

Nos. 18-6102 / 18-6165

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**UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT**

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RACHEL TUDOR,

*Plaintiff-Appellant/ Cross-Appellee,*

v.

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

*Defendants-Appellees/ Cross-Appellants.*

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On appeal from the United States District Court  
for the Western District of Oklahoma  
The Hon. Robin J. Cauthron  
No. 5:15-CV-00324-C

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**APPENDIX *for* DEFENDANTS–APPELLEES/CROSS-APPELLANTS**

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**VOLUME 1**

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

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

**DEFENDANTS SOUTHEASTERN  
OKLAHOMA STATE UNIVERSITY AND THE REGIONAL  
UNIVERSITY SYSTEM OF OKLAHOMA’S MOTION TO DISMISS  
PLAINTIFF/INTERVENOR’S COMPLAINT IN PART AND BRIEF IN SUPPORT**

COME NOW Defendants, Southeastern Oklahoma State University (“SEOSU”), and The Regional University System of Oklahoma (“RUSO”), (collectively “University Defendants” or “the State”), and pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) move this Court for an order dismissing Plaintiff/Intervenor’s Complaint [Doc. No. 24] in part.

**STATEMENT OF THE CASE**

Intervenor failed to take advantage of the academic and professional opportunities offered to her by the University Defendants in her pursuit of a tenured position at SEOSU. Instead, Intervenor ignored the academic and professional advice she received from University leadership, pushed forward with her application for tenure before it was ready, and ultimately failed to attain tenure as a result. Rather than taking responsibility for her cavalier approach to an important and detail-oriented process, Intervenor filed grievances, complaints and the present lawsuit. Now the

State is called upon to defend claims by a disgruntled former employee who recklessly casts aspersions on the University Defendants and their employees. Although the University Defendants elect to answer (rather than seek dismissal of) certain counts set forth by the Plaintiff and by the Intervenor, the University Defendants presently seek dismissal of Count One of Intervenor's Complaint. As set forth more fully below, Count One of Intervenor's Complaint should be dismissed with prejudice.

### STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to mere conclusory allegations of jurisdiction." *Groundhog v. Keller*, 442 F.2d 674, 677 (10th Cir. 1971). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso v. Utah Power and Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974); *Eagle Air Med Corp. v. Martin*, No. 08-CV-00532LT, 2009 WL 651800 (D. Colo. Mar. 12, 2009) *aff'd*, 377 F. App'x 823 (10th Cir. 2010).

Federal Rule of Civil Procedure (12)(b)(6) empowers a court to dismiss a complaint for failure to state claims upon which relief may be granted. Motions to dismiss are properly granted when a complaint provides no more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In deciding a 12(b)(6) motion a court must accept all the well-pleaded allegations of the complaint as true, and must construe the allegations in the light most favorable to the claimant. *Id.*; *Alvarado v. KOBTV, L.L.C.*, 493 F.3d 1210, 1215 (10th Cir. 2007). But the complaint must contain enough

“facts to state a claim to relief that is plausible on its face” and those factual allegations “must be enough to raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570 (citations omitted). Thus, “in analyzing the sufficiency of the [Intervenor’s] complaint, the court need accept as true only the [Intervenor’s] well-pleaded factual contentions, not h[er] conclusory allegations.” *Hall v. Bellmon*, 935 F.2d 1106, 1109-10 (10th Cir. 1991).

## ARGUMENT AND AUTHORITY

### I. INTERVENOR’S COMPLAINT LACKS SUFFICIENT SUPPORTING FACTUAL AVERMENTS TO MAINTAIN THE TITLE VII HOSTILE WORK ENVIRONMENT CLAIM.

Intervenor’s Complaint fails to state a hostile work environment claim. “The words ‘hostile work environment’ are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.” *Moya v. Schollenbarger*, 465 F.3d 444, 457 (10th Cir.2006) (citation omitted). In order to set forth a prima facie case of hostile work environment sexual harassment, Intervenor must show “(1) that she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and created an abusive working environment.” *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1134 (10th Cir. 2005). This requires a plaintiff to show that “the environment was both objectively and subjectively hostile or abusive.” *Davis v. U.S. Postal Serv.*, 142 F.3d 1334, 1341 (10th Cir. 1998).<sup>1</sup>

However, “Title VII does not establish a general civility code for the workplace,” and given that “[w]orkplaces are not always harmonious locales, [] even incidents that would

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<sup>1</sup> The Tenth Circuit Court of Appeals has explicitly held that “transsexuals are not a protected class under Title VII . . . .” *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007).

objectively give rise to bruised or wounded feelings will not on that account satisfy the severe or pervasive standard. Some rolling with the punches is a fact of workplace life.” *Morris v. City of Colo. Springs*, 666 F.3d 654, 663-64 (10th Cir. 2012) (citations and internal marks omitted). In other words, the law is “not a federal guarantee of refinement and sophistication in the workplace,” *id.* at 668 (citation omitted), and “not all workplace conduct that may be described as harassment affects a term, condition, or privilege of employment within the meaning of Title VII,” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). A “few isolated incidents” of “sporadic” offensive behavior, as opposed to “a steady barrage of opprobrious” harassment, is not enough to make out a hostile work environment claim, *id.* at 665-66 (quoting *Chavez v. New Mexico*, 397 F.3d 826, 832 (10th Cir. 2005)), unless those few events amount to such extreme behavior as physical or sexual assault, *id.* at 666-68.

Intervenor’s Complaint fails to allege sufficient facts to show that any harassment based on sex (which, in any event, did not occur) was so severe or pervasive such that it altered the terms or conditions of her employment and created a hostile working environment. Aside from the denial of tenure, Intervenor’s Complaint alleges without specificity (as to either date or person) three instances of supposed harassment: (1) she was once told not to wear certain types of clothing by “an employee” of the University [Doc. No. 24, ¶ 64]; (2) she was told by “an employee” [Doc. No. 24, ¶¶ 45-47] and/or “a Southeastern administrator” [Doc. No. 24, ¶ 51] which restroom she should use; and (3) the University’s health insurance company did not cover certain procedures.<sup>2</sup> Apart

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<sup>2</sup> Even if the allegations are true, those actions do not constitute sexual harassment by Defendants. For example, with regard to the health insurance plan, there is no allegation that any specific exclusions or limitations were requested or controlled by the University Defendants. There is no allegation that any limitations were aimed at Intervenor or any particular groups of employees or were so pervasive as to create a hostile work environment. And just like Intervenor’s failure to complain about any restroom or wardrobe limitations for roughly four years, there is no allegation that any complaints of any kind were raised about the health insurance plan.

from her own conclusory statements about a “campaign of harassment,” these few allegations of comments regarding her bathroom or wardrobe designations and her health insurance plan, spread out over the span of four years, do not objectively have the requisite frequency or severity of conditions to raise a claim of hostile work environment. *See Morris*, 666 F.3d at 666, 669 (few “isolated incidents” of verbal harassment and throwing biological waste at employee does not make out a hostile work environment claim, and collecting cases); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) (“five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in her presence in a sixteen month period” were not sufficiently pervasive to support a hostile work environment claim); *cf. Witt v. Roadway Exp.*, 136 F.3d 1424, 1428-29, 1432 (10th Cir. 1998) (two incidents over two years where employee was called a “n\*\*\*\*r,” including “F\*\*\* that n\*\*\*\*r, he don’t have no rights” in response the employee’s complaint, did not constitute a hostile work environment).

Not only do her allegations fail to meet the objective requirements of her claim, she also fails to allege subjective hostility, as it does not appear that Intervenor’s Complaint alleges that she ever actually objected (verbally or in writing) to the alleged directions regarding restroom usage or her wardrobe or to the content of her health insurance plan, over a timespan of “nearly four years,” [Doc. No. 24, ¶ 53]. *See Morris*, 666 F.3d at 669 (failure to complain of incident for several days and continuing to work for employer for three months suggests incident not subjectively severe).

Even assuming the alleged actions are true and do not constitute Defendant’s employees’ good-faith efforts to adjust to a relatively new cultural development, and are instead viewed in the light most favorable to Intervenor, these allegations do not constitute a sufficiently severe or pervasive set of abuses such that they objectively and subjectively altered the terms or conditions

of Intervenor's employment and created an abusive working environment. The meager factual support set forth in Intervenor's Complaint does not provide a plausible basis for Intervenor's legal conclusions, and should be dismissed.

**II. INTERVENOR FAILED TO EXHAUST ADMINISTRATIVE REMEDIES AS TO ANY "HOSTILE WORK ENVIRONMENT" CLAIM, AND ANY SUCH CLAIM WOULD NOW BE UNTIMELY.**

Intervenor failed to exhaust her administrative remedies as to any "hostile work environment" claim. Intervenor does not allege that she filed an EEOC charge of "hostile work environment,"<sup>3</sup> nor does she allege that she filed such a charge with any relevant State agency.

An elementary requirement for suit under Title VII is that, before bringing an action against an employer for an unlawful employment practice, an employee must file a complaint with the Equal Employment Opportunity Commission ("EEOC") within 180 days after the unlawful practice occurred. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 109 (2002) (citing 42 U.S.C. § 2000e-5(e)). At minimum, this requires "a written statement sufficiently precise to identify the parties, and to describe generally the action or practices complained of," and "each discrete act of discrimination (such as termination, failure to promote, denial of transfer, or refusal to hire)" must "be described in and the subject of a timely filed charge." *Montes v. Vail Clinic, Inc.*, 497 F.3d 1160, 1166 (10th Cir. 2007) (citations omitted). "If the employee does not submit a timely EEOC charge, he or she may not proceed to court." *Id.* at 1163.

