18-6102 / 18-6165

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RACHEL TUDOR,

Plaintiff-Appellant/Cross-Appellee,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
and the REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendants-Appellees/Cross-Appellants.

On appeal from the United States District Court
for the Western District of Oklahoma
The Hon. Robin J. Cauthron
No. 5:15-CV-324-C

PRINCIPAL AND RESPONSE BRIEF FOR DEFENDANTS–APPELLEES/CROSS-APPELLANTS

ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

The claims in this case were brought under Title VII of the Civil Rights Act of 1964. Federal courts have jurisdiction over Title VII claims. *See* 28 U.S.C. § 1331. And this Court has jurisdiction to review the district court's rulings. *See* 28 U.S.C. § 1291.

The district court entered final judgment for Plaintiff on June 6, 2018. P.A.Vol.5 at 84.[1] Plaintiff filed a notice of appeal that day. *Id.* at 85-87. On July 5, Defendants filed for judgment as a matter of law and for a new trial. D.A.Vol.2 at 519-554. In abating Plaintiff's initial appeal, this Court's clerk acknowledged both parties had filed post-judgment motions within the 28-day period in FRCP 59. *See* Order of 7/18/18. Thus, per FRAP 4(a)(4)(A), the time to appeal did not begin until after the district court dispensed with these motions on September 25. Defendants filed a notice of appeal on September 28, well within the 30 days allowed by FRAP 4. D.A.Vol.2 at 560.

[1] Citations to the appendices will take this form: P.A.Vol.1 at XX (Plaintiff's Appendix) or D.A.Vol.1 at XX (Defendants' Appendix). Although the trial transcript is contained within Plaintiff's appendix—P.A.Vol.6 at 39 through P.A.Vol.9 at 121—citations to it herein will utilize the original numbering and volume: Tr.Vol.1 at XX.

PRIOR OR RELATED APPEALS

This brief contains a response to Plaintiff's appeal, No. 18-6102, and Defendants' cross-appeal, No. 18-6165. There were no prior appeals.

Plaintiff claims this case relates to "a collateral attack brought [in Texas] by the State of Oklahoma and others on the Western District of Oklahoma's July 2015 opinion in the instant case which held Plaintiff's sex discrimination claims are cognizable under *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007)." Pl's Op.Br. at xi.

Plaintiff mischaracterizes the Texas litigation, which was not a collateral attack, but rather a separate suit challenging federal guidance documents on transgender students and school restrooms. *See Texas v. United States*, 201 F. Supp. 3d 810, 815 (N.D. Tex. 2016). Defendants there contended for a position in line with *Etsitty*, which held that if transgender individuals "are to receive legal protection apart from their status as male or female ... such protection must come from Congress." *Id.* at 1222 n.2. In any event, the Texas injunction only applied to the United States, and only in part to its case against Defendants below; it did not apply to Plaintiff, a private party. *Texas v. United States*, 2016 WL 7852331 at n.2 (N.D. Tex. Oct. 18, 2016). The court below stayed all proceedings at the request of the United States, which opposed Plaintiff's Texas intervention. *See* Defs' Opp., *Texas v. U.S.*, 2016 WL 6138444 (N.D. Tex. Oct. 3, 2016).

ISSUES PRESENTED

I. *Cross-Appeal*

A. Did the district court abdicate its gatekeeping role under FRE 702 when it declined to analyze a tenure expert's reliability and permitted presentation of unfounded, subjective, and methodologically unsound testimony to the jury?

B. Did the district court misapply *Etsitty v. Utah Transit. Authority*, 502 F.3d 1215 (10th Cir. 2007), by holding that Plaintiff's allegations of transgender discrimination could be adjudicated as sex-stereotyping claims under Title VII even though the allegations and evidence presented by Plaintiff centered on transgender status and related issues such as bathroom use, religion, and pronouns?

C. Should the verdicts finding sex discrimination and retaliation in Plaintiff's tenure process stand when Plaintiff produced no evidence of stereotyping by the tenure decision-makers, did not show qualification for the job sought, and failed to show Defendants' legitimate concerns with Plaintiff's tenure application were pretextual?

II. *Response to Plaintiff's Appeal*

A. Did the district court abuse its discretion in denying reinstatement to a life tenure position where there is clear hostility between the parties, Plaintiff continues to betray Defendants' trust, and Plaintiff's own witness—the faculty chair of the department in which Plaintiff seeks tenure—testified that reinstatement would be detrimental and is opposed by at least half the faculty?

B. Did the district court abuse its discretion in finding that Plaintiff was made whole by $60,040.77 in front pay because the effects of discrimination had ended by the time Plaintiff was hired to teach for an equivalent salary elsewhere 14 months later?

C. Was the district court correct to apply the Title VII statutory cap to which the parties jointly stipulated?

STATEMENT OF THE CASE

A university's decision to grant or deny a professor tenure is both momentous and immensely complicated. This commitment to a lifelong relationship must be made after weighing academic potential, teaching, service, student interests, camaraderie, and scholarship—often arcane. As Judge Richard Posner has observed, these factors lack "fixed, objective criteria" and "there is no algorithm" for producing tenure decisions, as they "necessarily rely on subjective judgments." *Blasdel v. NW Univ.*, 687 F.3d 813, 815 (7th Cir. 2012) (citations omitted). Tenure decisions are "a source of unusually great disagreement," so courts "tread cautiously when asked to intervene," lest they infringe on "our long tradition of academic freedom" under the First Amendment. *Id.* at 816 (citations omitted). In this case, a university denied a professor tenure because the professor lacked scholarship and service. The professor has challenged the university's denial under Title VII of the Civil Rights Act, but has provided scant evidence of wrongdoing, and even less evidence of actions covered by Title VII.

I. *Etsitty*

In 2007, this Court issued *Etsitty*, 502 F.3d 1215. Etsitty, a biological male who identified and presented as a female, alleged unlawful termination by the Utah Transit Authority (UTA) under Title VII. *Id.* Specifically, Etsitty alleged (1) transgender discrimination, and (2) discrimination for failure to conform to gender stereotypes. *Id.*

at 1218. UTA had fired Etsitty, a UTA bus driver, solely due to express concerns about Etsitty's on-the-job use of women's restrooms. *Id.* at 1218-19.

The Tenth Circuit affirmed the dismissal of Etsitty's suit. For the first claim, this Court held per the "common and traditional interpretation" of sex that "transsexuals are not a protected class under Title VII." *Id.* at 1220-21. The "plain meaning of 'sex,'" this Court wrote, "encompasses … male and female" and nothing more. *Id.* at 1222. The court noted its "reluctance to expand the traditional definition of sex in the Title VII context" and said if "transsexuals are to receive legal protection apart from their status as male or female ... such protection must come from Congress and not the courts." *Id.* at 1222 & n.2. The court recognized that an "individual's status as a transsexual should be irrelevant to the availability of Title VII protection." *Id.* at 1222 (citing *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004)).

For the second claim, Etsitty sought "protection as a biological male who was discriminated against for failing to conform to social stereotypes." *Id.* at 1223 (referencing *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)). Etsitty contended that using the women's restroom was "an inherent part of her non-conforming gender behavior." *Id.* at 1224. In response, this Court assumed without deciding that stereotyping claims are viable and apply to "transsexuals who act and appear as a member of the opposite sex." *Id.* at 1224. The court then dismissed the stereotyping claim, holding that it "cannot conclude [Title VII] requires employers to allow biological

males to use women's restrooms. Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." *Id.* at 1224. Then the Court found that testimony by UTA's operations manager was insufficient for pretext even though she—directly responsible for the firing—said Etsitty was terminated due to "an image issue out there for us, that we could have a problem with having someone who, even though his appearance may look female, he's still a male." *Id.* at 1225. These "isolated and tangential comments about Etsitty's appearance are insufficient alone to permit an inference of pretext." *Id.* at 1226.

II. Factual Background

Defendant Southeastern Oklahoma State University is a century-old public university located in Durant, Oklahoma, with around 4,000 students. *See* History of SE, SEOSU, https://www.se.edu/about/history-of-se/. Southeastern is part of the broader Regional University System of Oklahoma (RUSO), which is also a Defendant. P.A.Vol.1 at 30, ¶3. In fall 2004, Southeastern hired Plaintiff to be a tenure-track assistant professor in English, Humanities, and Languages, a department in the School of Arts & Sciences. *See* Tr.Vol.1 at 39; School of Arts & Sciences, SEOSU, https://www.se.edu/arts-and-sciences/. Plaintiff's position was a one-year appointment, with annual renewal necessary. P.A.Vol.1 at 53, ¶12; D.A.Vol.3 at 595. At the time, Plaintiff presented as a man and used a male name. P.A.Vol.1 at 33 ¶12. In

2007, however, Plaintiff began identifying and presenting as a female, Rachel Tudor, and informed Southeastern. *Id.* ¶14; Tr.Vol.1 at 40-41.

To obtain tenure at Southeastern, an applicant's portfolio must be reviewed separately by a faculty committee, the relevant college dean, and the vice president for academic affairs—all who then issue independent recommendations to the president. *See* P.A.Vol.1 at 34, ¶19; Tr.Vol.1 at 187; Tr.Vol.4, at 690; Tr.Vol.5 at 788-89. The president must then make a final decision and obtain the RUSO governing board's approval for a tenure grant. *See* Tr.Vol.5 at 788-789. Substantively, a successful portfolio must demonstrate an applicant's accomplishments in scholarship, service, and teaching. D.A.Vol.3 at 589-91; D.A.Vol.3 at 622 (Rule 4.6.1). Procedurally, the Arts & Sciences School had strict formatting standards for tenure portfolios when Plaintiff served as a professor. Tr.Vol.2 at 311; Tr.Vol.3 at 513.

In fall 2008, Plaintiff submitted a portfolio to the faculty committee, which voted against tenure. Tr.Vol.1 at 144-45. Plaintiff withdrew that application, Tr.Vol.1 at 146, which contained no publications. Tr.Vol.3 at 451-52. The next year, Plaintiff submitted another portfolio. Tr.Vol.1 at 52-53, 58-59. That portfolio did not comply with the Arts & Sciences formatting requirements. Tr.Vol.3 at 453. Moreover, Plaintiff's letter of application in the portfolio was "unprofessionally written," according to one of Plaintiff's own witnesses, tenured English professor Mark Spencer, who testified that his "heart sort of sank" when he first read it. Tr.Vol.3 at 441. Spencer testified the

committee discussion was "going … against" Plaintiff until someone raised, favorably, Plaintiff's transgender identity. Tr.Vol.3 at 454; *see also* Tr.Vol.3 at 476-77. The committee then voted 4-1 to recommend tenure. Tr.Vol.3 at 465. Tenured professor Randy Prus voted no, in part because Plaintiff's cover letter "lacked professional competence" and "didn't make sense," and Plaintiff only had one qualifying publication. Tr.Vol.3 at 465-66. Spencer, who voted yes, testified that it "was not a strong application … I would even say it was weak." Tr.Vol.3 at 444-45.

Arts & Sciences Dean Lucretia Scoufos was shocked by the poor state of Plaintiff's portfolio, Tr.Vol.4 at 579-80, and eventually recommended tenure denial. D.A.Vol.3 at 671. Doug McMillan, the vice president for academic affairs, told Plaintiff he would also recommend that Southeastern President Larry Minks deny tenure. Tr.Vol.1 at 64-65; D.A.Vol.3 at 806. Seeking reasons for these recommendations, Plaintiff filed a grievance with the faculty appellate committee, Tr.Vol.1 at 66, which demanded that explanations be provided. D.A.Vol.3 at 652. Soon after, Scoufos informed Plaintiff that Minks would permit Plaintiff to reapply for tenure in two years if Plaintiff would withdraw the application. Tr.Vol.1 at 68; Tr.Vol.4 at 589-90, 610; D.A.Vol.3 at 669, 687. Plaintiff declined this offer. Tr.Vol.1 at 69; D.A.Vol.3 at 669.

In April 2010, President Minks informed Plaintiff that he would deny tenure and that he had "delegated the responsibility to Dr. McMillan for providing you with the

reasons for my denial." D.A.Vol.3 at 807; Tr.Vol.1 at 69-70.[2] The assistant vice president for academic affairs, Charles Weiner, then explained to Plaintiff that McMillan's reasons would moot Plaintiff's grievance. D.A.Vol.3 at 652-53. McMillan provided these reasons on April 30. D.A.Vol.3 at 683-84. Among other things, McMillan said Plaintiff was deficient in "the areas of research/scholarship and contributions to the institution and/or profession." *Id.* For scholarship, McMillan wrote that "the body of your work, since being employed at Southeastern, is either unverifiable or falls below the policy requirement for tenure and promotion." *Id.* And Plaintiff's service, McMillan observed, had largely "been limited to serving on internal departmental committees." *Id.*

In fall 2010, Plaintiff filed race and gender discrimination complaints with Claire Stubblefield, Southeastern's affirmative action officer, and with the faculty appellate committee. Tr.Vol.1 at 80-81. Next, Plaintiff complained about sex discrimination to the U.S. Department of Education, which referred the complaint to the Equal Employment Opportunity Commission (EEOC). P.A.Vol.1 at 31-32 ¶8. Plaintiff also began preparing to apply for tenure again. Tr.Vol.1 at 82-83. On October 5, however, McMillan reminded Plaintiff that "you were extended an offer which would have

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[2] Plaintiff claims this was the only time in Southeastern history that an administrator vetoed a faculty tenure recommendation. Pl's Op.Br. at 10. But the only cited source for this "fact" is Plaintiff's own trial testimony, which was limited "[t]o my knowledge" and provided no foundation for Plaintiff having significant knowledge on this subject. Tr.Vol.1 at 59-60.

allowed you an additional year to strengthen your portfolio and hopefully obtain tenure." D.A.Vol.3 at 687. "To my astonishment," McMillan wrote, "you declined this offer." *Id.* As such, he made the "decision as acting chief academic officer that your application/request and portfolio will not be accepted for review for the 2010-2011 academic year." *Id.* "I find no policy that allows for an application for tenure in a subsequent year after being denied tenure and promotion," he wrote. *Id.* Allowing Plaintiff to reapply after one year did not give Plaintiff enough time to correct previous deficiencies, and it could "inflame the relationship between faculty and administration." *Id.* Plaintiff claimed this was retaliatory. Tr.Vol.1 at 95, 97-98.