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<sup>3</sup> Correspondence from the U.S. Department of Education (attached hereto as Exhibit 1) confirms that Intervenor's complaint was for employment discrimination based on race and sex when SEOSU decided not to grant Intervenor tenure, not for "hostile work environment." Defendants request this Court take judicial notice of Exhibit 1, but not convert this Motion to Dismiss into one for Summary Judgment. *See Jenkins v. Educ. Credit mgmt. Corp.*, 212 Fed. App'x 729, 732-33 (10th Cir. 2007) ("[I]t is appropriate, particularly in the exhaustion context, for a district court to consider evidence beyond the pleadings in resolving a challenge to subject-matter jurisdiction."); *Sizova v. NIST*, 282 F.3d 1320, 1324 (10th Cir. 2002); *Martinez v. City & County of Denver*, 2010 WL 1380529 at \*1 (D. Colo. Mar. 31, 2010) (taking judicial notice of discrimination charges filed with the EEOC on a motion to dismiss).

Intervenor's Complaint conclusorily alleges that she filed "a timely charge" on September 9, 2010 with the U.S. Department of Education, purportedly then forwarded to the EEOC, alleging that she was subjected to "sex discrimination" when SEOSU denied Intervenor's tenure application. [Doc. No. 24, ¶ 6]. Intervenor then alleges she supplemented her charge on July 12, 2011 to allege sex discrimination and retaliation. At no point does she ever allege that she included a charge of "hostile work environment" in her complaints to the EEOC. Because "[n]owhere in [her EEO claim] did Plaintiff allege that she was subject to a hostile work environment because of her gender," and because "Plaintiff has offered no argument or evidence demonstrating that she filed a separate EEO claim raising allegations of sexual harassment/hostile work environment based on gender, . . . it is clear that Plaintiff did not exhaust the required administrative remedies prior to filing the present action" and, "[c]onsequently, the Court lacks subject matter jurisdiction to consider that claim." *Gilpin v. Potter*, 2007 WL 1959284, \*1 (W.D. Okla. July 2, 2007) (Cauthron, J.) (citing *Sizova v. Nat'l Inst. of Standards & Tech.*, 282 F.3d 1320, 1325 (10th Cir. 2002)); *see also Martinez v. Potter*, 347 F.3d 1208, 1210-11 (10th Cir. 2003). Accordingly, pursuant to Federal Rule of Civil Procedure 12(b)(1), Count One of Intervenor's complaint must be dismissed.<sup>4</sup>

The "procedural requirements established by Congress for gaining access to the federal courts are not to be disregarded by courts" and equitable doctrines such as tolling and estoppel are to be used sparingly. *Morgan*, 536 U.S. at 113-14. "[E]quitable tolling may be appropriate where plaintiff has been lulled into inaction by her past employer, state or federal agencies, or the courts

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<sup>4</sup> Even if Intervenor's newly brought "hostile work environment" was somehow properly exhausted, Intervenor never alleges that she received the requisite Notice of Right to Sue from the EEOC on this charge, providing yet another independent reason for dismissal. 42 U.S.C. § 2000e-5(f)(1); *Rodriguez v. Wet Ink, LLC*, 603 F.3d 810, 812 (10th Cir. 2010) ("Both state and federal law require discrimination complainants to receive right-to-sue notice to file private civil actions.").

. . . is actively misled, or has in some extraordinary way been prevented from asserting his or her rights.” *Martinez v. Orr*, 738 F.2d 1107, 1110 (10th Cir. 1984) (citations omitted). Here, there is no reason to excuse Intervenor’s disregard for administrative requirements precedent to her bringing a claim for “hostile work environment.” There is no suggestion that any party lulled Intervenor into inaction, or misled or prevented her from filing the requisite additional EEOC charges. In fact, there is every indication that the Intervenor was in the past, and is currently, actively engaged with Federal officials during the investigation, preparation, and coordination of the present lawsuit.

These attempts to sandbag employers and the EEOC are contrary to the important policy considerations behind the Congressionally-mandated exhaustion requirements. “[R]equiring exhaustion of administrative remedies serves to put an employer on notice of a violation prior to the commencement of judicial proceedings,” which also “facilitate[s] internal resolution of the issue rather than promoting costly and time-consuming litigation.” *Martinez*, 347 F.3d at 1211. Congress desired that even a dysfunctional employment situation have the possibility of being corrected by the employer so as to allow all parties to proceed with a healthy working relationship and without resorting to litigation. After “nearly four years” of allegedly restricted restroom access and allegedly inadequate health insurance, and an indeterminate number of years of alleged wardrobe restriction while employed at SEOSU, Intervenor failed to file a charge of “hostile work environment,” thereby eliminating the possibility of amicable resolution and frustrating the Congressional plan.

Nor could any failure to exhaust possibly be cured in this case. Today, after nearly four years since she worked at SEOSU [Doc. No. 24, ¶ 119], and *eight* years since the allegedly discriminatory practices occurred, she has still not filed a charge with the EEOC as to a “hostile

work environment” claim. Her time to file any such charge with the EEOC (180 days) has long ago passed, and Count One of the Intervenor’s Complaint must be dismissed.

### **III. THE DOCTRINE OF LACHES BARS INTERVENOR’S COMPLAINT**

“Laches consists of two elements, inexcusable delay in instituting suit and prejudice resulting to the defendant from such delay.” *Alexander v. Phillips Petroleum Co.*, 130 F.2d 593, 605 (10th Cir. 1942). Based on Intervenor’s Complaint, she began her gender transition in 2007 and alleges she was subjected to discrimination at SEOSU starting sometime soon thereafter, receiving her non-renewal in 2011. For most of that time, at least according to her Complaint, Intervenor made no complaints or objections, formally or informally, verbally or in writing, to the University Defendants regarding the way their employees treated her, or regarding her work environment at SEOSU. In 2010 she involved the Federal Government in her complaints against SEOSU. Notably, no complaints or objections are alleged to have been raised until *after* Intervenor failed to attain tenure. Even once that had happened, Plaintiff and Intervenor did not bring their lawsuits until nearly another four years had passed, seemingly without any real justification for the delay. Thus, there was significant delay by Intervenor both in raising her concerns and in filing of her lawsuit, especially with respect to her “hostile work environment” claim.

Intervenor’s delay prejudices the University Defendants. As the Supreme Court has noted:

When a public official is unlawfully removed from office, whether from disregard of the law by his superior or from mistake as to the facts of his case, obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified the government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

*U.S. ex rel. Arant v. Lane*, 249 U.S. 367, 372 (1919). In that case, the plaintiff relator failed to bring his claims for explanation of termination and reinstatement for nearly two years. The Supreme

Court held that, because “the relator did nothing to effectively assert his claim for reinstatement to office for almost two years,” and because “[s]uch a long delay must necessarily result in changes in the branch of the service to which he was attached and in such an accumulation of unearned salary,” a “manifest inequity [] would result from reinstating him, render[ing] the application of the doctrine of laches to his case peculiarly appropriate in the interests of justice and sound public policy.” *Id.*

In the case at bar, Intervenor allegedly waited some four years to lodge grievances with her employer, after which Intervenor and the United States waited nearly four more years to bring their current suits. To order reinstatement (as sought by Intervenor) would be manifestly unjust. If Intervenor was aware of tortious conduct in 2007, she should have reported it then, and not be allowed to sit back for eight years in order to accumulate damages before making any complaint. Moreover, by waiting so long to bring her initial grievances/charges, and then compounding that delay by waiting so long to file her lawsuit, Intervenor has worked to prejudice the University Defendants by allowing the passage of time to potentially destroy or obfuscate evidence favorable to the University. As employees retire or otherwise separate from the University and as memories fade, it becomes more difficult each day, month, and year that passes to ensure the availability and reliability of evidence. *See Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966) (citation omitted). Some eight years after the initial mistreatment is alleged by Intervenor to have happened, the University is now forced to muster its defenses and is deprived of the ability address these concerns in a timely fashion that could have potentially averted litigation altogether. Intervenor should not be permitted to benefit from her intentionally dilatory conduct, and thus dismissal is appropriate.

**CONCLUSION**

Count One of Intervenor's Complaint is fatally flawed, and should be dismissed with prejudice. Intervenor fails to allege proper and timely compliance with Title VII's exhaustion requirements, fails to establish this Court's jurisdiction over the putative hostile work environment claim, and fails to allege sufficient factual averments to state a claim in compliance with *Twombly* and *Iqbal*. For the reasons set forth above, Defendants pray this Court to dismiss Count One with prejudice, and for all such other relief as this Court deems appropriate.

Respectfully submitted,

/s/ Mithun Mansinghani

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*Attorneys for Defendants*

**1**



UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS - REGION VII

September 15, 2010

**RECEIVED**

**SEP 17 2010**

**President's Office**

Dr. Larry Minks, President  
Southeastern Oklahoma State University  
1405 North 4<sup>th</sup> Street  
Durant, Oklahoma 75701

Re: OCR Docket # 07102099

Dear Dr. Minks:

On September 9, 2010, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against Southeastern Oklahoma State University (University), Durant, Oklahoma, solely alleging employment discrimination. The complainant alleges the College discriminated against her when it decided to not award her tenure.

Under certain circumstances, we are required to refer allegations of employment discrimination to the Equal Employment Opportunity Commission (EEOC). We will inform you within 30 days whether we will handle the complaint or whether we will refer it to the EEOC for further action.

OCR's determination regarding whether this complaint is complete or timely under OCR's case processing rules will be deferred until it has been determined whether OCR or the EEOC will investigate the complaint. If the EEOC investigates the complaint, the EEOC will consider the complaint to have been received on the date that OCR received it, unless the EEOC received an earlier complaint.

If you have any questions, please contact me at (816) 268-0571 or (877) 521-2172 (telecommunications device for the deaf), or by email at [karl.menninger@ed.gov](mailto:karl.menninger@ed.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Karl Menninger".

Karl Menninger  
Supervisory Attorney

8930 WARD PARKWAY, SUITE 2037, KANSAS CITY, MO 64114-3302  
[www.ed.gov](http://www.ed.gov)

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UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS—REGION VII

October 12, 2010

Dr. Larry Minks, President  
Southeastern Oklahoma State University  
1405 North 4<sup>th</sup> Street  
Durant, Oklahoma 74701

Re: OCR Docket # 07102099

Dear Dr. Minks:

On September 7, 2010, the U.S. Department of Education (Department), Office for Civil Rights (OCR), received the above-referenced complaint against Southeastern Oklahoma State University (University), Durant, Oklahoma, solely alleging employment discrimination. The complainant alleges the College discriminated against her on the bases of race and sex when it decided to not grant her tenure.

OCR is responsible for enforcing Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments Act of 1972, which prohibit discrimination on the bases of race, color, or national origin, and sex, respectively, by recipients of Federal financial assistance. Although the University receives funds from the Department, government-wide regulations require us to refer this complaint to the EEOC. The EEOC may have authority to investigate this complaint under Title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the bases of race, color, national origin, sex, and religion. This referral also delegates to the EEOC our investigative authority under the applicable statutes and regulations enforced by OCR.

We are referring this complaint to the EEOC at the following address and numbers:

Equal Employment Opportunity Commission  
St. Louis District Office  
Robert A. Young Federal Building  
1222 Spruce Street  
Room 8.100  
St. Louis, Missouri 63103

Phone: 1-800-669-4000  
Fax: 314-539-7894  
Website: [www.eeoc.gov](http://www.eeoc.gov)

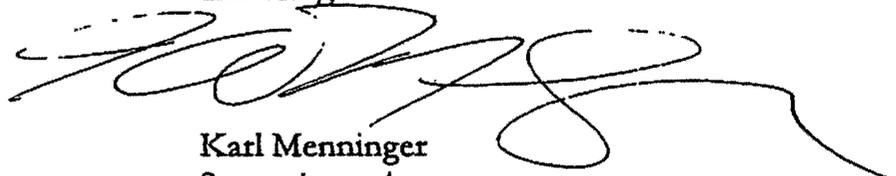
8930 WARD PARKWAY, SUITE 2037, KANSAS CITY, MO 64114-3302  
[www.ed.gov](http://www.ed.gov)

Page 2 – Dr. Larry Minks, President – 07102099

The EEOC will consider the date of filing to be the date the complaint was filed with OCR unless an earlier complaint was filed with the EEOC. We are also notifying the complainant that this complaint has been referred to the EEOC.

The enclosed document entitled *OCR Complaint Processing Procedures* contains additional information about OCR and the laws we enforce. If you have any questions, please contact the EEOC at the number shown above, or me at (816) 268-0571 (voice) or (877) 521-2172 (telecommunications device for the deaf), or by email at [karl.menninger@ed.gov](mailto:karl.menninger@ed.gov).

Sincerely,

A handwritten signature in black ink, appearing to read 'Karl Menninger', with a long, sweeping horizontal line extending to the right.

Karl Menninger  
Supervisory Attorney

Enclosure

## OCR COMPLAINT PROCESSING PROCEDURES

### LAWS ENFORCED BY OCR

OCR enforces the following laws:

- Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color or national origin;
- Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex;
- Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability;
- Age Discrimination Act of 1975, which prohibits discrimination on the basis of age;
- Title II of the Americans with Disabilities Act of 1990, which prohibits discrimination on the basis of disability;
- Boy Scouts of America Equal Access Act, part of the No Child Left Behind Act of 2001, which prohibits denial of access to or other discrimination against the Boy Scouts or other Title 36 U.S.C. youth groups in public elementary schools, public secondary schools, local education agencies, and state education agencies that have a designated open forum or limited public forum.

### EVALUATION OF THE COMPLAINT

OCR evaluates each complaint that it receives in order to determine whether it can investigate the complaint. OCR makes this determination with respect to each allegation in the complaint. For example, OCR must determine whether OCR has legal authority to investigate the complaint; that is, whether the complaint alleges a violation of one or more of the laws OCR enforces. OCR must also determine whether the complaint is filed on time. Generally, a complaint must be filed with OCR within 180 calendar days of the last act that the complainant believes was discriminatory.<sup>1</sup> If the complaint is not filed on time, the complainant should provide the reason for the delay and request a waiver of this filing requirement. OCR will decide whether to grant the waiver. In addition, OCR will determine whether the complaint contains enough information about the alleged discrimination to proceed to investigation. If OCR needs more information in order to clarify the complaint, it will contact the complainant; the complainant has 20 calendar days within which to respond to OCR's request for information.

OCR will dismiss a complaint if OCR determines that:

- OCR does not have legal authority to investigate the complaint;
- The complaint fails to state a violation of one of the laws OCR enforces;

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<sup>1</sup> Complaints that allege discrimination based on age are timely if filed with OCR within 180 calendar days of the date the complainant first knew about the alleged discrimination.

## Page 2 – OCR Complaint Processing Procedures

- The complaint was not filed timely and that a waiver will not be granted;
- The complaint is unclear or incomplete and the complainant does not provide the information that OCR requests within 20 calendar days of OCR's request;
- The allegations raised by the complaint have been resolved;
- The complaint has been investigated by another Federal, state, or local civil rights agency or through a recipient's internal grievance procedures, including due process proceedings, and the resolution meets OCR regulatory standards or, if still pending, OCR anticipates that there will be a comparable resolution process under comparable legal standards;
- The same allegations have been filed by the complainant against the same recipient in state or Federal court;
- The allegations are foreclosed by previous decisions of the Federal courts, the U.S. Secretary of Education, the U.S. Department of Education's Civil Rights Reviewing Authority, or OCR policy determinations.

### OPENING THE COMPLAINT FOR INVESTIGATION

If OCR determines that it will investigate the complaint, it will issue letters of notification to the complainant and the recipient. Opening a complaint for investigation in no way implies that OCR has made a determination with regard to the merits of the complaint. During the investigation, OCR is a neutral fact-finder. OCR will collect and analyze relevant evidence from the complainant, the recipient, and other sources as appropriate. OCR will ensure that investigations are legally sufficient and are dispositive of the allegations raised in the complaint.

### INVESTIGATION OF THE COMPLAINT

OCR may use a variety of fact-finding techniques in its investigation of a complaint. These techniques may include reviewing documentary evidence submitted by both parties, conducting interviews with the complainant, recipient's personnel, and other witnesses, and/or site visits. At the conclusion of its investigation, OCR will determine with regard to each allegation that:

- There is insufficient evidence to support a conclusion that the recipient failed to comply with the law, or
- A preponderance of the evidence supports a conclusion that the recipient failed to comply with the law.

OCR's determination will be explained in a letter of findings sent to the complainant and recipient. Letters of findings issued by OCR address individual OCR cases. Letters of findings contain fact-specific investigative findings and dispositions of individual cases. Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such. OCR's formal policy statements are approved by a duly authorized OCR official and made available to the public.

## **RESOLUTION OF THE COMPLAINT AFTER A DETERMINATION OF NONCOMPLIANCE**

If OCR determines that a recipient failed to comply with one of the civil rights laws that OCR enforces, OCR will contact the recipient and will attempt to secure the recipient's willingness to negotiate a voluntary resolution agreement. If the recipient agrees to resolve the complaint, the recipient will negotiate and sign a written resolution agreement that describes the specific remedial actions that the recipient will undertake to address the area(s) of noncompliance identified by OCR. The terms of the resolution agreement, if fully performed, will remedy the identified violation(s) in compliance with applicable civil rights laws. OCR will monitor the recipient's implementation of the terms of the resolution agreement to verify that the remedial actions agreed to by the recipient have been implemented consistent with the terms of the agreement and that the area(s) of noncompliance identified were resolved consistent with applicable civil rights laws.

If the recipient refuses to negotiate a voluntary resolution agreement or does not immediately indicate its willingness to negotiate, OCR will inform the recipient that it has 30 days to indicate its willingness to engage in negotiations to voluntarily resolve identified areas of noncompliance, or OCR will issue a Letter of Finding to the parties providing a factual and legal basis for a finding noncompliance.

If, after the issuance of the Letter of Finding of noncompliance, the recipient continues to refuse to negotiate a resolution agreement with OCR, OCR will issue a Letter of Impending Enforcement Action and will again attempt to obtain voluntary compliance. If the recipient remains unwilling to negotiate an agreement, OCR will either initiate administrative enforcement proceedings to suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient, or will refer the case to the Department of Justice. OCR may also move immediately to defer any new or additional Federal financial assistance to the institution.