In January 2011, Stubblefield found there was no discrimination or retaliation. Tr.Vol.1 at 101-02; D.A.Vol.3 at 658-663. Plaintiff appealed to President Minks, who found no discrimination, either. Tr.Vol.1 at 103-04. But the faculty committee decided that Plaintiff should be allowed to reapply for tenure in 2010-11. Tr.Vol.1 at 104-05. That decision was reviewed by a designee of Minks, who disagreed. D.A.Vol.3 at 667; Tr.Vol.1 at 105-06. Without a specific policy addressing when a designee and the faculty committee disagree, assistant vice president for academic affairs Bryon Clark notified Plaintiff of a newly drafted procedure that would allow Plaintiff and McMillan to take a final appeal to Minks. D.A.Vol.3 at 667. Both parties filed an appeal, and Minks decided against Plaintiff on March 25, 2011. Tr.Vol.1 at 111. The faculty senate then urged Minks to reverse, Tr.Vol.1 at 115, but Plaintiff's contract was not renewed.

After departing Southeastern in spring 2011, Plaintiff told the EEOC that Southeastern discriminated and retaliated by declining to permit Plaintiff to re-apply for tenure. P.A.Vol.1 at 32 ¶9. The EEOC referred Plaintiff's sex discrimination claims to the U.S. Department of Justice (DOJ). P.A.Vol.1 at 53 ¶10.

In mid-2012, Plaintiff was hired by Collin College in Texas as a non-tenure track teacher. Tr.Vol.1 at 122-23. Plaintiff taught there for four years, receiving raises in pay every year. D.A.Vol.2 at 438-443. Plaintiff's salary during that time was roughly equal to or higher than it was at Southeastern. *Compare id.* at 440, 443 ($51,184 in 2012-13 at Collin College, $58,022 in 2014-15), *with* P.A.Vol.4 at 194 ($51,279 salary in final year at Southeastern). But after several years of teaching, Plaintiff's supervising dean at Collin College wrote that a "notable number of students" had reported that Plaintiff's "instruction is not as clear as it should be and that her classroom management is lacking." D.A.Vol.2 at 446. "[A]pproximately half of the [student] comments are critical in nature, something rarely seen when reviewing student evaluations," he added. *Id.* at 451. At one point, he wrote that "[t]here are more unfavorable ratings than I have ever seen for any other faculty member." *Id.* at 454.

One student in 2014 complained that Plaintiff's "teaching is very unprofessional" and criticized Plaintiff for critiquing a private email of the student's in front of class. D.A.Vol.2 at 465. Another wrote that Plaintiff put a student's complaint against Plaintiff "upon the overhead projector for the class to read, asking us if we agreed or disagreed.

... [T]his is highly unethical." *Id.* at 466. Yet another wrote that Plaintiff "exposed my paper in front to my classmate[s], without my permission. She used my paper as a bad example. I felt so embarrassed, because my name was on it and everybody knew it was my paper." *Id.* at 467. A fourth student called Plaintiff "a bully." *Id.* at 469.

In a 2014-15 performance appraisal, the supervising dean did not recommend Plaintiff for a multi-year contract because of a "need for improvement in instruction and classroom management." *Id.* at 452. Plaintiff filed an internal grievance against the dean, alleging transgender bias and discrimination by him and the students. *Id.* at 453-59. (Plaintiff alleged students "were biased because a few of them … called her 'sir.'" *Id.* at 457.) Plaintiff also requested that the investigation "take into consideration the hostile environment faced by transgender faculty." *Id.* at 458. A college hearing officer found Plaintiff's claims "not substantiated," with no "discriminatory or harassing conduct by" the dean. *Id.* at 456-59. This decision was upheld on appeal. *Id.* at 464. Collin College decided not to renew Plaintiff's contract for 2016-17. Tr.Vol.1 at 180.

III. *The Allegations*

In March 2015, the DOJ filed a complaint in the Western District of Oklahoma, alleging that Defendants subjected Plaintiff, "a professor who is transgender, to unlawful sex discrimination and retaliation in violation of Title VII." P.A.Vol.1 at 30. The complaint focused on transgender identity. For example, the complaint emphasized that Plaintiff "was the first transgender professor ever to work at

Southeastern," *Id.* at 33 ¶13, and it baselessly alleged that McMillan had inquired whether Plaintiff "could be fired because her 'transgender lifestyle' offended his religious beliefs" and that some people on campus "were openly hostile toward transgender people." *Id.* at 33-34 ¶¶15, 17. It also alleged that Scoufos had "intentionally referred to Dr. Tudor by male pronouns" when Scoufos first discovered Plaintiff was transgender, *id.* at 36, ¶26, and that Plaintiff was treated differently than similarly situated non-transgender professors. *Id.* at 38, 40, 44 ¶¶37, 46, 62. In addition, the complaint asserted one of the factors that determines a person's "sex" is that individual's gender identity. *Id.* at 45-46 ¶¶65-69. The complaint's primary charge was that Plaintiff was discriminated and retaliated against due to gender identity and gender transition. *See, e.g., id.* at 45 ¶71. The complaint added a conclusory claim that Plaintiff was discriminated against because Plaintiff "did not conform to traditional gender stereotypes." *Id.* ¶72. But the factual allegations did not mention sex stereotyping.

In May 2015, Plaintiff intervened with a separate complaint, which also focused on transgender identity. P.A.Vol.1 at 71-105. Plaintiff included lengthy discussions about scientific studies on, and various medical association beliefs about, transgenderism, as well as allegations about Defendants' health insurance plan mistreating transgender persons. *See e.g.*, *id.* at 74-77, 82-83 ¶¶15-36, 67-71. Plaintiff also added nearly 25 paragraphs claiming Defendants broke the law by preventing Plaintiff

from using a women's restroom. *Id.* at 76, 78-81, 102 ¶¶28-29, 43-63, 166, 170. Largely based on this restriction, Plaintiff added a hostile work environment claim. *Id.* at 96.

Plaintiff's complaint contained stray, unsupported references to "sex stereotyping." *See, e.g.*, *id.* at 74, 96 ¶¶16, 131. Plaintiff also included a brief allegation that Southeastern's human resources director (Cathy Conway) told Plaintiff not to wear short skirts. *Id.* at 81-82, ¶¶64-66. That allegation had never been raised previously[3] and was presented through the prism of transgenderism. *Id.* Plaintiff emphasized that the listed claims depend on Plaintiff's belief that sex is "an ambiguous term of art that includes . . . gender identity within its meaning." *Id.* at 74 ¶15.

The DOJ settled with Defendants and was dismissed with prejudice in October 2017. D.A.Vol.2 at 327-30.

IV. *Pretrial*

In May 2015, Defendants moved to dismiss the hostile work environment claim, noting that the Tenth Circuit had held that "transsexuals are not a protected class under Title VII." D.A.Vol.1 at 3 n.1 (quoting *Etsitty*, 502 F.3d at 1220). In response, Plaintiff ignored *Etsitty*. *Id.* at 22-54. The district court found Plaintiff's claims were premised on

[3] In the eight years between Plaintiff's gender transition and intervening complaint, Plaintiff did not mention dress restrictions in any formal or informal setting—internally at Southeastern or to the EEOC. *See* Tr.Vol.1 at 177-78.

Defendants' alleged reactions to Plaintiff's gender transition and identity, but nevertheless declined to dismiss under *Etsitty*. P.A.Vol.1 at 147-153.

A year later, Defendants moved to exclude the testimony of Plaintiff's tenure "expert" Robert Parker, arguing that tenure decisions are inherently subjective and that numerous flaws in Parker's analysis made it unreliable. D.A.Vol.1 at 73-94. The district court denied this motion without analyzing reliability. *Id.* at 125-128.

In September 2017, Defendants moved for summary judgment on the hostile work environment, discrimination, and retaliation claims. *Id.* at 129-291. Defendants again cited *Etsitty*, this time pointing out that the United States had recently emphasized—like *Etsitty*—that Title VII protects only against sex discrimination based on biological male or female status. *Id.* at 154-55. Defendants argued that Plaintiff's case must fail because it was premised entirely on Plaintiff being discriminated against as a transgender female, when Plaintiff was still biologically a male and could not qualify under Title VII as a female. *Id.* Alternatively, Defendants observed, other females were in fact granted tenure in the same time frame as Plaintiff, meaning Plaintiff had not demonstrated a prima facie case of sex discrimination. *Id.* In response, Plaintiff disputed the categorization of Plaintiff as a biological male, and did not mention sex stereotyping once or point to stereotyping evidence in the record. *Id.* at 297. The Court denied the motion; regarding *Etsitty*, the court pointed back to its earlier analysis denying the motion to dismiss. P.A.Vol.2 at 31, 34-35.

On October 17, 2017, the parties filed a joint pretrial report and stipulated as a fact that "[b]ased on the number of Defendants' total employees, the $300,000 [Title VII] damage cap at 42 U.S.C. § 1981a(b)(3)(D) applies to this case." D.A.Vol.2 at 331, 335. Similarly, near trial's end, Plaintiff told the Court that "all" Plaintiff's claims are "subject to the same cap." Tr.Vol.5 at 843.

V. *Trial*

Plaintiff's case was tried before a jury from November 13 to November 20, 2017. Plaintiff called seven faculty witnesses, and nine overall: (1) Plaintiff; (2) tenure 'expert" Parker; (3-6) four tenured professors in the English Department (Cotter-Lynch, John Mischo, Spencer, and Prus, the department chair; (7) a member of the faculty appeals committee (James Knapp); (8) a former Scoufos assistant, Mindy House; and (9) assistant vice president Weiner. Defendants called five witnesses, all from the administration: (1) Dean Scoufos, (2) Conway, the HR director, (3) McMillan, the vice president, (4) Stubblefield, the affirmative action officer, and (5) former President Jesse Snowden, who is Scoufos's husband. President Minks was not called to testify.

A. Plaintiff provided scant evidence of sex-stereotyping.

Only two witnesses testified about sex stereotyping. The first was Plaintiff, who testified that Conway, in a 2007 phone call, "talked about the length of my skirts or dresses, about—and about my makeup. … [I]t was rather vague. … I think that she was concerned that I not look like—I hate to use the word 'drag queen.'" Tr.Vol.1 at 47.

The second was House, who served as Scoufos' assistant until she was fired in 2016 for academic dishonesty in a separate incident. Tr.Vol.3 at 538. House claimed that, in private and outside the presence and hearing of Plaintiff, Scoufos criticized Plaintiff's clothing and other efforts to appear feminine, as well as Plaintiff's voice. *See* Tr.Vol.3 at 520-21. House declined to accuse McMillan of the same statements and actions. *See id.* 522. Instead, she claimed that McMillan said he did not agree with Plaintiff's transgender lifestyle and did not believe Plaintiff should be allowed to use the women's restroom. *Id.* at 522. No one accused President Minks of anything.

B. Plaintiff made transgender status the focal point of trial.

In contrast to the meager evidence of sex stereotyping, Plaintiff, the witnesses called by Plaintiff, and Plaintiff's counsel repeatedly painted the proceedings for the jury as being about transgender identity, as well as about related issues such as bathrooms, religious bias, and pronoun misuse:

Opening Statements:

- Plaintiff's counsel: "My client … is transgender. That fact right there is why we're all here today." Tr.Vol.1 at 17.
- Plaintiff's counsel: "Doug McMillan wanted Rachel gone because she's transgender." *Id.* at 20.
- Plaintiff's counsel: Defendants are "counting on you to not like transgender people." *Id.* at 27.

Plaintiff Testimony

- Plaintiff's counsel: "Now, Rachel, we're obviously all here today because you went through a gender transition." *Id.* at 40.

- Plaintiff: Conway "told me that Doug McMillan, when he discovered that I'm transgender, that he wanted to summarily fire me." *Id.* at 42.

- Plaintiff: "[Conway] said I was not allowed to use the women's restroom." *Id.* at 43.

- Plaintiff: Stubblefield "didn't seem to know how to handle a complaint involving a transgender person. For instance, when I mentioned to her that Lucretia Scoufos had used a male pronoun in reference to me, she didn't seem concerned." *Id.* at 99.

- Plaintiff's counsel: "Dr. Tudor, at any point did you try to help Claire Stubblefield learn more about transgender folks who experience discrimination?" *Id.* at 99. (Plaintiff said yes.)

Cotter-Lynch Testimony

- Plaintiff's counsel: "Today, would you recommend Southeastern as a good place for transgender students to attend? … [W]ould you recommend that transgender professors apply for positions at Southeastern?" Tr.Vol.2 at 351-52. (Cotter-Lynch said no.)

Scoufos Testimony

- Plaintiff's counsel: "So you right away, right out the gate, started classifying Dr. Tudor's portfolio in the transgender stack, is that correct?" Tr.Vol. 4 at 604.

- Plaintiff's counsel: "And you understand that the allegations of discrimination is that – it's because Dr. Tudor's transgender; correct? You understand that?" *Id.* at 623-24.

McMillan Testimony

- Plaintiff's counsel: "Do you recall, when your deposition was taken, that you indicated you didn't know which restroom transgender people should use?" *Id.* at 698.

Closing Argument

- Plaintiff's counsel: "[I]f Rachel Tudor were not a transgender woman, we would not all be here today." Tr.Vol.5 at 828.

- Plaintiff's attorney: "Professors who are transgender women are still scared to apply there, to go there. Things can't ever be right down at Southeastern if Rachel Tudor doesn't get justice." *Id.* at 833-34.

- Plaintiff's counsel: "Conway projected her own animus of transgender women onto other folks at Southeastern." *Id.* at 840.

Relatedly, Plaintiff moved for mistrial after the court inadvertently referred to Plaintiff as a "he." Tr.Vol.1 at 144, 156; Tr.Vol.2 at 196-97. The court denied the motion. *Id.* Also, Plaintiff's sole rebuttal witness was called to testify about the bathroom issue. Tr.Vol.5 at 806-809.

C. Plaintiff blamed McMillan and baselessly attacked his religion.

Plaintiff's theory at trial was that the discrimination and retaliation originated with McMillan. During closing, Plaintiff's attorney claimed that "[a]ll of this, it all went back to Doug McMillan" and that "McMillan pulled the puppet strings to push Rachel out of that university." Tr.Vol.5 at 837, 841. Scoufos, Plaintiff claimed, "was just following orders" and she "told you it was all Doug McMillan's fault." *Id.* at 840. During trial, Plaintiff's counsel repeatedly insinuated that McMillan's religion caused him to

discriminate against a transgender person. For instance, Plaintiff's counsel asked House if McMillan frequently brought up his religion at work, whether that made House feel uncomfortable, and whether McMillan ever made an employment decision on the basis of his religion. Tr.Vol.3 at 511. House said yes, although it was later revealed that the decision referenced was when McMillan found House a new job, rather than let her go, in part because "the Bible says that we take care of our widows." *Id.* at 541. Plaintiff's counsel then accused McMillan of having "felt the need to discuss [his] faith here today," Tr.Vol.4 at 697, despite the fact that Plaintiff introduced the subject at trial. In closing, Plaintiff again attacked McMillan's religion: "Frankly, you'd think that a true man of faith might just come out and confess to doing the obvious. Something was rotten at Southeastern. I guess he's not yet ready to admit it. But we all saw it … it all went back to McMillan." Tr.Vol.5 at 841.

D. Plaintiff's witnesses testified about Plaintiff's lack of scholarship.

Plaintiff testified that a tenure candidate must publish multiple articles to demonstrate good scholarship. Tr.Vol.1 at 51. Professor Mischo agreed, Tr.Vol.3 at 402, 418, as did Spencer, *Id.* at 451-52, and Prus, *id.* at 466—and all were called by Plaintiff, not Defendants. And Plaintiff's 2009 application, Spencer testified, "wasn't a strong application because there was just the one article." *Id.* at 443. Mischo's contemporaneous evaluation also mentioned Plaintiff had merely a "[p]ublished article," *id.* at 402, 421, and Mischo testified that he advised Plaintiff that Plaintiff was

not doing enough research and scholarship to qualify for tenure. *Id.* at 421-23. Prus also testified that Plaintiff had only one qualifying publication at the time. *Id.* at 466, 472-74. Defendants' witnesses echoed this. *See, e.g.,* Tr.Vol.4 at 581 (Scoufos: "She had only one publication [in 2009] … by a peer review, and so her scholarship was lacking.").

E. Plaintiff did not produce critical evidence of qualification.

Plaintiff did not produce the actual tenure portfolio submitted in 2009 or testify to its complete contents. Plaintiff's expert Parker admitted the portfolio he was given to analyze as was "partial" and incomplete. Tr.Vol.2 at 229. Professor Cotter-Lynch admitted she never reviewed Plaintiff's 2009 portfolio nor saw a complete copy. *Id.* at 358-59. Dean Scoufos testified that she believed original documents were missing from the portfolio reconstruction shown at trial, and that there were documents in the trial version that were not in the original. Tr.Vol.4 at 583-84. This testimony was unrebutted.

F. The tenure "expert" gave unfounded and unreliable testimony.

Plaintiff's primary evidence that the tenure denial was pretextual, rather than based on legitimate concerns with Plaintiff's qualifications, was the testimony of tenure "expert" Parker. An English professor from Illinois whose work focuses on American literature and critical theory, Parker testified that outside of his Illinois university he had reviewed just 25 tenure portfolios in his career. Tr.Vol.2 at 213, 224. He also admitted that it is improper to consider documents that are not in a portfolio when making a tenure decision because it would "open the door to bias, to misinformation, to personal

whim, to all sorts of inappropriate things." *Id.* at 240. He nevertheless testified that the version of Plaintiff's portfolio he was given to analyze was incomplete and that he didn't "know what was submitted" in 2009. *Id.* at 229, 250, 278. Parker conceded, as well, that he had not seen the Arts & Sciences' formatting requirements. *Id.* at 280.

Parker offered his personal views comparing Plaintiff's partially reconstructed portfolio from 2009-10 to the portfolios of four other professors at Southeastern that received tenure. He testified that a "good syllabus … tells a story." *Id.* at 249. He noted that he "really enjoyed" Plaintiff's "wonderful" course descriptions, which were "fun to me." *Id.* at 250. In commenting on Plaintiff's articles, he talked about how "serious" and "strong" they were, and how much they "advance[d] a discussion." *Id.* at 263-64. Parker testified that all of the candidate portfolios he reviewed were "impressive" and "strong," and indeed, "stronger than I'm accustomed to seeing." *Id.* at 254-55. Parker did not attempt to evaluate portfolios of any candidates who did not receive tenure. Parker claimed he couldn't "understand" McMillan and Scoufos's lower evaluations of Plaintiff's scholarship, *id.* at 266-67, and that "if things were fair" Plaintiff would have been awarded tenure. *Id.* at 236.

Contrary to Parker, Spencer—who was actually on Plaintiff's tenure committee, viewed Plaintiff's tenure portfolio, voted for Plaintiff's tenure, and was called as Plaintiff's witness—testified that Plaintiff's "was not a strong application … I would even say it was weak." Tr.Vol.3 at 444-45. Another of Plaintiff's witnesses, Mischo,

testified that the process of evaluating tenure portfolios is "inherently subjective," and that two professionals can look at the same tenure portfolio and come to completely different conclusions. Tr.Vol.3 at 415-16.

G. The jury issued verdicts and awarded damages.

Defendants submitted jury instructions and verdict forms to the court, although the court chose to utilize its own verdict form. *See* P.A.Vol.2 at 71-72. Neither party objected to this form, Tr.Vol.5 at 843-44, which states in the "Damages" section that "[i]f you have answered yes to any of the above questions, please set [on the single blank line below] the amount of damages to which Plaintiff is entitled to compensate her for her injuries." P.A.Vol.2 at 71-72. On November 20, 2017, the jury found for Plaintiff on the retaliation and discrimination claims and for Defendants on the hostile work environment claim. *Id.* The jury awarded Plaintiff $1.165 million in damages. *Id.*

VI. Post-trial

After the jury was dismissed, the district court ordered briefing on reinstatement and front pay and stated it was not going to enter judgment until those questions were resolved. Tr.Vol.6 at 872-73. Defense counsel inquired as to the appropriate time to move for judgment notwithstanding the verdict, and the court stated that the "same schedule would apply." *Id.* at 874. Defendants voiced no opinion on this schedule. *Id.* Defense counsel later contacted the court for clarification, given that its final trial action seemingly made post-judgment motions due *pre*-judgement. D.A.Vol.2 at 557-58. The

courtroom deputy consulted with the court and relayed that the deadlines set forth in the federal rules were applicable. *Id.*

Plaintiff next moved for reinstatement, which the district court denied, finding that "the relationship between the parties was so fractured as to make reinstatement infeasible." P.A.Vol.5 at 79-83; P.A.Vol.4 at 126-29. The court instead awarded $60,040.77 in front pay. P.A.Vol.5 at 45-49, 79-83. The court also reduced Plaintiff's jury award to $360,040.77 pursuant to the Title VII statutory cap. *Id.* at 79-83. To get that amount, the court determined that the jury at most could have awarded $60,040.77 in back pay. *Id.* at 82-83. The rest of the jury's award, the court found, was clearly subject to the statutory cap and therefore had to be reduced to $300,000 under Title VII. *Id.* This led to a total award of $420,081.54. *Id.* at 84.

On June 6, 2018, the court entered judgment. *Id.* at 84. On July 5, within the proper time period under FRCP 50(b), Defendants filed a renewed motion for judgment as a matter of law and for a new trial. D.A.Vol.2 at 519-554. Defendants accused Plaintiff, *inter alia*, of "religious hostility" and "anti-religious animus" for McMillan's treatment. *Id.* at 545-47. Plaintiff, in turn, blasted this accusation as "patently offensive given [counsel's] own faith." P.A.Vol.5 at 128 n.4. The court struck the motion because it was not filed before the court's separate end-of-trial deadline. P.A.Vol.5 at 154-56. Alternatively, the court denied the motion on the merits. *Id.*

SUMMARY OF THE ARGUMENT

The district court made significant errors that warrant reversal. *First*, the court erred in permitting Plaintiff's so-called tenure expert to testify. It failed to analyze his reliability and instead deferred that assessment to the jury. This was an abdication of the court's gatekeeping role under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993). And it mattered: that witness was the only expert who testified in a hotly contested case where Plaintiff's own witnesses were skeptical about Plaintiff's qualifications, and the expert's testimony was unfounded, subjective, and methodologically unsound. *Second*, the district court repeatedly ignored the fact that Plaintiff pleaded and tried a discrimination case based on transgender identity, focusing on Plaintiff's transgender status and related issues such as bathroom use, religion, and pronouns. But under Title VII and *Etsitty*, 502 F.3d 1215, transgender identity is irrelevant to a Title VII claim, and Plaintiff's evidence on sex-stereotyping was virtually non-existent. *Third*, the district court failed to acknowledge that Plaintiff's evidence was insufficient to sustain the trial verdicts; for instance, Plaintiff didn't even produce the original tenure portfolio or solid evidence of multiple publications. Nor did Plaintiff accuse the actual decision-maker of anything.

Nevertheless, the district court was correct—and it certainly did not abuse its discretion—when it deemed reinstatement infeasible based primarily on mutual hostilities. Animosity between the parties in this case is undeniable and well-supported

by the record. The current English Department chair, whom Plaintiff vouches for as trustworthy, testified that reinstatement would be detrimental and is opposed by at least half the faculty. Moreover, Plaintiff continues to betray Defendants' trust by revealing private settlement discussions, including before this Court. These are not elements conducive to a court-ordered lifetime relationship. Furthermore, the district court did not abuse its discretion by declining to grant Plaintiff a front pay windfall of millions of dollars when Plaintiff found a job soon after leaving Southeastern that paid as well as Southeastern, and then lost that job due to no fault of Defendants. Finally, Plaintiff cannot claim Defendants waived the Title VII statutory cap when Plaintiff jointly stipulated before and during trial to that cap's applicability.

ARGUMENT

I. Cross-Appeal

A. The district court abdicated its gatekeeping role when it did not analyze the reliability of Plaintiff's tenure expert and permitted subjective, baseless, and methodologically unsound testimony.

"Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 595 (1993). As such, Federal Rule of Evidence 702 tasks courts with "gatekeeping" to ensure that expert testimony is relevant and reliable before permitting the jury to see it. *See Adamscheck v. Am. Family Mut. Ins. Co.*, 818 F.3d 576, 586 (10th Cir. 2016) (citing *Daubert*). Specifically, Rule 702 requires expert witnesses to have "specialized

knowledge" and to testify based on "reliable principles and methods" applied to "sufficient facts" or "data." The party proposing expert testimony must establish that it is admissible. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987). That party must first show that the expert is sufficiently qualified, and second that the expert's opinion is reliable "by assessing the underlying reasoning and methodology." *U.S. v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009). This Court reviews de novo whether a district court "actually performed its gatekeeper role in the first instance." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003). If that role is performed, the application of the *Daubert* standard is reviewed for abuse of discretion. *Id.* If a trial court abdicates its gatekeeping role, however, the presumptive remedy is a new trial. *Adamscheck*, 818 F.3d at 590-91.

Here, Plaintiff put forth the report and trial testimony of Parker, an Illinois-based English professor. D.A.Vol.1 at 95-124. Parker compared Plaintiff to four Southeastern professors with tenure and opined that "no reasonable, objective or fair grounds [existed] for denying" Plaintiff tenure. *Id.* at 120. Defendants moved to exclude Parker's testimony, a motion the court denied without analyzing Parker's reasoning or methodology. D.A.Vol.1 at 125-28. This Court should remand for a new trial.

1. The district court expressly abandoned its gatekeeping role.

Again, this Court reviews *de novo* whether a district court sufficiently developed a record showing it applied the relevant law under *Daubert*, with "specific findings or discussion" of the issues. *Adamscheck*, 818 F.3d at 586. Here, the district court issued a

four-page order denying Defendants' motion. D.A.Vol.1 at 125-28. But three pages simply listed the parties' arguments—only the last page discussed the court's own views. *Id.* And while this single page (barely) mentioned Parker's qualifications and relevance, it contained no analysis of the reliability of Parker's methodology. *Id.* Rather, the court explicitly punted the critical reliability determination to the jury: "To the extent Defendants raise challenges to the procedure used by Dr. Parker or challenge his methodology, those arguments are matters to be addressed through proper cross-examination." D.A.Vol.1 at 128. This is plainly erroneous under *Daubert*, which tasks courts—not juries—with determining reliability. *See, e.g.*, *Rider v. Sandoz Pharm.*, 295 F.3d 1194 (11th Cir. 2002) ("The *Daubert* court made it clear that the requirement of reliability found in Rule 702 was the centerpiece of any determination of admissibility.").

The district court eschewed its gatekeeper role, and this alone is enough for reversal. *See Adamscheck*, 818 F.3d at 586-87 (collecting cases where Tenth Circuit reversed district courts for not serving as a gatekeeper). Parker was the only expert who testified in a close case where Plaintiff's own witnesses cast doubt on Plaintiff's merit; moreover, his comparison of candidates is something no other witness offered, so it cannot possibly be viewed as cumulative or harmless. *See id.* at 590-91. Rather, it was the critical evidence at trial indicating that Plaintiff merited tenure and Defendants' explanations were pretext, which is why Plaintiff called Parker's report "very important" in closing. Tr.Vol.5 at 834. This Court should order a new trial.

2. Parker's testimony was unfounded, subjective, and unreliable.

By abdicating its gatekeeping role, the court admitted unfounded, unreliable, and subjective testimony from an unqualified witness. Even if the court had analyzed reliability, it would have abused its discretion by permitting Parker to testify as an expert.

Qualifications: For starters, the tenure process is not Parker's field of study. D.A. Vol.1 at 95-96. Rather, he is a tenured professor of English specializing in American literature and critical theory who has reviewed about two dozen tenure portfolios outside of his own school. Tr.Vol.2 at 213, 224. Moreover, while he specializes in similar fields as Plaintiff, he never claims to be a specialist in various genres of the other professors he evaluated. D.A.Vol.1 at 95-96. In addition, Parker has no prior experience in Oklahoma universities. The district court did not address these concerns in its order. D.A.Vol.1 at 125-28. If Parker were qualified to testify as an expert in this case, then surely thousands of tenured professors across the country, with no knowledge of Oklahoma or RUSO or Southeastern, would also be qualified to testify as experts—including other professors at Southeastern.

Foundation: Parker admitted he lacked foundation for his testimony. An expert's testimony must be "*based on facts* which satisfy Rule 702's reliability requirements." *Conroy v. Vilsack*, 707 F.3d 1163, 1170 (10th Cir. 2013). But Parker conceded the portfolio he analyzed from 2009-10 was incomplete. Tr.Vol.2 at 229, 250; *see also id.* at 278 (Parker: "I don't know what was submitted [in 2009].") This alone disqualifies him,

at least as to the 2009-10 discrimination complaint. There is no factual basis to compare the actual portfolios submitted, so the district court abused its discretion in holding that his testimony "will be helpful to the jury in evaluating the veracity of Defendants' stated reasons for denying Dr. Tudor tenure." D.A.Vol.1 at 127.

Parker's comparison of candidates was also based on Southeastern's written policies, without analyzing key local factors—such as the strict formatting requirements in the Arts & Sciences school. *See* Tr.Vol.2. at 280. But Spencer testified that Plaintiff had a "weak" application in part due to Plaintiff's non-compliance with the formatting requirements. Tr.Vol.3 at 444-45, 453. Parker's ignorance of these requirements renders his testimony unreliable, unhelpful, and misleading for a jury.