## **RESOLUTION OF THE COMPLAINT PRIOR TO THE CONCLUSION OF THE INVESTIGATION**

### **Early Complaint Resolution (ECR):**

Early Complaint Resolution allows the parties (the complainant and the institution which is the subject of the complaint) an opportunity to resolve the complaint allegations quickly; generally, soon after the complaint has been opened for investigation. If both parties are willing to try this approach, and if OCR determines that Early Complaint Resolution is appropriate, OCR will facilitate settlement discussions between the parties and work with the parties to help them understand the legal standards and possible remedies. To the extent possible, staff assigned by OCR to facilitate the Early Complaint Resolution process will not be the staff assigned to the investigation of the complaint. OCR does not approve, sign or endorse any agreement reached between the parties as a result of Early Complaint Resolution, and OCR does not monitor the agreement. However, if the recipient institution does not comply with the terms of the agreement, the

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complainant may file another complaint with OCR within 180 days of the date of the original discrimination or within 60 days of the date the complainant learns of the failure to comply with the agreement, whichever date is later.

**Resolution of the Complaint Prior To the Conclusion of an Investigation**

A complaint may also be resolved before the conclusion of an investigation, if the recipient expresses an interest in resolving the complaint. If OCR determines that resolution of the complaint before the conclusion of an investigation is appropriate, OCR will attempt to negotiate an agreement with the recipient. OCR will notify the complainant of the recipient's request and will keep the complainant informed throughout all stages of the resolution process. The provisions of the resolution agreement that is reached must be aligned with the complaint allegations and the information obtained during the investigation, and must be consistent with applicable regulations. A resolution agreement reached before the conclusion of an investigation will be monitored by OCR.

**REQUEST FOR RECONSIDERATION OR APPEAL OF OCR'S DETERMINATIONS**

OCR is committed to a high quality resolution of every case. OCR affords an opportunity to the complainant to submit a request for reconsideration or an appeal of OCR determinations that are not in the complainant's favor. If the complainant disagrees with OCR's decision to dismiss or administratively close a complaint for any reason (e.g., jurisdiction, timeliness, other administrative reasons), he or she may send a written request for reconsideration to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's dismissal or administrative closure letter. If the complainant disagrees with an OCR decision finding insufficient evidence to support the complaint allegation(s) after investigation, he or she may send a written appeal to the Deputy Assistant Secretary for Enforcement within 60 days of the date of OCR's letter of finding(s). Requests for reconsideration and appeals should be sent to:

Deputy Assistant Secretary for Enforcement  
Office for Civil Rights  
U.S. Department of Education  
400 Maryland Avenue, S.W.  
Washington, D.C. 20202-1100

This review process provides an opportunity for complainants to bring information to OCR's attention that would change OCR's decision. For both requests for reconsideration and appeals, the complainant must explain why he or she believes the factual information was incomplete, the analysis of the facts was incorrect, and/or the appropriate legal standard was not applied, *and* how this would change OCR's determination in the case. Failure to do so may result in the denial of the request for reconsideration or appeal. The review process will not be a *de novo* review (i.e., OCR will not review the matter as if no previous decision had been rendered) of OCR's decision.

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**ADDITIONAL INFORMATION**

**Right to File a Separate Court Action**

The complainant may have the right to file suit in Federal court, regardless of OCR's findings. OCR does not represent the complainant in case processing, so if the complainant wishes to file a court action, he or she must do so through his or her own attorney or on his or her own through the court's pro se clerk's office.

If a complainant alleges discrimination prohibited by the Age Discrimination Act of 1975, a civil action in Federal court can be filed only after the complainant has exhausted administrative remedies. Administrative remedies are exhausted when either of the following has occurred:

- 1) 180 days have elapsed since the complainant filed the complaint with OCR and OCR has made no finding; or
- 2) OCR issues a finding in favor of the recipient. If this occurs, OCR will promptly notify the complainant and will provide additional information about the right to file for injunctive relief.

**Prohibition against Intimidation or Retaliation**

An institution under the jurisdiction of the Department of Education may not intimidate, threaten, coerce, or retaliate against anyone who asserts a right protected by the civil rights laws that OCR enforces, or who cooperates in an investigation. Anyone who believes that he or she has been intimidated or retaliated against should file a complaint with OCR.

**Investigatory Use of Personal Information**

In order to investigate a complaint, OCR may need to collect and analyze personal information such as student records or employment records. No law requires anyone to give personal information to OCR and no formal sanctions will be imposed on complainants or other persons who do not cooperate in providing information during the complaint investigation or resolution process. However, if OCR is unable to obtain the information necessary to investigate a complaint, we may have to close the complaint.

The Privacy Act of 1974, 5 U.S.C. § 552a, and the Freedom of Information Act (FOIA), 5 U.S.C. § 552, govern the use of personal information that is submitted to all Federal agencies and their individual components, including OCR. The Privacy Act of 1974 protects individuals from the misuse of personal information held by the Federal government. It applies to records that are maintained by the government that are retrieved by the individual's name, social security number, or other personal identifier. It regulates the collection, maintenance, use and dissemination of certain personal information in the files of Federal agencies.

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The information that OCR collects is analyzed by authorized personnel within the agency and will be used only for authorized civil rights compliance and enforcement activities. However, in order to investigate or resolve a complaint, OCR may need to reveal certain information to persons outside the agency to verify facts or gather additional information. Such details could include the age or physical condition of a complainant. Also, OCR may be required to reveal information requested under FOIA, which gives the public the right of access to records of Federal agencies. OCR will not release any information to any other agency or individual except in the one of the 11 instances defined in the Department's regulation at 34 C.F.R. § 5b.9(b).

OCR does not reveal the name or other identifying information about an individual unless it is necessary for completion of an investigation or for enforcement activities against an institution that violates the laws, or unless such information is required to be disclosed under the FOIA or the Privacy Act. OCR will keep the identity of complainants confidential except to the extent necessary to carry out the purposes of the civil rights laws, or unless disclosure is required under the FOIA, the Privacy Act or otherwise by law.

FOIA gives the public the right of access to records and files of Federal agencies. Individuals may obtain items from many categories of records of the Federal government, not just materials that apply to them personally. OCR must honor requests for records under FOIA, with some exceptions. Generally, OCR is not required to release documents during the case evaluation and investigation process or enforcement proceedings, if the release could affect the ability of OCR to do its job. 5 U.S.C. § 552(b)(7)(A). Also, a Federal agency may refuse a request for records if their release would result in an unwarranted invasion of privacy of an individual. 5 U.S.C. § 552(b)(6) and (7)(C). Also, a request for other records, such as medical records, may be denied where disclosure would be a clearly unwarranted invasion of privacy.

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

1. UNITED STATES OF AMERICA, and	)	
	)	
2. DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
1. SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
2. THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

**PLAINTIFF/INTERVENOR DR. RACHEL TUDOR'S  
RESPONSE TO DEFENDANTS' MOTION TO DISMISS**

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## I. SUMMARY OF THE ARGUMENT

Defendants' Motion to Dismiss (Doc. 30) wages three attacks on Dr. Tudor's hostile work environment claim. None of Defendants' arguments have merit.

Defendants' contention that Dr. Tudor failed to plead facts supporting hostile work environment cannot be reconciled with the pleading standard under Rule 8 of the Federal Rules of Civil Procedure. Rule 8 only requires that a complaint point to facts, taken as true, that are sufficient to make the claim *plausible*. Dr. Tudor's Complaint in Intervention (Doc. 24) ("Complaint") is replete with allegations that point to a series of acts, courses of conduct, and policies. These allegations are more than sufficient to render Tudor's hostile work environment claim plausible.

Defendants' administrative exhaustion argument lacks merit. In her filings with the U.S. Department of Education ("DOE") and the U.S. Equal Employment Opportunity Commission ("EEOC"), Dr. Tudor pointed to events, dates, policies, and used language from which a hostile work environment claim properly flows. It is of no moment that Dr. Tudor did not use the technical legal phrase "hostile work environment" in her administrative filings. Title VII does not demand that complainants articulate their grievances in exacting legal language.

Lastly, Defendants' invocation of the doctrine of laches fails on its face. The doctrine of laches is an affirmative defense that turns on an intensive factual inquiry and is thus not an appropriate defense to resolve on a motion to dismiss. Moreover, application of laches is not warranted because Defendants have failed to point to specific

facts that support the existence of actual harm or prejudice resulting from a delay which is legally and equitably attributable to Dr. Tudor.

For all the aforementioned reasons Defendant's motion to dismiss should be denied.<sup>1</sup>

## **II. STANDARD OF REVIEW**

Dr. Tudor agrees with the standard of review for motions to dismiss filed pursuant to Federal Rule of Civil Procedure Rule 12(b)(1) & (6) articulated by Defendants.

## **III. ARGUMENTS & AUTHORITIES**

### **A. HOSTILE WORK ENVIRONMENT CLAIM SUFFICIENTLY PLED**

Under Rule 8, a plaintiff need only clearly and succinctly plead facts that, taken as true, give rise to a plausible violation of Title VII. *See Johnson v. City of Shelby, Miss.*, 135 S.Ct. 346, 347 (2014) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)). A plaintiff need not make out every element of a hostile work environment claim, she need only allege enough facts to raise a reasonable expectation that discovery will reveal supporting evidence. *See, e.g., Roberts v. Independent School Dist. No. 12, Edmond, Okla.*, civ-13-1245-HE, 2014 WL 1347379, at \*2, n.2 (W.D. Okla. Apr. 3, 2014). Dr. Tudor's complaint sets out sufficient detail regarding her work environment to render it plausible.