Parker's lack of knowledge—both of Arts & Sciences requirements and of the full portfolio—explains why his testimony was far removed from that of Plaintiff's own witnesses. Parker repeatedly testified that all the candidates were "impressive" and "strong," Tr.Vol.2 at 254, and indeed, "stronger than I'm accustomed to seeing," *id.* at 255, while Spencer, a Southeastern professor who evaluated Plaintiff's *actual* portfolio, testified that Plaintiff's application "was *not* a strong application … I would even say it was weak." Tr.Vol.3 at 444-45 (emphasis added). But even though Parker lacked the original portfolio or knowledge of the local standards—unlike Spencer, Prus, and Mischo—Parker received the prestigious label of "expert."

Subjectivity: An expert's testimony must be based on knowledge, which "connotes more than subjective belief." *Daubert*, 509 U.S. at 590; *see also U.S. v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999). And courts have held that a university's tenure decision is a highly subjective inquiry where universities deserve great deference. *See, e.g.*, *Carlile v. South Routt School Dist. RE–3J*, 739 F.2d 1496, 1500 (10th Cir. 1984) ("[T]enure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions in general."); *Babbar v. Ebadi*, 216 F.3d 1086, *6 (10th Cir. 2000) (unpublished) ("Federal courts are not particularly well-suited to the task of evaluating the criteria for successful tenured professors and are particularly ill-suited to determine the best candidates."); *Adelman–Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 667 (7th Cir. 2007); *Thrash v. Miami University*, 549 F. App'x 511, 521 (6th Cir. 2014) (collecting cases). As such, courts have generally rejected "expert" tenure witnesses. *See, e.g.*, *Babbar v. Ebadi*, 36 F.Supp.2d 1269, 1279 (D. Kan. 1998), *aff'd* 216 F.3d 1086 (10th Cir. 2000); *Goswami v. DePaul Univ.*, 8 F.Supp.3d 1019, 1035 (N.D. Ill. 2014); *Goodship v. University of Richmond*, 860 F.Supp. 1110, 1112-13 (E.D. Va. 1994); *Kossow v. St. Thomas University, Inc.*, 42 F.Supp.2d 1312, 1317 (S.D. Fla. 1999); *El-Ghori v. Grimes*, 23 F.Supp.2d 1259, 1268-69 (D. Kan. 1998). *Cf. Gupta v. Bd. of Regents of Univ. of Wisc. Sys.*, 63 F. App'x 925, 928 (7th Cir. 2003).

The Northern District of Illinois issued a comprehensive opinion in 2014 explaining why tenure experts do not meet Rule 702 for a pretext inquiry. *See Goswami*,

8 F.Supp.3d 1019. There, a professor who was denied tenure offered the "expert" testimony of six professors who opined that she deserved tenure; in doing so, they described her scholarship "in such undeniably subjective terms as: careful, innovative, vital, thought provoking, outstanding, [etc.]." *Id.* at 1022-29. The court rejected this testimony, observing "the uniform line of authority explicitly holding that evaluations of scholarship are inherently subjective" and "the absence of fixed, objective criteria for tenure decisions." *Id.* The court cited a simple analogy:

> Suppose Dr. Goswami submitted a manuscript … and the publisher rejected it. What she is trying to do here is akin to finding another publisher who liked the material and saying that this proves the first publisher was "wrong." The publisher may have made a poor judgment … but it was not "wrong." It simply would have had a different opinion of her work, in much the same way as the various professors do here.

Id. at 1039.

Parker's report is filled with subjective statements. He gives Plaintiff high marks for teaching because of "impressively written" descriptions of classes that show "admirable adaptability" and "reveal a carefully reasoned teaching imagination." D.A.Vol.1 at 100. He applauds Plaintiff's "extraordinary syllabi," which are "among the best I have ever seen" (though noting that "the font of the syllabi is too small"). *Id.* at 101. Meanwhile, he criticizes Spencer as worse than Plaintiff because his written course descriptions "do not show the depth of thought and imagination visible in Tudor's descriptions," and, from Spencer's syllabi, it appears "he may assign too much reading" and allot too much class time for "student presentations." *Id.* at 101-02.

Parker's evaluation of scholarship is even more subjective. He describes Plaintiff's publications as "sophisticated and well-informed," "genuinely critical yet still sympathetic," and "knowledgeable, intelligent, and wise," while claiming another candidate's article was "slow-moving and too long." *Id.* at 108, 113, 116. Parker's trial testimony turned out to be remarkably subjective, as well. On the stand, he emphasized that a "good syllabus ... tells a story." Tr.Vol.2 at 249. He "really enjoyed" Plaintiff's "wonderful" course descriptions, which were "fun to me." *Id.* at 250. He talked about how "serious" and "strong" Plaintiff's articles were, and how much they "advance[d] a discussion." *Id.* This is hardly the stuff of objective testimony that Rule 702 envisions. *Cf. Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir. 1984) "[T]here is no common unit of measure by which to judge scholarship."). It certainly didn't merit the label "expert."

Nearly every other witness who testified also had some measure of expertise on tenure and yet were not presented to the jury as an "expert." Former president Snowden, for example, testified to having reviewed maybe a "thousand" tenure portfolios at multiple universities—a tenfold increase over Parker. *See* Tr.Vol.5 at 765-66. Furthermore, Plaintiff's own witness, tenured professor Mischo, agreed that the process of evaluating tenure and promotion portfolios is "inherently subjective," and that two professionals can look at the same portfolio and come to opposite conclusions. Tr.Vol.3 at 415-16. If Mischo is correct—and he is—then virtually every tenure decision is now subject to an expert's disagreement and a pretext finding under the court's ruling.

Unreliable Method: Devising an objective methodology for analyzing a subjective endeavor such as tenure is nigh impossible. Parker hardly even tried. Parker does not purport to employ a methodology that has been subjected to peer review; that has a known or potential rate of error or has objective standards; or that has been generally accepted by the tenure-review community. *Kumho Tire v. Carmichael*, 526 U.S. 137, 145 (1999). Nor does Parker "testify about matters growing naturally and directly out of research [he has] conducted independent of litigation" FRE 702, Advisory Committee Notes. Again, his field of study is American literature and critical theory, not the tenure process. Parker has not "accounted for obvious alternative explanations" such as strict local procedural requirements, either, nor has he demonstrated that his ranking system is "known to reach reliable results for the type of opinion the expert would give." *Id.*

Instead, Parker attempts to prove tenure was deserved by comparing Plaintiff to four other candidates who were awarded tenure. But such a small sampling cannot be the basis of a meaningful comparison, especially in a process that involves so many subjective variables. In cases involving comparisons of similarly situated individuals, sample sizes that are too small render the expert testimony unreliable. *See, e.g.*, *Martinez v. Wyoming*, 218 F.3d 1133, 1138-39 (10th Cir. 2000); *Ram v. New Mexico Dep't of Env't*, No. CIV 05-1083, 2006 WL 4079623, at *8, *13-14 (D.N.M. Dec. 15, 2006); *see also Blasdel*, 687 F.3d at 817 (Posner, J); *Lieberman v. Gant*, 630 F.2d 60, 67 (2d Cir. 1980)

(Friendly, J.). Moreover, Parker does not analyze any other professors who *did not receive* tenure—a glaring methodological flaw.

For these myriad reasons, Dr. Parker's testimony does not meet the *Daubert* standard, and the court abused its discretion in permitting such testimony.

3. Parker's testimony should have been excluded as irrelevant.

The critical inquiry in demonstrating pretext is not whether the reasons for Southeastern denying tenure were correct, but rather whether Southeastern "honestly believed those reasons and acted in good faith upon those beliefs." *Lobato v. New Mexico Envtl. Dep't*, 733 F.3d 1283, 1289 (10th Cir. 2013). In other words, "[i]t is not the court's concern that an employer may be wrong about its employee's performance.... Rather, the only question is whether the employer's proffered reason was pretextual, meaning that it was a lie." *Goswami*, 8 F.Supp.3d at 1031 (citations omitted).

Parker offered no relevant testimony on this score. Rather, he proffers testimony expressing his own subjective disagreement with Southeastern. But "plaintiff's own perceptions (or the perceptions of his expert) with respect to his qualifications for tenure are irrelevant; it is the perception of the decisionmaker which is relevant." *Babbar*, 36 F.Supp.2d at 1279 (D. Kan. 1998); *Goodship*, 860 F.Supp. at 1112. For these reasons and more, courts have routinely rejected testimony as to whether a candidate deserved tenure, even in comparison to colleagues, because it is irrelevant to the determination

of whether the reasons given for denial are pretext. *See supra* pp. 32, 35. The court below should have excluded this evidence from being presented to the jury.

B. The district court misapplied *Etsitty* by holding that Title VII covered claims of transgender discrimination focusing on bathroom usage, pronouns, and religion.

Title VII does not cover claims based on transgender identity; indeed, per *Etsitty* transgender identity should be "irrelevant" to a person's Title VII claims. *See supra* pp.5-7. Rather than treat transgender identity as irrelevant, Plaintiff made it the centerpiece of this case, from the first complaints through the end of trial.

To make a *prima facie* case of Title VII discrimination or retaliation, Plaintiff must demonstrate membership in a protected class. *See Fassbender v. Correct Care Solutions*, 890 F.3d 875, 884-85 (10th Cir. 2018). Before trial, Defendants filed a motion to dismiss and a motion for summary judgment, arguing that judgment should be rendered in favor of Defendants because Plaintiff's case was improperly focused on Plaintiff's transgender status. D.A.Vol.1 at 1-12, 129-165. The court denied those motions, P.A.Vol.1 at 147-53, Vol.2 at 31-37, stating later that Plaintiff was not "complaining that transgender persons were treated different" but rather contending that "once she was a woman, [Plaintiff] was treated differently." Tr.Vol.1 at 8. Plaintiff's claims could go forth as "sex-stereotyping" claims, the court held, reasoning that "[h]ere, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took

against her were based upon their dislike of her presented gender." P.A.Vol.1 at 151. The district court claimed that the Tenth Circuit had recognized this distinction in an *Etsitty* footnote, which cited *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004). *Id.*

This Court applies de novo review both to legal questions of statutory interpretation, *see Knitter v. Corvias Military Living*, 758 F.3d 1214, 1225 (10th Cir. 2014), and to a district court's decision to deny summary judgment. *See Scott's Liquid Gold v. Lexington Ins.*, 293 F.3d 1180, 1183 (10th Cir. 2002).

The district court seriously erred in interpreting *Etsitty*. For the following reasons, the court should have dismissed Plaintiff's claims and granted judgment to Defendants before trial. To begin, the district court erred by misreading *Etsitty* to allow Plaintiff to bring a claim as a female. In the very *Etsitty* footnote relied upon by the court below, the Tenth Circuit favorably quoted the Seventh Circuit for the proposition that if "the term 'sex' as it is used in Title VII is to mean more than biological male or biological female, the new definition must come from Congress." *Etsitty*, 502 F.3d at 1222 n.2 (quoting *Ulane v. E. Airlines*, 742 F.2d 1081, 1087 (7th Cir. 1984)). This is now the official position of the United States as well. *See* Brief for Federal Respondent, *Harris Funeral Homes v. EEOC*, No. 18-107 (S. Ct. Oct. 2018) ("When Title VII was enacted in 1964, sex meant biological sex; it referred to the physiological distinction between male and female. … Title VII thus does not apply to discrimination against an individual based on his or her gender identity." (cleaned up)). This position does not contradict *Smith*.

Smith was a biological male who the Sixth Circuit ruled could bring a claim *as a male* alleging discrimination because of feminine behavior. *See Smith*, 378 F.3d at 570. Plaintiff did not bring this claim as a biological male, like Smith, and thus Plaintiff's claims did not fall within the purview of Title VII.

In addition, rather than treat transgender identity as "irrelevant," as required by *Etsitty*, 502 F.3d at 1222, throughout this litigation Plaintiff has attempted to claim that gender identity and biological status are inseparable. *See supra* pp.13-15. Plaintiff's complaint, for example, asserted that sex is an "ambiguous term" that includes "gender identity within its meaning," P.A.Vol.1 at 74 ¶15, and Plaintiff disputed in briefing that Plaintiff could be considered a biological male. D.A.Vol.2 at 297. Plaintiff's repeated insistence on the inseparability between transgender status and sex discrimination under Title VII demonstrates that Plaintiff, from the beginning, has considered this a transgender identity case that actually seeks to overturn or eviscerate *Etsitty*.[4]

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[4] Notably, Plaintiff claims Defendants "decided in exchange for Dr. Tudor's expert on sex, Dr. Brown, not testifying at trial that they would cease raising challenges concerning the meaning of the term 'sex'." Pl's Op.Br. at 25. This is not true. Defendants raised their *Etsitty* argument about "sex" in their motion to dismiss *and* their motion for summary judgment. *See supra* pp.15-17. At the pretrial hearing in question, Defendants indicated they did "not intend to dispute the definition of sex" *at trial* because *the court had already ruled against Defendants on that question*—twice. *See* P.A.Vol.6 at 45. The exchange leading up to Defendants' statement makes that clear. Both the district court and Plaintiff first agreed that Plaintiff's "sex" expert was now irrelevant for jury trial *because of the summary judgment ruling*. Defendants then simply added their acknowledgment of this development, which had led to Defendants' developing a trial strategy commensurate with the court's ruling. *Id.* The court later agreed with Defendants on this point. Tr.Vol.5 at 723. There was no waiver. *See* Fed.R.Evid. 103(b).

Even if *Etsitty* allows Plaintiff to bring a sex-stereotyping claim as a woman, that is not the claim Plaintiff pursued in allegations or evidence. *Etsitty* makes clear that "[t]he critical issue under Title VII 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Etsitty*, 502 F.3d at 1225 (citation omitted). But Plaintiff and the DOJ focused their complaints almost exclusively on Plaintiff's transgender identity and controversies surrounding transgenderism, rather than anything resembling sex stereotyping. *See supra* pp.13-15 *Cf. Price Waterhouse*, 490 U.S. at 250 (example of stereotyping is employer believing women cannot be aggressive).

Most jarringly, one of Plaintiff's primary allegations of discriminatory motive—taking up nearly 25 paragraphs of the complaint—was restrictions on bathroom usage. *See supra* pp.14-15. But *Etsitty* itself revolved entirely around transgender bathroom usage, and the Court there unambiguously ruled that such claims were not evidence of a Title VII violation: "Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes." 502 F.3d at 1224. Amazingly, the district court never discussed this aspect of *Etsitty*, and permitted Plaintiff to pursue Title VII claims largely based on bathroom usage before the jury.

Plaintiff did briefly pay lip service to sex stereotyping, alleging that several years before the tenure process Conway counseled against wearing short skirts and traditionally female articles of clothing. P.A.Vol.1 at 81-82 ¶64. But Conway was not a

decision-maker or even a recommender in regard to Plaintiff's tenure process. This cannot be enough to sustain a claim that Plaintiff was denied tenure due to sex stereotyping, especially given that *Etsitty* explicitly held that "isolated and tangential comments" about a transgender individual's appearance are insufficient. *Etsitty*, 502 F.3d at 1226; *see also Price Waterhouse*, 490 U.S. at 251 ("stray" stereotyping remarks are not enough to make a stereotyping case). In short, nothing in Plaintiff's allegations or evidence produced in discovery made even a *prima facie* case of sex stereotyping, so the district court should have entered judgment for Defendants.

C. Plaintiff did not produce sufficient evidence of sex stereotyping, qualification, or pretext, so the court should have granted judgment as a matter of law to Defendants.

Judgment as a matter of law is appropriate where "the evidence points one way and is not susceptible to reasonable, contrary inferences." *Perez v. El Tequila, LLC*, 847 F.3d 1247, 1255 (10th Cir. 2017); *see also* FRCP 50(a). Put differently, the verdict in question must be "supported by substantial evidence." *See Dodoo v. Seagate Tech.,* 235 F.3d 522, 527 (10th Cir. 2000). The evidence in the record is viewed in the light most favorable to the prevailing party. *Id.* Defendants moved for judgment as a matter of law on all four Title VII claims, arguing that each was unsupported by sufficient evidence; the court denied Defendants' motion. Tr.Vol.5 at 724-25.

1. Defendants' renewed motion for judgment was timely.

FRCP Rule 50(b) permits parties to file a renewed motion for judgment as a matter of law within 28 days of judgment being entered. Here, it is undisputed that Defendants' Rule 50(b) motion was filed within 28 days of the district court entering judgment. *See* P.A.Vol.5 at 154-55. Nevertheless, the district court ruled that Defendants' motion was untimely because it was not filed within the court's separate deadline, set six months prior to judgment. *Id.* at 155. The court's ruling is incorrect.

The court had no authority to shorten unilaterally the deadline, much less to make a Rule 50(b) motion challenging the jury's verdicts due *before* judgment. No text gives the court that ability, the court cited no authority for its decision, and Defendants have found no case law authorizing it, either. Rather, case law indicates commonsensically that district courts are bound to enforce federal rules, *see, e.g.*, *Eberhart v. U.S.*, 546 U.S. 12, 17 (2005) ("[D]istrict courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked."); *In re A.G. Fin. Serv. Ctr.*, 395 F.3d 410, 413–14 (7th Cir. 2005) ("Bankruptcy courts lack authority to … depart from those [rules] in the Code, to implement their own views …."), and that local rules give way to federal rules and not the other way around. *See S.E.C. v. All. Leasing Corp.*, 28 F. App'x 648, 651 (9th Cir. 2002) ("The district court had the authority to disregard the technical local rule and consider the Rule 59 motion timely filed ….").

Neither did Defendants acquiesce to the court's new deadline. When the court gave its initial order at the end of the week-long trial, Defendants did not verbally respond. Tr.Vol.6 at 873-74. Soon after, they called the court in an attempt to clarify how a post-judgment motion could be due pre-judgment. D.A.Vol.2 at 557-59. The courtroom deputy consulted with the court and relayed to Defendants that the deadlines set forth in the federal rules were applicable. *Id.* Defendants interpreted this to mean that the court's order could only pertain to the small subset of 50(b) motions that don't address the jury verdict, and that Defendants would still have 28 days after judgment was entered to challenge the verdict itself. *See* D.A.Vol.2 at 503. In striking Defendants' motion, the court never said why its deputy told Defendants to follow federal rules; rather, it cited its own "intent" and how it would not make sense to wait six months to file post-judgment motions. P.A.Vol.5 at 154-55. Defendants should not be hit with a drastic penalty for following federal rules.

2. Plaintiff did not produce sufficient evidence of sex stereotyping.

No direct evidence of discrimination or retaliation has been produced, so this Court must "evaluate whether circumstantial evidence … presents a triable issue." *Fassbender v. Correct Care Solutions*, 890 F.3d 875, 884 (10th Cir. 2018) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *McDonnell Douglas* framework requires Plaintiff first to establish a *prima facie* case of discrimination. *Id.* If accomplished, Defendants must then articulate legitimate, non-discriminatory reasons for tenure

denial. *Id.* When Defendants do so, the burden shifts to Plaintiff to "show there is a genuine issue of material fact as to whether the proffered reasons are pretextual." *Id.* Plaintiff "bears the ultimate burden of persuasion to show discrimination." *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 969 (10th Cir. 2017).

Plaintiff failed to make a *prima facie* case of sex stereotyping at trial; instead, Plaintiff put on a transgender identity case, which is not covered by Title VII. As in the pleadings, Plaintiff repeatedly painted the proceedings for the jury as being about transgender identity, bathroom use, and pronouns. *See supra* pp.18-20. Plaintiff also repeatedly attacked McMillan on religious grounds, stating in closing that "a *true* man of faith might just come out and confess to doing the obvious." *See supra* pp.20-21. Beyond being wildly inappropriate, this slur has nothing to do with sex stereotyping.

It is impossible to look at this testimony and the record as a whole and not conclude that Plaintiff put on a transgender identity case, not a case proving discrimination based on sex stereotyping. This is impermissible under *Etsitty*. If allowed to stand, this case would make a mockery of the careful distinctions drawn in *Etsitty*, and would turn *Etsitty* into nothing more than a pleading formality. The court below clearly did not share this Court's "reluctance to expand the traditional definition of sex in the Title VII context." *Etsitty*, 502 F.3d at 1222.

The only trial testimony remotely connected to sex stereotyping is unavailing to Plaintiff. First, Plaintiff testified that Conway placed "rather vague" restrictions on the

length of Plaintiff's skirts and Plaintiff's makeup in 2007. Tr.Vol.1 at 47. Conway denied this, Tr.Vol.4 at 650, but even if true this occurred several *years* before Plaintiff's tenure application process, and—most importantly—Conway played no role in that process. This testimony is not enough to show even a *prima facie* case of discrimination. Second, House testified that, in private and outside the presence of Plaintiff, Scoufos criticized Plaintiff's clothing and other efforts to appear feminine, as well as Plaintiff's voice. *See* Tr.Vol.3 at 520-21. House was fired from Southeastern a year earlier due to academic dishonesty in a separate matter, and Scoufos denied these charges. *See supra* p.18.

But even accepting House's testimony, *Price Waterhouse* and *Etsitty* emphasize that stray, isolated, or tangential stereotyping comments are not enough to sustain a case like this. *Price Waterhouse*, 490 U.S. at 251; *Etsitty*, 502 F.3d at 1225-26. Furthermore, it is undisputed that Scoufos was not the tenure decision-maker. President Minks was the relevant decision-maker, and no one testified that Minks stereotyped Plaintiff in any way. Indeed, Plaintiff declined to call Minks as a witness, and there was no testimony that Scoufos' recommendation somehow influenced Minks to deny tenure. Substantial testimony indicated otherwise. *See, e.g.*, Tr.Vol.4 at 689-690 (McMillan: Plaintiff "wasn't turned down at that level [by Scoufos]. … [I]t was a recommendation. … [A]ll levels of the review process are independent of one another."); Tr.Vol.5 at 788-89 (Snowden: A tenure application "can be changed at any succeeding level going up. … It's important to state that these are only recommendations until it gets to the president."). Even

Plaintiff admitted that each level of review "has an *independent* obligation … to thoroughly review the portfolio and determine if it is sufficient for tenure." Tr.Vol.1, at 187 (emphasis added). Without any evidence of stereotyping by Minks, or influence of Minks by Scoufos, there is no discrimination based on sex stereotyping. *See Blasdel*, 687 F.3d at 817 (Posner, J.) ("[T]he tenure decision was made by Northwestern's provost, and there is no evidence that he was influenced by the fact that Blasdel is a woman. So [Blasdel] can prevail only by showing that the provost's decision was decisively influenced by someone who was prejudiced."); *Adelman-Reyes*, 500 F.3d at 667 (similar).

President Minks aside, Plaintiff's entire theory of the case was that the true culprit was McMillan—not Scoufos; and again, there was no evidence of sex stereotyping by McMillan, as House declined to accuse him of the statements she ascribed to Scoufos. *See supra* p.18. Thus, even under *Plaintiff's own theory* there was no evidence presented that sex stereotyping led to McMillan discriminating or retaliating against Plaintiff.

Plaintiff had every chance to put on a sex-stereotyping case and refused to do so. Rather than treat gender identity as irrelevant, as required by *Etsitty*, Plaintiff made it the centerpiece of trial and failed to produce meaningful evidence of sex stereotyping. This nullifies Plaintiff's *prima facie* case under Title VII. *See id.* at 1220-21 (Title VII "should not be treated as a 'general civility code' and should be 'directed only at discrimination because of sex.'"). Judgment should have been granted to Defendants.

3. Plaintiff did not produce sufficient evidence of qualification.

To make a *prima facie* case that Defendants unlawfully discriminated by not awarding tenure, Plaintiff most show qualification for the position being sought at the time in question. *See DePaula*, 859 F.3d at 969–70. This means Plaintiff must introduce "credible evidence" of meeting Defendants' "objective requirements necessary to perform the job." *Kilcrease v. Domenico Transp.*, 828 F.3d 1214, 1219-20 (10th Cir. 2016). For Plaintiff's 2009-10 application, Plaintiff failed to do so.

Plaintiff never produced the actual tenure portfolio from 2009-10. Plaintiff's most favorable witnesses acknowledged this absence. Parker admitted the portfolio he was given was "partial" and incomplete. Tr.Vol.2 at 229. Cotter-Lynch admitted she never reviewed Plaintiff's 2009 portfolio, *id.* at 358-59, even while admitting that she had preserved her own portfolio, *id.* at 313-14. Plaintiff, too, did not testify comprehensively as to the precise contents of the 2009 portfolio. And Dean Scoufos gave unrebutted testimony that original documents were missing from the portfolio reconstructed by Plaintiff's counsel for purposes of trial, and that certain documents in that trial version were *not* in the original portfolio. Tr.Vol.4 at 583-84. Without the original portfolio, it is nearly impossible to know the extent of Plaintiff's qualifications as they appeared to Defendants in 2009-10. Thus, it can hardly be said Plaintiff met the burden of producing a *prima facie* case showing qualification for a tenured professorship.

4. Plaintiff did not produce sufficient evidence of pretext.

Defendants put forth legitimate, non-discriminatory reasons for the tenure denial: lack of scholarship and service. *See, e.g.*, D.A.Vol.3 at 683-84; Tr.Vol.4 at 581-82, 591; *see also DePaula*, 859 F.3d at 970 ("The defendant's burden is 'exceedingly light,' as its stated reasons need only be legitimate and non-discriminatory 'on their face.'"). Plaintiff must provide legitimate evidence that these reasons were pretextual. *See DePaula*, 859 F.3d at 970. Plaintiff may do so by attacking Defendants' reasons or by providing evidence that unlawful discrimination was a primary factor. *Id.*

Plaintiff did not provide evidence of sex stereotyping, either for a *prima facie* case or for pretext. And while Plaintiff relies heavily on Parker's expert report to demonstrate pretext, Parker's testimony should have been excluded. *See Babbar*, 36 F.Supp.2d at 1279 ("[P]laintiff's assertions [backed by an expert] that he was more qualified than successful tenure candidates, without more, are insufficient to create an inference that defendants' proffered reasons … are pretextual.").

Plaintiff has also cited the faculty's tenure recommendation to attack Defendants' reasons. But a disagreement between faculty and the administration, no matter how fierce, cannot be the basis to discredit the administration's non-discriminatory reasons for denying tenure. *See Blasdel*, 687 F.3d at 816 (Posner, J.) (tenure decisions are "a source of unusually great disagreement," so courts "tread cautiously when asked to intervene"); *Babbar*, 216 F.3d 1086 at *6 ("Federal courts …

are particularly ill-suited to determine the best [tenure] candidates."); *DePaula*, 859 F.3d at 970–71 ("Evidence that … the employer was mistaken or used poor business judgment—is not sufficient."). That is especially the case here, where Plaintiff's own witness, Spencer, testified that a positive view of Plaintiff's transgender identity—rather than qualifications—potentially led the faculty to recommend tenure in the first place. *See* Tr.Vol.3 at 454. Right or wrong, the administration wasn't required to agree.

5. Plaintiff did not produce sufficient evidence to show that Defendants discriminated by refusing to let Plaintiff reapply for tenure in 2010-11.

Defendants provided at least two legitimate, non-discriminatory reasons for denying reapplication of tenure in 2010-11: (1) Defendants' rules and practices do not allow for multiple applications; and (2) Plaintiff was offered the opportunity to reapply for tenure but turned it down. *See, e.g.*, D.A.Vol.3 at 687. Plaintiff has not provided sufficient evidence showing that either of these reasons were pretext.

First, the relevant rule states that a tenure-track candidate can apply for tenure in their "fifth, sixth, *or* seventh" year. D.A.Vol.3 at 623 (Rule 4.6.3). The use of the word "or" indicates that professors must pick one year to see their application through. Certainly, several witnesses testified that they thought multiple applications were allowed, and the faculty appellate committee claimed this, as well. *See, e.g.*, Tr.Vol.3 at 501; Tr.Vol.5 at 810-11. But this cannot be sufficient to dispute the rule's plain text when none of these witnesses, including Plaintiff, could point to a single person in

school history who was allowed to reapply after being denied tenure by the president.[5] *See, e.g.*, Tr.Vol.3, at 506.

To the contrary, Snowden testified that "[a]t the seven universities where I've worked, I don't know of any case where someone has been able to reapply for tenure after they've been denied." Tr.Vol.5 at 787-88. Plaintiff's own actions speak loudly as well. If the rule allowed for multiple re-applications, then Plaintiff's withdrawing in 2008 makes no sense. Why not see it through? And in 2009-10, why would Defendants offer Plaintiff the opportunity to withdraw and reapply later if denial did not preclude reapplication? And why did the faculty rewrite the policy afterward, as Cotter-Lynch testified, to allow for reapplication? Tr.Vol.2 at 370. The burden was on Plaintiff to show that reliance on the policy's plain language was pretextual, and Plaintiff failed to do so. *See DePaula*, 859 F.3d at 970-71 ("[T]he relevant inquiry is whether the employer honestly believed those reasons and acted in good faith upon those beliefs.").

Second, Defendants *did* offer to let Plaintiff reapply, *if* Plaintiff would withdraw the 2009 application (as in 2008). *See, e.g.,* Tr.Vol.1 at 130-31; Vol.4 at 589-91. Plaintiff refused to do so. Plaintiff claims the offer was illegitimate because it wasn't in writing. But despite claiming to have documented the entire situation thoroughly, Tr.Vol.1 at 119, Plaintiff never complained about that at the time, nor indicated that a written offer

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[5] When asked at trial, Plaintiff refused to even attempt to explain this absence of evidence. Tr.Vol.1 at 185.

was ever requested. *Id.* at 133-34. Regardless, Plaintiff has pointed to no requirement that an offer be put in writing before it can become legitimate.