#### **1. Dr. Tudor pointed to specific facts supporting her hostile work environment claim.**

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<sup>1</sup> Defendants have not contested in this motion the validity or necessary elements of a Title VII complaint based on gender expression, gender identity, and gender stereotyping, therefore Dr. Tudor will not raise here any arguments regarding these issues.

Dr. Tudor’s Complaint did far more than just invoke the phrase “hostile work environment” and append legal conclusions—it exhaustingly alleges events, courses of conduct, and policies that support Tudor’s hostile work environment claim. For example, Dr. Tudor specifically alleges events contributing to the hostile work environment which occurred in the 300 day period<sup>2</sup> prior to her first filing dated September 9, 2010, “including but not limited to the daily humiliations caused by the restroom restrictions and misgendering, the maintenance of the discriminatory insurance policy exclusion, dress restrictions, administrators repeatedly interfering with the tenure review process and the constant threat of termination.” Doc. 24 ¶ 148. Dr. Tudor also alleges that Southeastern’s agents subjected her to a barrage of biased remarks that denigrated her as a transgender woman.<sup>3</sup> Though Title VII does not prescribe a “code of workplace

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<sup>2</sup> Because Oklahoma is a deferral state, the correct limitations period is 300 days. *See, e.g., Riley v. Tulsa Cnty. Juvenile Bureau ex rel. Tulsa Cnty. Bd. of Comm'rs*, 421 Fed.Appx. 781, 783 (10<sup>th</sup> Cir. 2010) (unpublished) (*citing* 42 U.S.C. § 2000e–5(e)(1)).

<sup>3</sup> For instance, Dr. Tudor alleges that early on in her transition that two of Defendants’ agents made statements to her directly, or reported comments made by others to her, which expressly denigrated transgender persons. For example, she alleges that during Summer 2007 a Southeastern human resources employee told her that Dr. McMillan wanted her terminated from Southeastern because of her “transgender lifestyle.” *See* Doc. 24 ¶ 40. Dr. Tudor also alleges that shortly after she started to present as female during the 2007–08 academic term that Ms. Jane McMillan, then the director of Southeastern’s Counseling Center, told her that Dr. McMillan considered transgender people to be a “grave offense to his [religious] beliefs.” *See* Doc. 24 ¶ 42. In that same conversation with Ms. McMillan, Dr. Tudor was told she should take safety precautions when she was on Southeastern’s campus because unnamed persons were openly hostile towards transgender people. *Id.* Dr. Tudor also alleges that she was warned by Southeastern’s human resources personnel that if she used a multi-stall women’s restroom on campus that students or faculty would complaint. *See* Doc. 24 ¶ 47.

Verbal disparagement took on a different form from August 2009 onward. For example, Dr. Tudor alleges that starting in Summer 2009, Dean Scoufos began to misgender her. *See* Doc. 24 ¶ 80 (alleging misgendering started during an August 2009

conduct,” *Chavez v. New Mexico*, 397 F.3d 826, 833 (10<sup>th</sup> Cir. 2005), it is well recognized that a barrage of animus ridden statements, combined with other allegations, is sufficient to support a hostile work environment claim. *See, e.g., Smith v. Northwest Financial Acceptance, Inc.*, 129 F.3d 1408, 1413–14 (10<sup>th</sup> Cir. 1997) (holding that aggregation of other hostilities with “[a]t least three . . . disparaging remarks directed at Plaintiff were severe enough to affect a reasonable person’s identity as a woman”).

Dr. Tudor also alleges many incidents that evidence that Southeastern’s administration treated Dr. Tudor less favorably than her nontransgender colleagues.<sup>4</sup>

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meeting with Dean Scoufos); *id.* ¶ 81 (defining and explaining misgendering). Misgendering of the ilk Dr. Tudor alleges is a hallmark of transgender sex discrimination. *See, e.g., Jamison v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992, 2013 WL 2368729, at \*2 (May 21, 2013) (“Intentional misuse of the employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.”); *Lusardi v. Department of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 at \*11–\*12 (Apr. 1, 2015) (holding that repeated references to a transgender woman with male pronouns by a coworker gives rise to a claim of hostile work environment). *Cf. Myers v. Cuyahoga County, Ohio*, 182 Fed.Appx. 510, 520 (6<sup>th</sup> Cir. 2006) (“calling a transsexual or transgendered person a “he/she” is a deeply insulting and offensive slur, and we agree that using that term is strongly indicative of a negative animus towards gender nonconforming people”).

<sup>4</sup> For example, Dr. Tudor alleges that she was directed by Southeastern’s human resources office to not use the women’s restroom located adjacent to her office (Doc. 24 ¶ 45), and that no other faculty member was given a similar instruction (Doc. 24 ¶ 48). Dr. Tudor alleges that she was given special counseling on her attire, including a special instruction to not wear “short skirts” (Doc. 24 ¶ 64), and that no other member of the faculty was given similar counseling (Doc. 24 ¶ 65) despite the fact that nontransgender female faculty routinely wore short skirts (Doc. 24 ¶ 66). She also alleges unequal treatment throughout the tenure and promotion process. For example, she alleges that Dean Scoufos declined to report her complaint of sex discrimination to Southeastern’s Affirmative Action Officer (Doc. 24 ¶ 82); Vice President McMillan refused to discuss his rationales for opposing her application for promotion and tenure, and that in the previous academic term Dr. McMillan chose to meet with a similarly situated nontransgender English professor and gave him feedback on how to improve his portfolio (Doc. 24 ¶ 92); after filing a grievance with President Minks (Doc. 24 ¶ 93) and receiving

Though not all the unequal treatment alleged was explicitly gendered in nature, Dr. Tudor did expressly allege that she was treated unequally because of her sex and thus these incidents properly support her hostile work environment claim. Doc. 24 ¶ 131–32. *Stahl v. Sun Microsystems, Inc.*, 19 F.3d 533, 538 (10<sup>th</sup> Cir. 1994) (citing *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10<sup>th</sup> Cir. 1987) (holding that any unequal treatment, even if not gendered in nature, perpetrated because of sex, can give rise to hostile work environment claim)).

Dr. Tudor also alleges that Dr. McMillan, a man whom had previously expressed animus towards Tudor and transgender people generally (*see, e.g.*, Doc 24 ¶¶ 40, 42), subjected Tudor’s application for tenure and promotion to heightened scrutiny during the 2009–10 application cycle.<sup>5</sup> As pled, Dr. McMillan’s superficially “gender neutral”

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a favorable ruling from the Faculty Appellate Committee (“FAC”) (Doc. 24 ¶ 94), President Mink’s designated agent, the Assistant Vice President for Academic Affairs (Doc. 24 ¶ 95), both declined to follow the FAC’s recommendation *and* failed to notify Dr. Tudor of the decision within the ten workday deadline prescribed by Southeastern’s policy (Doc. 24 ¶ 96).

<sup>5</sup> Among other things, Dr. Tudor alleges that Dr. McMillan opposed her application for spurious reasons—claiming that her record of “research/scholarship” and “university service” were deficient. *See* Doc. 24 ¶ 100. She also alleges that her qualifications were comparable if not superior to the qualifications of at least three similarly-situated nontransgender English professors whose applications were approved for tenure during Tudor’s time at Southeastern. *See* Doc. 24 ¶ 101. For example, Dr. Tudor had a greater number of peer-reviewed publications than at least one other successful tenure applicant. *Id.* Indeed, Dr. Tudor’s scholarly contributions were lauded by her peers at Southeastern. Doc. 24 ¶ 120 (noting that Tudor was awarded with the Faculty Senate Recognition Award for Excellence in Scholarship during the 2010–11 academic year). Despite her recognized contributions to her field, Dr. McMillan sent a letter to the FAC during the 2010–11 academic year claiming that Dr. Tudor’s portfolio was the “poorest portfolio [he had] ever review in the 20 years” he had worked at Southeastern. *See* Doc. 24 ¶ 109. Dr. McMillan’s statements stand in stark contrast to those of one of Dr. Tudor’s colleagues, who claimed in a letter to the FAC that Tudor

objection to Dr. Tudor's application, when viewed in context with his past statements evidencing animus towards Dr. Tudor and other transgender persons, is sufficient to sustain a hostile work environment claim. *See O'Shea v. Yellow Technology Services, Inc.*, 185 F.3d 1093, 1097 (10<sup>th</sup> Cir. 1999) ("Facially neutral abusive conduct can support a finding of gender animus sufficient to sustain a hostile work environment claim when that conduct is viewed in the context of other, overtly gender-discriminatory conduct."). *See also Hernandez v. Valley View Hosp. Ass'n*, 684 F.3d 950, 960 (10<sup>th</sup> Cir. 2012); *Chavez*, 397 F.3d at 833. Indeed, heightened scrutiny of the ilk Dr. Tudor alleges is a hallmark of transgender discrimination. *See, e.g., Barnes v. Cincinnati*, 401 F.3d 729, 738 (6<sup>th</sup> Cir. 2005) (finding that heightened scrutiny of transgender officer by nontransgender supervisor was perpetrated with the intent of building a poor performance record to justify adverse employment action).