And again, no sex-stereotyping evidence against the actual decision-maker was produced—and even more so here, as Scoufos had absolutely nothing to do with denying Plaintiff the ability to reapply for tenure. *See, e.g.,* Tr.Vol.1 at 92 (Plaintiff: "McMillan had made the decision that I was not to be allowed to reapply."); *id.* at 111 (Plaintiff: Minks was the deciding vote on appeal); Tr.Vol.4 at 593, 617 (Scoufos: I was not involved with the decision.).

6. Plaintiff did not produce sufficient evidence of retaliation.

Plaintiff claimed it is virtually self-evident that Defendants' declining to allow Plaintiff to reapply for tenure in 2010-11 was retaliation for Plaintiff complaining about Defendants' denying tenure in 2009-10. Tr.Vol.1 at 95. But Title VII requires more than "self-evident" employment action; it requires evidence. And Plaintiff did not produce a speck of evidence of retaliation.

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

inference of retaliatory motive, such as protected conduct closely followed by adverse action." *Stover v. Martinez,* 382 F.3d 1064, 1071 (10th Cir. 2004).

Most significantly, Plaintiff has provided no evidence showing that when Plaintiff engaged in protected conduct, Defendants even considered it a possibility that Plaintiff could reapply for tenure. Rather, as just discussed, all the evidence points the other way, toward the rather obvious conclusion that Defendants believed themselves bound by the rules and situation to deny Plaintiff the opportunity to reapply from the moment Minks denied tenure. This is obvious from the undisputed offer made to Plaintiff: withdraw now in order to reapply later. Plaintiff has produced no evidence indicating the second tenure denial was retaliatory. Nor has Plaintiff produced evidence that Defendants' actions "closely followed" the protected conduct. For these reasons, judgement should have been granted to Defendants.

II. Response to Plaintiff's Appeal

A. Reinstatement with life tenure is not a feasible remedy when ongoing animosity and distrust exists between the parties, and a key faculty witness called by Plaintiff has recommended against it.

The district court declined to order Defendants to enter into a life tenure relationship with Plaintiff. P.A.Vol.4 at 126-29, 160; P.A.Vol.5 at 45-49. A district court's decision on whether reinstatement is appropriate is reviewed for an abuse of discretion. *See Abuan v. Level 3 Communications,* 353 F.3d 1158, 1176 (10th Cir. 2003).

1. Courts generally avoid entanglement in tenure decisions.

Plaintiff demands to be given the coveted and highly competitive life tenure to which many academics aspire yet never achieve. This is an extreme remedy, as it "mandates a lifetime relationship between the University and the professor" and could entangle this Court "excessively in matters that are left best to academic professionals." *Thornton v. Kaplan*, 961 F.Supp. 1433, 1439 (D. Colo. 1996). Again, "it is not the function of the courts to sit as 'super-tenure' committees." *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991); *see also Jiminez v. Mary Washington College*, 57 F.3d 369, 376 (4th Cir. 1995); *Brousard–Norcross v. Augustana College Ass'n*, 935 F.2d 974, 976 (8th Cir. 1991); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 731 (3d Cir. 1988).

In short, tenure should only be awarded in the most egregious cases of discrimination. *See Ford v. Nicks*, 866 F.2d 865, 876 (6th Cir. 1989). This is not one of those cases. There was no hostile work environment, Plaintiff's own witnesses thought Plaintiff's 2009-10 tenure portfolio was weak, Plaintiff has produced scant testimony of sex stereotyping, and the current department chair—whom Plaintiff endorsed as trustworthy—opposes reinstatement.

2. The district court accurately observed substantial and ongoing hostilities.

Reinstatement is not appropriate where "the employer-employee relationship has been irreparably damaged by animosity caused by the lawsuit." *Abuan,* 353 F.3d at 1176.

Even applying a presumption in favor of reinstatement, the district court rejected that remedy here, primarily due to *mutual* animosity:

> [R]einstatement is simply not feasible in this case. As has been the case throughout this litigation, there is clear evidence of ongoing hostility between the parties apparent in the briefs and the evidence. Whether as a result of counsel or the parties, there are repeated unnecessary attacks on individuals and their character or credibility. Neither side is blameless in this matter. … [R]einstating Plaintiff to Southeastern would only create an ongoing environment of hostility. Such an environment would be patently unfair to the students at that school.

P.A.Vol.4 at 128.

The district court had a front row seat for nearly three years to observe the parties, their counsels, and this case. Quibbles about who is more to blame aside, it is simply undeniable that these three years have seen constant and significant clashes between the parties and their respective counsels. Moreover, Plaintiff's case was built on Plaintiff's belief that, prior to 2015, Defendants were extremely hostile to Plaintiff. As the court found, it is simply not feasible to force a reinstatement with tenure—a lifetime relationship—in this contentious environment. The court in no way abused its discretion in declining to order such a drastic, long-lasting remedy.

The record contains plenty of evidence supporting the court's decision. To give just a few samples, the court repeatedly chastised Plaintiff for engaging in unfair litigation practices. *See, e.g.,* Tr.Vol.1 at 6 (Court to Plaintiff's counsel: "Do you have sticker numbers on each exhibit? … That should have been done days if not weeks ago."); Tr.Vol.1 at 190 (Court to Plaintiff's attorneys: "I understand that defendants

have been at a disadvantage without having marked exhibits.... This is just not acceptable."); Tr.Vol.1 at 172 (Court: "If [Plaintiff] would only answer a question, I would stand up and cheer. This is painful. … You do have to let her answer the question even if she's never going to answer a question."). The court and Defendants were also disturbed by Plaintiff's releasing of expedited trial transcripts publicly online as soon as they were received *during trial*. *See* Tr.Vol.4 at 556-57 (Court: "I've never had this come up before .... It makes me very uncomfortable."). These underhanded tactics have undeniably coarsened the relationship between the parties.

Plaintiff also insinuated at trial that McMillan targeted Plaintiff because of his religion, and misleadingly used as an example McMillan's helping a widow find employment. *See supra* pp.20-21.[6] Even worse was Plaintiff's claim during closing that McMillan would admit his guilt if he was truly a man of faith. *Id.* This spurious smear has no place in the American court system. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S.Ct. 1719, 1729 (2018) ("The neutral and respectful consideration to which Phillips was entitled was compromised here … [by] a clear and impermissible hostility toward [his] sincere religious beliefs."). McMillan may no longer work for Southeastern, but other men and women do—and many of them are friends with

[6] McMillan called this an "extreme distortion of his faith." Tr.Vol.4 at 689.

McMillan, as well as being people of faith. Defendants have no desire to bring back a professor willing to attack, on religious grounds, an administrator in this manner.

In response to Plaintiff's attacks, Defendants asked the court for a new trial and accused Plaintiff of "religious hostility" and "anti-religious animus." D.A.Vol.2 at 545-47.[7] Plaintiff responded by blasting this accusation as "patently offensive given [counsel's] own faith." P.A.Vol.5 at 128 n.4. Regardless of where blame is assigned in this hullabaloo, this is one of many examples of significant ongoing animosity between the parties, animosity that clearly goes beyond the normal friction expected to arise out of litigation. *See Olivares v. Brentwood Indus.*, 822 F.3d 426, 429-30 (8th Cir. 2016).

3. Plaintiff has repeatedly betrayed Defendants' trust.

Trust is a key factor in any employment relationship—especially a life tenure relationship. Parties simply cannot work together if there is no trust. *See Acrey v. American Sheep Industry Ass'n*, 981 F.2d 1569, 1576 (10th Cir. 1992) (denying reinstatement when there was "an absence of mutual trust"); *Olivares*, 822 F.3d at 430 (similar). But during the course of this litigation, Plaintiff has time and again betrayed the confidence of Defendants in an attempt to further Plaintiff's litigation position. In this very appeal, Plaintiff included leaked emails from Defendants' private internal settlement

[7] Defendants have not renewed that request as a standalone argument on appeal. In tandem with Defendants' arguments regarding Parker's unreliability and the district court's absentee gatekeeping, however, it certainly provides further support for a new trial.

discussions and attempted to use those to further Plaintiff's case for reinstatement. *See* Pl's Op.Br. at 16-17. (Plaintiff indicates these discussions led to an agreement to bring Plaintiff back, which is not true.) Plaintiff did the same before the district court. *See* P.A.Vol.3 at 4. This is inappropriate, and rather than show that reinstatement is feasible it shows that Defendants cannot trust Plaintiff to keep confidential things confidential, which is a vital aspect of any employment relationship, much less a lifetime union.

4. The department chair and half the faculty oppose reinstatement.

At trial, Plaintiff called Prus, the current English Department chair, who testified that he stood by the faculty committee's decision in 2009-10 to recommend tenure and that he thought Plaintiff's 2010-11 application would have merited tenure. Tr.Vol.3 at 466, 486. Plaintiff, in turn, testified that Prus is truthful and has trustworthy judgment. Tr.Vol.1 at 90. Another of Plaintiff's witnesses, Cotter-Lynch, also endorsed Prus as respected and trustworthy. Tr.Vol.2 at 361. And Plaintiff's closing argument called Prus an "honest curmudgeon" while citing him favorably. Tr.Vol.5 at 835.

But Prus's position on reinstatement is the polar opposite of Plaintiff's. Prus testified at trial that it would not be a good thing for the English Department, for students, or for Southeastern for Plaintiff to return as a professor. Tr.Vol.3 at 480. He also testified that he had spoken with his colleagues in the English Department and they were "split at best" about reinstatement, with some "who would object to it for a variety of reasons." Tr.Vol.3 at 483. So Tudor does not enjoy a "near unanimous

endorsement by colleagues within and without [the] department." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989). In a post-trial declaration, Prus reiterated that "at least half of the faculty oppose Dr. Tudor's possible return," and he added that his department does not have the need or budget for an additional professor, either. D.A.Vol.2 at 479. For these reasons, he wrote, reinstatement would be "detrimental to department functioning and collegiality." *Id.*

The district court favorably cited Prus's testimony in denying reinstatement, P.A.Vol.4 at 129, and it did not abuse its discretion by doing so. Plaintiff ignores Prus's testimony entirely, instead cherry-picking professors to give a misleading impression of total support from Southeastern's English Department.

5. Defendants have legitimate concerns about Plaintiff's teaching and scholarship.

The district court found that "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." *Id.* at 128-29. Specifically, the court found that Plaintiff went years after leaving Southeastern without producing scholarship and that Plaintiff's teaching at Collin College was poor and resulted in Plaintiff being let go. *Id.*

For teaching, Defendants pointed the court to Plaintiff's poor teaching and classroom management at Collin College, which led to "more unfavorable ratings" than Plaintiff's supervising dean had "ever seen" and to Plaintiff's eventual non-renewal.

D.A.Vol.2 at 454. In response, Plaintiff again relies on cherry-picked student and peer reviews. Pl's Op.Br. at 19-20.[8] But Plaintiff's own tenure expert wrote in his report that he attaches "little significance" to individual student evaluations because instructors can pick and choose them in an unrepresentative manner. D.A.Vol.1 at 100. And indeed, two can play this game: other Collin College students complain Plaintiff is "unprofessional," "unethical," and a "bully" in class. *See supra* pp.12-13. Even ignoring these harsh assessments, however, Plaintiff has not shown that the district court's finding was mistaken, or an abuse of discretion. *See Acrey*, 981 F.2d at 1576 (denying reinstatement when "the record contains examples of sharply conflicting evidence about specific incidents reflecting on plaintiff's job performance and treatment").

The same goes for scholarship. Before the district court, Defendants produced evidence that Plaintiff had not published anything from the time of leaving Southeastern in 2012 until December 2017. *See* D.A.Vol.2 at 416, 483-84. On appeal, Plaintiff ignores this time period. Pl's Op.Br. at 18-19. Instead, the brief references 11 supposed publications from Plaintiff's time at Southeastern, and a publication or two post-dating the original reinstatement order. *Id.* But this cannot possibly show that the

[8] Plaintiff also wrongly claims that Defendants stipulated that Collin College information was after-acquired evidence that was not pertinent to remedies in this case. Pl's Op.Br. at 25. As the district court explained, Plaintiff misunderstands the doctrine of after-acquired evidence, which does not prohibit Defendants from citing, and the court from relying on, Collin College information for post-termination purposes. P.A.Vol.5 at 48; *see also id.* at 14, 38-39.

district court abused its discretion regarding Plaintiff's five years of inactivity after leaving Southeastern. *Cf. Blasdel*, 687 F.3d at 816 ("[S]uppose Professor C used to publish a paper every six months, but she has slowed down …. That is an ominous sign from the standpoint of granting C tenure."). Moreover, even taking Plaintiff's 11 publications at face value, only one of them is listed as coming before 2010—validating the fact that Plaintiff simply lacked qualification for tenure with the 2009-10 application. *See* P.A.Vol.2 at 115; *see supra* pp.21-22, 47.

In the end, the district court correctly held that "[p]lacing Plaintiff back into an environment where she is considered unworthy would lead to renewed litigation between the parties and again, that result is unacceptable." P.A.Vol.4 at 129.

6. Plaintiff's arguments for reinstatement are without merit.

Plaintiff's primary argument is that the alleged perpetrators have moved on and "all relevant parties appear amenable to welcoming Dr. Tudor back." Pl's Op.Br. at 39. This is false. Prus is undeniably a relevant party—he's the department faculty chair—and he is not amenable. Tr.Vol.3 at 480. English Department faculty are also relevant, and half of them are not amenable, according to Prus. Tr.Vol.3 at 483; D.A.Vol.2 at 479. Third, Plaintiff accused Bryon Clark at trial of having "made up new rules" against Plaintiff, Tr.Vol.1 at 105-06, and he is currently serving as vice president for academic affairs. *See* Office of the President: Executive Team, SEOSU, http://www.se.edu/dept/president/executive-team/. So he disproves Plaintiff's

assertion that "[e]very single administrator responsible for Dr. Tudor's mistreatment or who simply failed to protect her in the past has retired." Pl. Op.Br. at 16. Most significantly, Defendants are obviously relevant, and they do not support reinstatement.

Remarkably, Plaintiff contends that because the jury found no hostile work environment it is "all the more likely that a fresh start is possible." Pl's Op.Br. at 41. But this is absurd, as the hostile work environment claim cuts *against* Plaintiff. Of course, Defendants have always denied Plaintiff was subjected to a hostile work environment—and the jury agreed. But Defendants concur with the district court that since this litigation began there has been intense conflict between the parties and their counsels. Plaintiff spent years in litigation bashing Southeastern as a horrible place to work, leading to significant negative national publicity,[9] only to now turn and claim everything is copacetic. Unless Plaintiff's hostile work environment claim was brought in bad faith, the jury verdict does not change the fact that Plaintiff believed the environment to be hostile, acted on that belief, and elicited testimony *just one year ago* that Southeastern was a hostile place for transgender professors and students. *See, e.g.*, Tr.Vol.2 at 352 (Cotter-Lynch); *cf.* Tr.Vol.5 at 833-34 (Counsel to jury: "Professors who are transgender women are still scared to apply there."). Plaintiff can't have it both ways.