In addition to pointing to discrete acts, Dr. Tudor's Complaint also alleges the existence of discriminatory policies, some of which were crafted with discriminatory intent and some of which had a disparate impact upon transgender persons.<sup>6</sup> As pled, the

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"ha[d] published more research than any other member of the [English] department, tenured or untenured." *See* Doc. 24 ¶ 111.

<sup>6</sup> Dr. Tudor alleges that Defendants' maintained a health insurance plan that expressly excluded medically necessary care to transgender persons (Doc. 24 ¶ 68); that the Plan's exclusion had the effect of limiting treatments such as exogenous hormones and routine blood tests on the basis of one's sex (*id.*); that under the Plan, nontransgender persons could seek coverage for medically necessary exogenous hormone treatment and blood level tests which were otherwise denied to transgender persons (*id.* ¶ 69). Defendants do not deny the existence of the transgender exclusion. *See* Southeastern Answer, Doc. 28 ¶ 67 (admitting the existence of a transgender exclusion in the health plan); RUSO Answer, Doc. 29 ¶ 67 (same). It is well settled that an employer provided

environment was not merely affected by the fact that Dr. Tudor was told “one time” not to wear certain gendered clothing, not to use gender-appropriate restrooms, or denied appropriate health care (Doc. 30 at 4). These policies were binding on Dr. Tudor and their effects were felt daily. A hostile work environment is plausible when predicated in whole or in part on policies that have a disparate impact upon members of a protected status. *See, e.g., Maldonado v. City of Altus*, 433 F.3d 1294, 1308 (10<sup>th</sup> Cir. 2006) *overruled on other grounds, Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). Under 10<sup>th</sup> Circuit precedent, allegations of policies that have a disparate impact are more than sufficient to sustain a hostile work environment claim. *See Maldonado*, 433 F.3d at 1304. Contrary to Defendants’ contentions, Dr. Tudor need not plead that policies with a disparate impact were specifically crafted against members of a protected status. *Id.*

Taken together, Dr. Tudor’s Complaint does not simply invoke legal conclusions or labels, it points to a combination of discrete acts and policies which, taken as true, are more than sufficient to buttress her hostile work environment claim, as explained by the Supreme Court:

“A plaintiff . . . must plead facts sufficient to show that her claim has substantive plausibility. Petitioners’ complaint was not deficient in that

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health plan that limits coverage of benefits on the basis of sex violates Title VII. *See generally Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Dr. Tudor also alleges that Defendants’ maintained a restrictive restroom policy that prohibited her from utilizing restroom facilities that comported with her gender identity from the onset of the 2007-08 academic year through her termination in May 2011 (Doc. 24 ¶¶ 53–56); that that the restrictive restroom policy was crafted by human resources because Defendants feared complaints from students and faculty (Doc. 24 ¶ 51); and that because of the policy Tudor was often times was unable to relieve herself during her work-day (Doc. 24 ¶¶ 54, 55) and as a result Tudor often experienced physical discomfort and humiliation (Doc. 24 ¶ 56).

regard. Petitioners stated simply, concisely, and directly events that, they alleged, entitled them to damages from the city. Having informed the city of the factual basis for their complaint, they were required to do no more to stave off threshold dismissal for want of an adequate statement of their claim.”

*Johnson*, 135 S.Ct. at 347.

**2. Dr. Tudor’s allegations point to incidents and policies that are sufficiently severe or pervasive to be deemed plausibly hostile.**

Defendants suggest that Plaintiff’s environmental claim is limited only to the “one time” she was told not to wear certain gendered clothing and the “one time” she was told not to use gender-appropriate restrooms (Doc. 30 at 4), ignoring the multitude of facts and circumstances set out in Dr. Tudor’s Complaint. Case law teaches that pervasiveness *or* severity should be measured by examining the totality of the circumstances, not the piecemeal assessment of discrete acts and individual policies that Defendants proffer. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (“But we can say that whether an environment is ‘hostile’ or ‘abusive’ can be determined only by looking at all the circumstances); *id.* at 23 (existence of hostile work environment not to be divined from a “mathematically precise test”).

Taken together, Dr. Tudor’s allegations demonstrate that it is plausible that her work environment was hostile. Indeed, Tudor’s allegations concerning disparaging statements and misgendering, heightened scrutiny, disparate treatment, the special dress code, and the restroom and insurance policies rise far above petty slights or routine “job stress.” *See Trujillo v. Univ. of Colo. Health Sciences Center*, 157 F.3d 1211, 1214 (10<sup>th</sup> Cir. 1998). These allegations are also more than “[c]asual or isolated manifestations of

discriminatory conduct, such as a few sexual comments or slurs . . . .” *Lowe v. Angelo’s Italian Foods, Inc.*, 87 F.3d 1170, 1175 (10<sup>th</sup> Cir. 1996) (citing *Hicks*, 833 F.2d at 1414). Indeed, Dr. Tudor’s allegations are plainly distinguishable from the authorities Defendants relies upon. For example, in *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365–66 (10<sup>th</sup> Cir. 1997) the plaintiff pointed to only five “offensive comments.” *Morris v. City of Colorado Springs*, 666 F.3d 654, 669 (10<sup>th</sup> Cir. 2012) is also inapposite.<sup>7</sup>

### **3. Rule 8 does not require exactitude.**

Defendants’ contention that Dr. Tudor’s complaint fails to satisfy Rule 8 because some allegations lack exact dates or names fails on its face. Defendants complain that Dr. Tudor alleges approximate dates and/or provides a description of an individual who made statements to her over the phone and does not provide their exact name. *See* Doc. 30 at 4. By no means does either Title VII or Rule 8 require this level of exactitude in pleading. Indeed, the 10<sup>th</sup> Circuit has observed that Rule 8 is satisfied in hostile work environment claims even where imprecise dates are alleged. *Nettle v. Cent. Okla. Am. Indian Health Council, Inc.*, 334 Fed.Appx. 914, 921 (10<sup>th</sup> Cir. 2009) (unpublished). The reason for this is plain—imprecise dates and, by extension, generalized descriptions rather than names of individuals, are sufficient to put defendants on notice of the facts upon which a

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<sup>7</sup> In *Morris*, the employee alleged a handful of distasteful incidents occurred over a three month period, after the employee complained, the employer placed the employee and problematic team members in a “team building” program and the employee was later removed from her environment after she issued a formal complaint. These facts are in no way similar to those in the case at bar. Dr. Tudor alleges a pervasive campaign of discrimination that stretches from Summer 2007 through her termination on May 31, 2011. It touched on everything from her inability to use the restroom when she needed to relieve herself, to her inability to reap the benefits of Defendants’ established grievance procedures, to the events leading up to and resulting in her termination on May 31, 2011.

plaintiff relies. Title VII requires no more than this. *Johnson*, 135 S.Ct. at 347. Because the nature of a hostile work environment is that the workplace is permeated with bias, and that the bias endures for a period of time, the exact dates and names attendant to particular allegations is not required.

Indeed, it is telling that Defendants had little difficulty proffering answers to the same allegations they allege were insufficiently specific under Rule 8. *See, e.g.*, RUSO Answer, Doc. 29 ¶ 45 (denying, without claiming insufficient knowledge or information to admit, that an employee of Southeastern’s human resources office instructed Tudor to not use the multi-stall women’s restroom proximate to Tudor’s office); Southeastern Answer, Doc. 28 ¶ 45 (same); RUSO Answer, Doc. 29 ¶ 51 (denying, without claiming insufficient knowledge or information to admit, that Tudor was instructed by human resources employee to not use women’s restroom); Southeastern Answer, Doc. 28 ¶ 51 (same); RUSO Answer, Doc. 29 ¶ 67 (admitting maintenance of transgender insurance exclusion); Southeastern Answer, Doc. 28 ¶ 67 (same).

#### **4. Subjective and objective elements both pled and adducible from pleadings.**

Defendants’ miscomprehend the requisite degree of subjective and objective hostility that must be demonstrated to render a hostile work environment claim plausible. As to the subjective prong, Dr. Tudor expressly pled that many of the discrete incidents and policies that constitute her hostile work environment claim were subjectively hostile.<sup>8</sup>

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<sup>8</sup> *See, e.g.*, Doc. 24 ¶¶ 55–56 (alleging physical discomfort and humiliation resulting from inability to regularly utilize restroom when needed); *id.* ¶ 58 (alleging profound guilt and humiliation when Tudor had to apologize to persons with disabilities when she inconvenienced them by using the single-stall restroom); *id.* ¶ 146 (alleging

This is sufficient to render it plausible that Dr. Tudor believed the environment was a hostile one. *Morris*, 666 F.3d at 654 (pointing to acts or policies which plaintiff alleges altered status of work environment is sufficient to satisfy subjective prong). Defendants draw a rule from *Morris v. City Colorado Springs*, 666 F.3d 654 (10<sup>th</sup> Cir. 2012) which does not exist. Namely, *Morris* does not stand for the proposition that an employee must complain about each and every incident constituting a hostile work environment claim within days of its occurrence for the subjective prong to be satisfied.<sup>9</sup> *Morris* did not reach the issue of subjectivity. *Morris*, 666 F.3d at 669 (“we need not definitively opine on this matter”). However, even if Tudor must establish that she complained about core incidents upon which her hostile work environment claim is premised, it is clear from her Complaint that she did just that.<sup>10</sup>

Dr. Tudor also alleged facts that make it plausible that a reasonable person would find her work environment to be hostile, thereby satisfying the objective prong. *Harris*, 510 U.S. at 21 (holding that a work environment is “objectively hostile” where a

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humiliation resulting from insurance exclusion); *id.* ¶ 146 (alleging humiliation resulting from insurance exclusion); *id.* ¶ 149 (alleging that Dr. Tudor found the working environment to be abusive or hostile).

<sup>9</sup> Plaintiff/Intervenor omits any discussion of notice under *Faragher-Ellerth*, as it is not raised here by Defendants.

<sup>10</sup> *See, e.g.*, Doc. 24 ¶ 82 (alleging Tudor made a oral complaint about discrimination in August 2009); *id.* ¶ 93 (alleging filing of grievance and request for hearing with the FAC in February 2010); *id.* ¶¶ 104–05 (alleging filling of grievance with the FAC in August 2010); *id.* ¶ 114 (alleging filling of sex discrimination complaint with Southeastern’s Affirmative Action Officer); *id.* ¶ 108 (alleging filing of grievance with the FAC in October 2010); *id.* ¶¶ 6, 115 (alleging filing of September 2010 complaint with DOE); *id.* ¶ 116 (alleging supplementation of complaint previously filed with Southeastern’s Affirmative Action Officer in or about October 2010); *id.* ¶ 7 (alleging supplementation of filings on or about July 12, 2011 with EEOC *after* termination).

“reasonable person would find [it] hostile or abusive”). Contrary to Defendants’ contentions, a reasonable person’s assessment of hostility is not centered on the humiliation due to any one discrete allegation on which the hostile work environment claim is predicated. *See Thomas v. Avis Rent a Car*, 408 Fed.Appx. 145, 156 (10<sup>th</sup> Cir. 2011) (unpublished) (“In considering whether a reasonable person would find his work environment hostile, we have said ‘the real impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used.’”) (*quoting Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 82 (1998)). As one example from the Complaint, taking Dr. Tudor’s allegations as true, it is plausible that a reasonable person would find a workplace where one cannot guarantee access to a restroom when needed (Doc. 24 ¶ 55) and resultant discomfort and humiliation (Doc. 24 ¶ 56) as inhospitable. Indeed, the physical and mental strain that Dr. Tudor alleges she experienced daily simply due to the restroom policy alone is enough for a “rational factfinder” to conclude that Dr. Tudor experienced more than a handful of sporadic slights. *See Hernandez*, 684 F.3d at 958 (holding that allegations pointing to more than sporadic slights are sufficient to satisfy objective prong).

#### **B. ADMINISTRATIVE REMEDIES WERE EXHAUSTED**

Defendants argue that because Dr. Tudor did not include the phrase “hostile work environment” in her administrative filings with the DOE and EEOC, that she has failed to satisfy Title VII’s administrative exhaustion requirement. Not so. Title VII’s exhaustion requirement does not demand that complainants exactly plead

discrimination in technical, legal terms. Title VII merely requires that administrative filings set forth a general description of discriminatory acts and/or policies, and that one or more of those acts and/or policies occur or be maintained during the limitations period. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116–17 (2002) (citing 42 U.S.C. §2000e-5(e)(1)); *Davidson v. Am. Online, Inc.*, 337 F.3d 1179, 1183–84 (10<sup>th</sup> Cir. 2003). Dr. Tudor clearly satisfied this standard.

Title VII does not specify the form or content of filings, providing only that “charges shall be made in writing under oath or affirmation.” 42 U.S.C. 2000e-5(b). *See also EEOC v. Shell Oil Co.*, 466 U.S. 54, 67 (1984) (holding that Title VII “prescribes only minimal requirements pertaining to the form and content of charges of discrimination”). In all other respects, Congress expressly left the details concerning the content of filings to the EEOC, stating that filings “shall contain such information and be in such form as the Commission requires.” 42 U.S.C. 2000e-5(b). The pertinent EEOC regulation requires only a “clear and concise statement of the facts,” not an expanded statement of all facts and circumstances. 29 C.F.R. 1601.12(a)(3). Thus, “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). *See also Shell Oil*, 466 U.S. at 62 n.11 (expressly rejecting the interpretation of some earlier courts that required aggrieved individuals to “se[t] forth the facts upon which [the charge is] based”). *See also Jones v. U.P.S., Inc.*, 502 F.3d 1176, 1184 (10<sup>th</sup> Cir. 2007) (implicitly recognizing the validity of §1601.12(b) and further holding that an aggrieved employee need not

even file an actual charge if she supplies the EEOC with sufficient information in another form that the EEOC then treats as a charge). Noticeably absent from the EEOC's regulation is any express requirement that charging parties include legal labels such as "hostile work environment" in the filings.

In parallel with the EEOC's lenient standards are 10<sup>th</sup> Circuit precedents that recognize that, though Title VII claims must flow from administrative pleadings, such pleadings should be liberally construed. *See, e.g., Green v. Donahoe*, 760 F.3d 1135, 1142 (10<sup>th</sup> Cir. 2014); *Jones*, 502 F.3d at 1186 (10<sup>th</sup> Cir. 2007); *MacKenzie v. City and Cnty. of Denver*, 414 F.3d 1266, 1274 (10<sup>th</sup> Cir. 2005) (similar holding in ADA context); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191, 1195 (10<sup>th</sup> Cir. 2004) (similar holding in ADEA context). Liberal construal of filings is all the more imperative where pleadings are filed, as is the case with the filings of Dr. Tudor, without the assistance of counsel. *See Donahoe*, 760 F.3d at 1142 (*citing Lyons v. England*, 307 F.3d 1092, 1104 (9<sup>th</sup> Cir. 2002)) ("We are required to construe appellant's EEOC charges with the utmost liberality since they are made by those unschooled in the technicalities of formal pleading.")).

With regard to hostile work environment claims specifically, Title VII merely requires that the charge(s) set forth a general description of discriminatory acts and/or policies, and that one or more of those acts and/or policies occur or be maintained during the limitations period. *See Morgan*, 536 U.S. 101, 116–17 (*citing* 42 U.S.C. §2000e-5(e)(1)); *Davidson*, 337 F.3d at 1183–84. Dr. Tudor clearly satisfied this standard. In her administrative filings (filed herewith in the Declaration of Dr. Rachel Tudor in Opposition to the Motion to Dismiss as Exhibits A, B, and C) (hereinafter referred to as

“Declaration”), Dr. Tudor specifically points to facts which plainly paint a picture of a workplace permeated with hostility because of sex. For instance, Dr. Tudor also pointed to her protected status.<sup>11</sup> Tudor’s filings also point to acts that span the course of several years as well as the existence of institutional policies that were enforced over a period of years.<sup>12</sup> Taken on their face, these facts were sufficient to put the EEOC on notice of the viability of a hostile work environment claim.

It is of no moment that Dr. Tudor did not invoke the term “hostile work environment” in her filings, since the allegations in her filings plainly fall under that label. A hostile work environment claim flows from filings that point to incidents and/or policies that discriminate based upon a protected status. *Anderson v. Clovis Mun. Schs.*, 265 Fed.Appx. 699, 706 (10<sup>th</sup> Cir. 2008) (unpublished) (holding that hostile work environment claim reasonably flows from charge which identifies the complainant’s protected status and points to discriminatory incidents occurring over a period of time). It was thus not necessary for Dr. Tudor to use the “magic words” of “hostile workplace

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<sup>11</sup> See, e.g., Declaration, Exhibit A at 4 (claiming discrimination on the basis of sex generally); Declaration, Exhibit B at 2 (claiming status as transgender woman); Exhibit C at 1–2 (claiming harassment based on gender).

<sup>12</sup> See, e.g., Declaration, Exhibit A at 2 (referencing “odious bullying,” “hostile attitude arising from discrimination,” alleging that Dr. Scoufos demanded that Tudor withdraw her tenure application immediately without giving Tudor opportunity to think the decision over); *id.* at 4 (alleging generally that the administration took a “adversarial and hostile demeanor” toward Tudor because of her protected status and alleging white male colleagues were treated more favorably than Tudor during the tenure and promotion process during 2009–10 academic year); Declaration, Exhibit C at 1 (alleging discriminatory restroom policy listing a date range of 1 ½ years, using the terms “harassed” and “harassment,” and alleging Tudor was told by human resources employee that Dr. McMillan had searched for reasons to terminate Tudor because she is transgender); *id.* at 2 (alleging Tudor’s tenure application was spuriously denied in 2009).

environment” in order to plead such a claim. *Kalka v. Nat'l Am. Ins. Co.*, No. CIV-07-708-C, 2007 WL 4287617, at \*2 (W.D. Okla. Dec. 5, 2007). *See also Hunt v. Riverside Transp., Inc.*, 539 Fed.Appx. 856, 859 (10<sup>th</sup> Cir. 2013) (unpublished) (observing that a hostile work environment claim is adequately exhausted where, even if not the phrase “hostile work environment” is absent from filings, the filings *describe* a hostile work environment).

As to her Complaint, Dr. Tudor pled that her filings with the DOE and the EEOC (Doc. 24 ¶¶ 6–7) included a hostile environment component (*id.* ¶ 115) (“This complaint specifically referenced “odious bullying” “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.”). This is sufficient to render her hostile work environment claim plausible.