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[9] *See, e.g.*, Susan Svrluga, *Justice Dept. sues a university for firing a transgender professor*, Wash. Post, March 30, 2015, https://www.washingtonpost.com/news/grade-point/wp/2015/03/30/justice-dept-sues-a-university-for-firing-a-professor-who-switched-gender/?utm_term=.b95be8f68b9d.

Plaintiff next claims that *Medlock v. Ortho-Biotech*, 164 F.3d 545 (10th Cir. 1999), "held that even violent brawls between employer and employee at a hearing cannot support withholding reinstatement." Pl's Op.Br. at 42. This warps *Medlock* beyond recognition. A reinstatement ruling wasn't even at issue in *Medlock*; the Court there was analyzing a jury instruction saying that an employee's post-termination fight with his employer could limit damages. *Id.* at 554-55. And this Court simply held that the lower court did not abuse its discretion by declining the instruction. *Id.* So even if *Medlock* were on point, it would not mean that the court below abused its discretion, as two courts can discretionarily reach different conclusions on hostilities. *Jackson v. City of Albuquerque* is also unavailing, as the Tenth Circuit there found that the hostility "appears to be all one-sided" and "on the part of officials now removed from city employment." 890 F.2d 225, 234(10th Cir. 1989). Here the animosity is mutual, at least one of the administrators (Clark) is still there, and there is substantial evidence that current Southeastern administrators *and* faculty oppose reinstatement.

Plaintiff's attempts to distinguish various cases where this Court has upheld denials of reinstatement are generally unavailing. *See* Pl's Op.Br. at 41-42. For example, Plaintiff says *Acrey*, 981 F.2d 1569, is distinguishable because all culpable actors here have left Southeastern, but as discussed above, that is simply not true. Similarly, Plaintiff says *Abuan*, 353 F.3d 1158, is distinguishable because it is unlikely here that there will be discord upon reinstatement. But Prus, an honest broker if there ever was one,

disagrees. And Plaintiff's claim that *Cooper v. Asplundh Tree Expert*, 836 F.2d 1544 (10th Cir. 1988), is distinguishable because a tenured professorship does not require frequent interactions with coworkers is unsupported by the record and unavailing regardless because of the undeniable fact that professors constantly interact with students.

Plaintiff relies on Cotter-Lynch, but the district court already examined this testimony and explicitly found it lacking: "Cotter-Lynch was not privy to Plaintiff's [2009] tenure application packet and has admittedly never seen her teach a class." P.A.Vol.4 at 129. Plaintiff also repeatedly claims that Defendant RUSO controls all public teaching universities in the Chickasaw Nation's historic boundaries. Pl's Op.Br. at 9, 51. Plaintiff cites nothing for this proposition. Nor does Plaintiff cite any evidence indicating a person can only serve the Chickasaw Nation or its people by working for Defendants and teaching within those historic boundaries.[10] The Chickasaw Nation has robust relationship with the University of Oklahoma, to give one counter-example, which is not controlled by RUSO and just outside the former Chickasaw boundaries.[11] Indeed, RUSO controls less than half of the public universities in Oklahoma, to say

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[10] These are just a few examples of Plaintiff's supposed facts that are not cited to anything, or to non-legal sources outside the record below, or to Plaintiff's own unfounded say-so. These "facts" should be disregarded.

[11] *See* Press Release, *Chickasaw Nation Honored by OU for Endowment*, the Chickasaw Nation (April 27, 2018), https://chickasaw.net/News/Press-Releases/Release/Chickasaw-Nation-honored-by-OU-for-endowment-47406.aspx ("The center overflowed with Native students, faculty, and university officials …."); *Recruitment and Retention Program*, the Chickasaw Nation, https://www.chickasaw.net/Services/Recruitment-and-Retention-Program.aspx (discussing Chickasaw student programs at Oklahoma schools outside the Chickasaw Nation).

nothing of private universities. *See State System Overview: A Guide to the History, Organization and Operation of the State System*, OK State Regents for Higher Education, https://www.okhighered.org/state-system/overview/part1.shtml.

Plaintiff also spends significant space discussing a "trial-run return" to Southeastern. Pl's Op.Br. at 21-23. But the district court found that "the evidence makes clear that the invitation to speak did not come from the university, but from an independent entity … using Southeastern's facilities." P.A.Vol.5 at 46. "Nothing about that event," the court wrote, "offers any evidence about the relationship between Plaintiff and Southeastern." *Id.*

B. The court did not abuse its discretion in considering Plaintiff's Collin College work, and in declining to grant a multi-million dollar windfall in front pay.

The district court ordered more than $60,000 in back pay, even though it "[w]as not persuaded that the jury had sufficient evidence from which to award back pay." P.A.Vol.5 at 82-83. The court also awarded the same amount in front pay, using the same calculation. *Id.* at 48-49. In short, the court took an estimated salary of $51,463.52 per year, divided it by 12 months and then multiplied it by 14 months, which was the time between Plaintiff leaving Southeastern and starting at Collin College. *Id.* Nevertheless, Plaintiff claims the court should have ordered more than $2 million in front pay, which would supposedly cover an annual salary for Plaintiff until retirement

at age 75—in the year 2039. The court below recognized this enormous and lengthy "request stretches the bound of reasonableness beyond recognition." *Id.* at 46-47.

A district court has "broad discretion in fashioning relief" under Title VII. *Fitzgerald v. Sirloin Stockade*, 624 F.2d 945, 957 (10th Cir. 1980). "Because determining a front pay award requires the district court to predict future events ... we review such awards with considerable deference, reversing only for an abuse of discretion." *Mason v. Okla. Tpk. Auth.*, 115 F.3d1442, 1458 (10th Cir. 1997), *overruled on other grounds by TW Telecom Holdings v. Carolina Internet*, 661 F.3d 495 (10th Cir. 2011). "In 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." *Id.* at 1458 (citation omitted). "[A] front pay award must specify an ending date … [This date] is within the district court's discretion." *Carter v. Sedgwick Cnty.,* 929 F.2d 1501, 1505 (10th Cir. 1991) ("*Carter II*"). The Tenth Circuit has established factors to consider in determining front pay, including:

> [1] work life expectancy, [2] salary and benefits at the time of termination, [3] any potential increase in salary ..., [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.

Whittington v. Nordam Grp., 429 F.3d 986, 1000-01 (10th Cir. 2005) (citation omitted).

Citing factors 4 and 5, the district court found that plaintiff's multi-million dollar demand failed for the "fundamental reason" that Plaintiff's claim that "she will be

unemployable for the remainder of her work life" is unsupportable given Plaintiff's subsequent four-year employment at Collin College, which paid Plaintiff the same or better than Southeastern. P.A.Vol.5 at 47, 80-81; D.A.Vol.2 at 438-43 (Plaintiff was paid $58,022 in 2014-15 at Collin College); P.A.Vol.4 at 194 (Plaintiff was paid $51,279 in last year at Southeastern). The court found "no suggestion or any evidence from which [it] could determine that the discrimination at Southeastern … played a role in Collin College's determination to terminate Plaintiff." P.A.Vol.5 at 47. "Because Plaintiff gained similar employment at Collin [College]," the court found, "any front pay to which Plaintiff is entitled must end with … her employment there." *Id.* at 48. In a follow-up order, the court clarified that it was not in fact compensating plaintiff for the 14-month period, but rather finding that this period "represented a reasonable period to make Plaintiff whole," and gave the court a "bright-line point at which … the effects of Defendant[s'] discriminatory acts ended." *Id.* at 80.

Plaintiff has not shown the court's well-supported findings are an abuse of discretion. Plaintiff claims the court failed to apply the proper "make whole" standard. This ignores the court's follow-up order, which explicitly cites that very standard. *Id.* And Plaintiff's citation to "*Carter III*" is easily distinguishable; there, both parties *agreed* that the district court did not make the plaintiff whole by awarding a mere two thousand dollars for a six-month period, and the Tenth Circuit so ruled. *Carter v. Sedgwick Cnty.*, 36 F.3d 952, 957 (10th Cir. 1994). Here, there is no such agreement, and the district

court's front pay award is substantially larger than two thousand dollars. Plaintiff also claims no comparable jobs are reasonably available. But as the district court found, Plaintiff worked for *four years* at a job that paid as well or better than Southeastern, and Plaintiff lost that job due to Plaintiff's own performance. P.A.Vol.5 at 47. Giving Plaintiff millions in these circumstances would truly be an undeserved windfall.

Plaintiff cites *Passantino v. Johnson & Johnson Consumer Products* from the Ninth Circuit, but ignores that Washington law controlled front pay there and not Title VII, as well as the fact that the Ninth Circuit upheld—not reversed—the lower court's decision. 212 F.3d 493, 511-12 (9th Cir. 2000) (Reinhardt, J.). Plaintiff also cites *Johnson v. Spencer Press of Maine*, 364 F.3d 368 (1st Cir. 2004), for the proposition that a "mitigation" job cannot cut off front pay if a worker is still not whole. But the district court here found that Plaintiff *was* made whole; and regardless, the First Circuit *upheld* its district court, finding no abuse of discretion because insufficient evidence showed continuing effects of harassment. *Id.* at 381-84. Plaintiff next cites this Court's decision in *McInnis v. Fairfield Communities*, 458 F.3d 1129 (10th Cir. 2006). But *McInnis* is easily distinguishable, as the Court found an abuse of discretion there because the district court entirely failed to discuss the *Whittington* factors or award *any* front pay. *Id.* at 1145-46. Not so here. Moreover, *McInnis* merely states that a job must be equivalent in *pay*, and says nothing about prestige. *Id.* So Plaintiff's contention that Collin College somehow doesn't count as an equivalent position is unsupported. And even if not

exactly equivalent, the district court still could not have ignored Collin College entirely and ordered a windfall, as Plaintiff demands, because Plaintiff has "an obligation to mitigate damages." *Acrey*, 981 F.2d at 1576.

Finally, Plaintiff accuses the district court of miscalculating the front pay amount by not realizing that the $51,463.52 figure it was using for 12 months was actually for 9 months. Pl's Op.Br. at 30-31. But the district court directly addressed this below, noting that Plaintiff's own affidavit said Plaintiff's annual salary at Southeastern was "approximately" $51,279 at the end of Plaintiff's employment. *See* P.A.Vol.5 at 81 (citing P.A.Vol.4 at 194). The higher $51,463.52 figure was only chosen to give Plaintiff the *benefit* of the word "approximately." *Id.* In other words, the court accurately calculated the amount, and then gave Plaintiff a bit extra. Plaintiff never acknowledges or addresses this explanation. The court below did not abuse its discretion.

C. The district court's application of the Title VII statutory cap was plainly correct, and the parties jointly stipulated to its applicability.

The relevant Title VII statutory cap allows for at most $300,000 in compensatory damages for "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses." *See* 42 U.S.C. § 1981a(a)(1) & (b)(3)(D). At the end of trial, on a general verdict form crafted by the court and objected to by neither party, the jury awarded Plaintiff $1.165 million in damages "to compensate her for her injuries." P.A.Vol.2 at 72.

After trial, the court reduced this award to $360,040.77. P.A.Vol.5 at 79-83. To get that amount, the court acknowledged that the jury's award potentially included both compensatory damages covered by the cap, as well as back pay that is not covered. *Id.* at 82. The court indicated, however, that the "evidence before the jury related to damages that are not subject to the statutory cap was very limited," and it seriously doubted "that the jury had sufficient evidence from which to award back pay damages." *Id.* The court nonetheless didn't view its doubts about back pay as sufficient to conclude all damages were capped, and it determined that the jury *at most* could have awarded $60,040.77 in back pay. *Id.* at 82-83. In other words, it was inconceivable to the court that in the fourteen months between departure from Southeastern and being hired at Collin College, which is the maximum time period Plaintiff stipulated for back pay, that Plaintiff would have earned anywhere close to a million dollars. The rest of the jury's award, the court determined, was clearly compensatory within Title VII's cap and therefore had to be reduced to $300,000. *Id.* On appeal, Plaintiff argues that Defendants waived the cap and that the court violated the Seventh Amendment. The district court found these arguments meritless and "disingenuous." *Id.* at 81-82.

1. Plaintiff stipulated to the statutory cap, so it was not waived.

Plaintiff argues that Defendants waived the Title VII cap by not pleading it. This argument is absurd. As the district court found: "[I]t 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." *Id.* at 81. Most significantly, prior to trial Defendants and Plaintiff *jointly stipulated* to the applicability of the cap to this case, *see* D.A.Vol.2 at 335, and at trial Plaintiff's counsel affirmatively represented to the Court that "all" Plaintiff's claims are "subject to the same cap." Tr.Vol.5 at 843. The record could not be clearer, so Plaintiff ignores it entirely. Instead, Plaintiff cites cases that are obviously distinguishable. In *Bentley*, for example, this Court did not create an absolute rule that failure to plead means waiver; rather, it indicated that the cap was waived because the opposing party was given no notice of the cap at trial. *Bentley v. Cleve. Cnty. Bd. of Cnty. Comm'rs*, 41 F.3d 600, 605 (10th Cir. 1994). The Tenth Circuit also indicated that there would have been no waiver had the defendant raised the cap "in its answer, the Pre–Trial Order, *or* at trial." *Id.* (emphasis added). Defendants easily met this standard.

Without once acknowledging the joint stipulation to the cap, Plaintiff next contends that Defendants waived the cap by not insisting on a verdict form that separated back pay from damages subject to the Title VII cap. The district court called this argument "disingenuous" because Plaintiff did not object to the court-produced verdict form, either. P.A.Vol.5 at 81-82. And the court is right: Plaintiff agreed to both the statutory cap and the court's verdict form—in the very same conversation at the end of trial. *See* Tr.Vol.5 at 843-44. Plaintiff cannot then turn around and protest post-hoc that, with these agreements on the record, the court somehow violated the law by

using its own general verdict form and then calculating, based on the evidence at trial, that the vast majority of the jury's award was subject to the cap.

Again, Plaintiff's cases are distinguishable. The Seventh Circuit case that Plaintiff calls "eerily similar," for example, contains no joint agreement to the applicability of the cap in question. *See Pals v. Schepel Buick & GMC Truck*, 220 F.3d 495 (7th Cir. 2000). Neither does the *Okland Oil* decision from this Court. *See Okland Oil v. Conoco*, 144 F.3d 1308, 1319 (10th Cir. 1998). Both of these cases are also obviously distinguishable on the ground that they involved challenges to a district court's decision *not* to apply a statutory cap. Indeed, *Okland Oil* was a plain error review. 144 F.3d at 1314. Here Plaintiff is challenging the court's sound decision, based on the parties' joint agreements, to apply the cap. And Plaintiff has offered this Court no case law showing this is an abuse of discretion.

If anything, rather than order the district court to ignore the agreed-upon cap, this Court should order the court to vacate the groundless back pay finding. The district court explicitly stated that it was "not persuaded that the jury had sufficient evidence from which to award back pay damages," P.A.Vol.5 at 82-83, but then awarded them anyway. This lack of evidence for back pay is the primary reason Defendants did not object to a general verdict form. In Defendants' view, which was validated by the court below, all of the evidence produced went to damages covered by the Title VII cap.

2. Applying Title VII's cap does not violate the Seventh Amendment.

Plaintiff argues that the court somehow violated the Seventh Amendment by lowering the jury's award to the Title VII statutory cap. Specifically, Plaintiff contends that "because there is no way of knowing which damages the jury intended to compensate for capped versus uncapped injuries, the District Court was without authority to apply the cap." Pl's Op.Br. at 62. Plaintiff's argument fails for three reasons.

First, again, Plaintiff waived this contention by agreeing to the statutory cap and the court's verdict form. Any subsequent argument attacking either is "disingenuous" and waived. P.A.Vol.5 at 81-82. If Plaintiff had an objection to the verdict form based on the Seventh Amendment, Plaintiff should have made it. Plaintiff did not, and the court, based on the evidence, applied the statutory cap. This was permissible.

Second, Plaintiff points to no authority indicating that the district court's enforcing the Title VII cap in the manner that occurred here is a Seventh Amendment violation.[12] As even Plaintiff acknowledges, the Seventh Amendment does not bar statutory caps from being enforced. *See, e.g.*, *Corpus v. Bennett*, 430 F.3d 912, 916-17 (8th Cir. 2005). Moreover, the U.S. Supreme Court has held that the Seventh Amendment "was

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[12] Plaintiff's case law citations in this section are for more generic propositions, *e.g.*, that a legislature may indeed cap damages by statute without violating the Seventh Amendment, *Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989), and that actual damages are within the general ambit of the Seventh Amendment. *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 437 (2001). This latter case, in particular, revolves around punitive damages and says nothing about the application of a statutory cap to non-punitive damages.

designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details." *Galloway v. United States*, 319 U.S. 372, 392 (1943). A court's conclusion, based on a generic procedural form and the trial evidence, that the jury awarded a certain amount of capped versus uncapped damages hardly seems like a "fundamental" intrusion on the jury trial right. And the court did not even eliminate uncapped damages, despite a dearth of evidence. Rather, it awarded Plaintiff over $60,000 in back pay. Finally, a number of courts have held that district courts should be given much leeway in determining how to handle difficult post-verdict questions. *See, e.g., Richard v. Firestone Tire & Rubber*, 853 F.2d 1258, 1260 (5th Cir. 1988) ("We have consistently given the district court wide discretion in deciding whether the jury's answers to the court's questions are clear.").

Third, Plaintiff's argument does not comport with the Seventh Amendment's plain text. The relevant clause of the Seventh Amendment holds that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States" unless in accordance with the common law. Here, the court did not "re-examine" any fact decided by the jury; rather, it simply calculated based on the evidence the maximum award the jury could possibly have given under the circumstances. *See Davis v. Omitowoju*, 883 F.2d 1155, 1161-65 (3d Cir. 1989) (analyzing the history and text of the Seventh Amendment). The court did not insert its own views in place of the jury's or find a fact in direct conflict with the verdict; rather, it based its entire approach on implementing

Congress's judgment, the evidence, and the jury's verdict. And the court explicitly awarded Plaintiff back pay *despite* not seeing much evidence for it, so as not to disturb the jury's verdict. There is no Seventh Amendment violation here.

CONCLUSION

This Court should reverse, vacate the verdicts, and order that summary judgment be granted to Defendants on all claims under Title VII. Alternatively, the Court should vacate the verdicts and remand for a new trial so the district court can perform its gatekeeping role under Rule 702. Absent a new trial, the Court should eliminate back pay because no evidence was presented to the jury that justified uncapped damages. Finally, at an absolute minimum, the Court should uphold the district court's discretionary decisions on reinstatement, front pay, and the Title VII statutory cap.

Oral argument is necessary because of the significance of the issues, as well as the factual and legal complexity of this case. Millions of dollars in taxpayer money are on the line, as is the reputation of a century-old state institution, and one of the remedies pursued is a lifelong court-ordered relationship.

Respectfully Submitted,

s/ Zach West

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ADDENDUM

	No.	Date	Description
1.	34	07/10/2015	Order Denying Motion to Dismiss
2.	163	09/06/2017	Order Permitting Expert Testimony
3.	219	10/26/2017	Order Denying Motion for Summary Judgment
4.	224	11/02/2017	Order Regarding Pretrial Filings
5.	225	11/06/2017	Docket Call
6.	Tr. Vol.1 at 7-8	11/13/2017	Transcript of the Proceedings
7.	Tr. Vol.5 at 722-23	11/17/2017	Transcript of the Proceedings
8.	262	11/20/2017	Jury Verdict
9.	293	06/06/2018	Judgment for Plaintiff
10.	337	09/18/2018	Order Denying Renewed Judgment as a Matter of Law and New Trial

ADDENDUM 1

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

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

MEMORANDUM OPINION AND ORDER

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

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

1. Exhaustion

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

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

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

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

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

2. Hostile Environment Claim

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

Defendants argue Dr. Tudor fails at the first step because she cannot establish she is a member of a protected class. According to Defendants, in Etsitty v. Utah Transit Auth., 502 F.3d 1215 (10th Cir. 2007), the Tenth Circuit held a transsexual individual is not within a protected class. However, the reasoning relied on by the Tenth Circuit in Etsitty is inapposite here. The Tenth Circuit's holding was that "transsexuals may not claim protection under Title VII from discrimination based solely on their status as a transsexual." Id. at 1222. The Circuit went on to clarify that "like all other employees, such protection extends

to transsexual employees only if they are discriminated against because they are male or because they are female." Here, it is clear that Defendants' actions as alleged by Dr. Tudor occurred because she was female, yet Defendants regarded her as male. Thus, the actions Dr. Tudor alleges Defendants took against her were based upon their dislike of her presented gender. The Tenth Circuit recognized this distinction in Etsitty at n.2, when it cited to the Sixth Circuit case of Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."). The factual allegations raised by Dr. Tudor bring her claims squarely within the Sixth Circuit's reasoning as adopted by the Tenth Circuit in Etsitty. Consequently, the Court finds that the discrimination occurred because of Dr. Tudor's gender, and she falls within a protected class. The first element is adequately pled.

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

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

3. Laches

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

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

CONCLUSION

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

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

ROBIN J. CAUTHRON
United States District Judge

ADDENDUM 2

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

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

MEMORANDUM OPINION AND ORDER

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

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

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

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

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

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

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

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

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

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

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

ROBIN J. CAUTHRON
United States District Judge

ADDENDUM 3

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

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

MEMORANDUM OPINION AND ORDER

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

STANDARD OF REVIEW

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

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

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

1. Hostile Environment

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

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

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

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

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

2. Discrimination

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

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

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

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

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

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

3. Retaliation

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

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

CONCLUSION

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

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

ROBIN J. CAUTHRON
United States District Judge

ADDENDUM 4

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

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

ORDER

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

Defendants' Motion in Limine:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ROBIN J. CAUTHRON
United States District Judge

ADDENDUM 5

Docket Call
November 1, 2017

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

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

TRANSCRIPT OF DOCKET CALL

BEFORE THE HONORABLE ROBIN J. CAUTHRON

WEDNESDAY, NOVEMBER 1, 2017; 9:30 a.m.

OKLAHOMA CITY, OKLAHOMA

Proceedings recorded by mechanical stenography, transcript produced by computer.

Sherri Grubbs, CSR, RPR, RMR, RDR, CRR
United States District Court, Western District of Oklahoma
(405) 609-5203 - sherri_grubbs@okwd.uscourts.gov

The argument to keep any dress code evidence out is denied.

The expert reports. Again, I'm not certain I understand what the argument is about or may become about, but I will tell you this, no expert can testify to anything not included in his or her expert report.

And that is -- seems to be the basis of your objection to Dr. Robert Parker and Dr. Brown.

Dr. Brown adds an additional problem for me in that I don't know how any of that is relevant.

Mr. Young, can you tell me the relevance of his testimony?

MR. YOUNG: Yes, Your Honor.

I believe he is potentially not relevant now that you've issued your decision on the summary judgment.

His relevance was really only going towards issues as to the definition of sex, which I believe is no longer something that should be presented to the jury at trial.

To the extent that the defendants are attempting to renew that argument, we would want to bring Dr. Brown in as an expert to educate the jury.

MS. COFFEY: Your Honor, we do not intend to dispute the definition of sex.

THE COURT: All right. So he's not going to testify because he's not relevant.

ADDENDUM 6

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

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

VOLUME 1

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ROBIN J. CAUTHRON

MONDAY, NOVEMBER 13, 2017; 9:00 a.m.

OKLAHOMA CITY, OKLAHOMA

Proceedings recorded by mechanical stenography, transcript produced by computer.

THE COURT: "No"?

MR. BUNSON: Yes, we have had a chance to review it.

THE COURT: As to the first issue, the failure to mitigate, do you have any objection?

MR. BUNSON: Your Honor, yes, actually, we do have an objection.

One, though the Court's order of 11-2 indicates that they could withdraw this claim, thereby making the failure to mitigate moot, unfortunately, they failed to document that -- the Collins College documents serve more than just a failure-to-mitigate purpose. They are, in fact, relevant for two very important purposes.

First, it goes to Dr. Tudor's credibility as to her own assessment of her teaching abilities, and it also demonstrates that Dr. Tudor has a pattern of claiming discrimination whenever a decision is made that doesn't benefit her.

Furthermore, the entire motion is a motion in limine, which, according to this Court's scheduling order, was due October 10th. None of the issues raised in plaintiff's motion was in any way new or novel.

THE COURT: Well, this is a response to a ruling I made last week, and, because of that, it's certainly timely. Or it's not untimely. I'll say it that way.

I'm not really prepared to rule on the second one of these.

The one I am ready to rule on is the fourth issue that asks me to strike your defense, that transgender persons are not protected by Title VII. To the contrary, I have cited the Tenth Circuit law that says they are not simply by means of being transgender. Gender is protected.

Your theory of this case throughout has been that you are not complaining that transgender persons were treated differently, but that Dr. Tudor, once she was a woman, was treated differently. That's permissible, but I'm not going to strike that defense because I have agreed with it.

As to the others, if something comes up today that you need a ruling on these, approach the bench before you go any further.

MR. YOUNG: Yes, Your Honor.

THE COURT: How long do you want for opening statement?

MR. YOUNG: Less than 15 minutes, Your Honor.

THE COURT: Is 15 minutes sufficient?

MS. COFFEY: 15 minutes, Your Honor.

THE COURT: All right. Call for the jury, please.

MR. JOSEPH: Your Honor, may we invoke the rule at this time before the jury gets here?

THE COURT: Yes.

MR. JOSEPH: Thank you, Your Honor.

THE COURT: Are there persons in the courtroom

ADDENDUM 7

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF OKLAHOMA

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

VOLUME 5

TRANSCRIPT OF JURY TRIAL

BEFORE THE HONORABLE ROBIN J. CAUTHRON

FRIDAY, NOVEMBER 17, 2017; 9:15 a.m.

OKLAHOMA CITY, OKLAHOMA

Proceedings recorded by mechanical stenography, transcript produced by computer.

(Proceedings held on November 17, 2017.)

(The following proceedings were had outside the presence of the jury with all parties present.)

THE COURT: Be seated, please. Our jury is missing. We don't know where they are. Since we have a little time until they show up somewhere, I'll permit you now -- I would state for the record that I've met with counsel this morning on instructions.

Counsel are aware of what I intend to give, and this is your opportunity to make a record on what you object to being there and not being there, and we'll interrupt this if the jury comes back.

MR. YOUNG: I'm trying to find my notes. One second.

THE COURT: Mr. Young?

MR. YOUNG: Yes.

For the record, Your Honor, plaintiff has an objection to the third paragraph of the Title VII instruction. I actually don't have the appropriate copy of that construction in front of me, but the -- the third paragraph of the Court's Title VII instruction.

In that paragraph, the instruction indicates that Title VII does not protect people because they are transgender and goes on to explain the grounds under which persons are protected on account of gender under Title VII.

Dr. Tudor objects to this because she believes, first and foremost, this instruction is a bit confusing to the jury, and she would suggest that a different instruction be given.

Dr. Tudor also objects to this instruction on the grounds that defendants have waived, at the docket call on November 1st, 2017, any quibbling over the meaning of "sex" in this case. Because defendants claimed that they would not quibble over the meaning of "sex," plaintiff told the Court that our expert witness on the issue of sex and what transgender means and all of those terms was not relevant to this case.

And, lastly, plaintiff objects because she believes that this puts an additional burden on her as a transgender person in violation of the Equal Protection Clause of the Constitution.

That's plaintiff's only objection, Your Honor.

THE COURT: All right. And as I've indicated, I don't agree and will give it as directed.

Ms. Coffey.

MS. COFFEY: Your Honor, do I need to address any of Mr. Young's arguments?

THE COURT: No.

MS. COFFEY: Your Honor, defendants believe that the facts in evidence support jury instructions for spoliation of evidence and for an instruction on failure to conform to sex

ADDENDUM 8

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

VERDICT FORM

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

Section I. Hostile Work Environment Claim

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

Yes ____ No ✓

(Proceed to Question 2.)

Section II. Discrimination Claims 2009-10

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

Yes ✓ No ____

(Proceed to Question 3.)

Section III. Discrimination Claims 2010-11

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

Yes ✓ No ____

(Proceed to Question 4.)

Section IV. Retaliation Claim

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

Yes ✓ No ____

(Proceed to Question 5).

Section V. Damages

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

$ 1,165,000

11/20/17
Date

Presiding Juror

ADDENDUM 9

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

ADDENDUM 10

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

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

MEMORANDUM OPINION AND ORDER

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

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

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

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

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

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

ROBIN J. CAUTHRON
United States District Judge

CERTIFICATE OF SERVICE

I certify that on January 9, 2019, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system. Seven hard copies of the foregoing, which is are exact copies of the document filed electronically, will be dispatched via commercial carrier to the Clerk of the Court for receipt within 2 business days.

s/ Zach West

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