It should be noted that Defendants contradict their own admissions,<sup>13</sup> alleging in their Motion to Dismiss that “[n]owhere in [her EEO claim] did Plaintiff allege that she was subject to a hostile work environment because of her gender.” Doc. 30 at 7. Curiously, Defendants argue that because a single transmittal letter from the DOE, attached to its brief as Exhibit 1, fails to mention the term “hostile work environment” that Dr. Tudor failed to exhaust her claims before the EEOC. However, there is no case law, statute, or regulation that teaches that exhaustion turns on what issues the EEOC or any other agency highlights for respondents in transmittal letters. Indeed, the 10th Circuit

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<sup>13</sup> Both Defendants “admit[] Dr. Tudor filed a discrimination complaint with DOE as alleged in Paragraph 115.” RUSO Answer, Doc. 29 ¶ 115; Southeastern Answer, Doc. 28 ¶ 115. *See* Doc. 24 ¶ 115 (“This complaint specifically referenced “odious bullying” “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.”).

has recognized that exhaustion turns on what issues flow from the administrative filings, not issues the EEOC discretely communicates to Defendants in other transmittals. *See, e.g., Jones*, 502 F.3d at 1185.

Lastly, Dr. Tudor notes that it is unclear whether Defendants are entitled to raise exhaustion as an affirmative defense on a motion to dismiss. The 10<sup>th</sup> Circuit has not yet explicitly decided in a published opinion what effect, if any, *Jones v. Bock*, 549 U.S. 199 (2007) has in the Title VII context.<sup>14</sup>

Because Dr. Tudor's EEOC charge met the minimal general description requirement of EEOC regulations and Dr. Tudor sufficiently alleged the same types of discrimination in her filings with the DOE and EEOC that she complained of in her Complaint in Intervention, Dr. Tudor sufficiently exhausted administrative prerequisites to suit.

### **C. DOCTRINE OF LACHES SHOULD NOT BE APPLIED**

The doctrine of laches is an affirmative defense that turns on intensive factual inquiry and thus is not an appropriate issue to be decided on a motion to dismiss. *See Patton v. Jones*, 2006 WL 2246441, at \*4 (W.D. Okla. Aug. 4, 2006) ("The laches defense raises fact questions regarding the existence of any delays, the reasons for any

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<sup>14</sup> Title VII is silent on the issue of whether exhaustion must be pled by the plaintiff or is an affirmative defense. A majority of circuits agree that it is an affirmative defense. *See, e.g., Williams v. Runyon*, 130 F.3d 568, 573 (3d Cir. 1997); *Salas v. Wisc. Dep't of Corr.*, 493 F.3d 913, 922 (7<sup>th</sup> Cir. 2007); *Little v. United States*, 794 F.2d 484, 487 n.2 (9<sup>th</sup> Cir. 1986); *Bowden v. United States*, 106 F.3d 433, 437 (D.C. Cir. 1997). The 10<sup>th</sup> Circuit has only addressed this issue directly in unpublished decisions. *See, e.g., Asebedo v. Kansas State Univ.*, 559 Fed.Appx. 668, 672 (10<sup>th</sup> Cir. 2014) (unpublished); *Martinez v. Target Corp.*, No. 09-2112, 2010 WL 2616651, at \*3 n. 2 (10<sup>th</sup> Cir. 2010) (unpublished).

such delays, the prejudice created by any delays, and the balance of equities. *These issues cannot be determined on a motion to dismiss.*”) (emphasis added). Even if the doctrine of laches *could* be properly raised at this stage, application is nevertheless improper because Defendants have failed to point to facts supporting a finding of inexcusable delay resulting in actual harm or prejudice that is legally and equitably attributable to Dr. Tudor.

Application of the doctrine of laches turns on the recognition that “stale claims” present difficulties for courts and parties, to wit, “as time elapses between the litigation and the events at issue . . . [m]emories fade; witnesses cannot be located or pass away; documentation becomes inaccessible and more difficult to interpret.” *Hutchinson v. Pfeil*, 105 F.3d 562, 565 (10<sup>th</sup> Cir. 1997). Laches consists of two elements: (a) inexcusable delay in instituting a suit and (b) prejudice or harm to Defendants flowing from that delay. *Alexander v. Philips Petroleum Co.*, 130 F.2d 593, 605 (10<sup>th</sup> Cir. 1942). Defendants bear the burden of demonstrating that both elements are satisfied *and* that application of the laches comports with principles of law and equity. *See Shell v. Strong*, 151 F.2d 909, 911 (10<sup>th</sup> Cir. 1945). Defendants have failed to satisfy their burden for at least three reasons.

**1. No delay in prosecuting administrative claims.**

Application of laches to this suit is inappropriate because Defendants have failed to demonstrate that Dr. Tudor inexcusably delayed administrative prosecution of her claims. Defendants have pointed to no facts that support a finding that Dr. Tudor inexcusably delayed initiation of the administrative proceedings. Indeed, Dr. Tudor’s Complaint reveals, on its face, that there was no delay. Dr. Tudor filed a timely charge

with the DOE on September 9, 2010, nearly eight months prior to her separation from Defendants. *See* Doc. 24 ¶ 6. Dr. Tudor was terminated on May 31, 2011. *See* Doc. 24 ¶ 119. On or about July 12, 2011—approximately forty-two days after her termination—Dr. Tudor supplemented her charge with the EEOC. *See* Doc. 24 ¶ 7. Approximately two months after her termination, Dr. Tudor supplemented her EEOC charge again. *See* Declaration, Exhibit C.

It is inappropriate to seek application of laches to a hostile work environment claim on the theory that an aggrieved employee should have complained about each and every discrete act and policy, as they occurred. As a preliminary matter, Title VII prohibits sex discrimination and thereby places an affirmative burden on employers to stay within the metes and bounds of the statute. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (recognizing employers’ “affirmative obligation to prevent violations”). The fact that Defendants now apparently wish they had not violated the statute is of no moment—it was their responsibility to take steps to ensure compliance. *See, e.g., Burlington v. Industries v. Ellerth*, 524 U.S. 742, 765 (1998) (holding employer liable for creation of hostile work environment where employer fails to exercise reasonable care to prevent and correct supervisor’s behavior).

Moreover, it also belies the very nature of a hostile work environment claim to argue that one must complain of each and every discrete act and/or policy giving rise to the claim as it occurs. “Hostile work environment claims are different in kind from discrete acts.” *Morgan*, 536 U.S. at 115. The difference lies in the fact that a hostile work environment claim is composed of a series of acts and/or policies, occurring over a period

of time, which collectively “constitute one ‘unlawful employment practice’.” *Morgan*, 536 U.S. at 116–17 (*citing* 42 U.S.C. §2000e-5(e)(1)). As articulated in her Complaint, the incidents and policies that Dr. Tudor alleges are actionable because, *taken together*, they created a hostile work environment. Doc. 24 ¶¶ 130–59. Additionally, it is well settled that a hostile work environment does not occur on any particular day, thus it is absurd that Defendants argue that Dr. Tudor should or even could have complained of the hostile work environment at some unspecified earlier date. *Morgan*, 536 U.S. at 115 (“The unlawful employment practice therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”) (quotations omitted). Though Dr. Tudor need not complaint of constitutive elements of the hostile work environment prior to the filing deadline, the Court may take notice of allegations in Dr. Tudor’s Complaint showing that, on several occasions before *and* after her termination, she sought redress of key components of her hostile work environment claim.<sup>15</sup>

To the extent that Defendants rely on *U.S. ex rel. Arant v. Lane*, 249 U.S. 367 (1919), a ninety-six year old Supreme Court case narrowly focused on the vagaries of the writ of mandamus, such reliance is misplaced. Though Dr. Tudor seeks reinstatement as a remedy for her wrongful termination claim (reinstatement *is not* sought as a remedy to the hostile work environment claim), the similarities between Dr. Tudor and the realtor in *Lane* end there. Unlike the realtor, Dr. Tudor complained of the discrimination both *before* and *after* her termination.

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<sup>15</sup> See citations and annotations, *supra* note 10.

**2. Tudor did not delay filing her private suit.**

As to Dr. Tudor's initiation of this litigation, she moved to intervene and join claims on April 9, 2015—a mere *ten days* after the United States filed its suit. Under the statute, Dr. Tudor was not privileged to file her private suit until the EEOC either issued a Notice of Right to Sue (“NORTS”) on her sex discrimination claims (which encapsulate her hostile work environment claim as it is premised on discrimination because of sex) *or* the United States filed suit. As Defendants helpfully point out, Dr. Tudor did not allege that a NORTS was issued. *See* Doc. 30 at 7, n.4. This is because no NORTS was issued on Dr. Tudor's sex discrimination allegations from which her hostile work environment claim flows. Because no NORTS was issued, Dr. Tudor could not file her private suit until after the United States filed its suit on March 30. Within ten days of the United States filing suit, Dr. Tudor invoked her statutory right to intervene and join claims. *See* 42 U.S.C. §2000e-5(f)(1) (providing the aggrieved the right to intervene in suit brought by the United States); Fed. R. Civ. P. 24(a)(1) (right to intervene where right is guaranteed by statute); Fed. R. Civ. P. 18(a) (right to join claims against defendants). This is not the stuff of delay.

To the extent that Defendants argue that Dr. Tudor should have requested a NORTS rather than intervening after the United States filed suit, such an argument is unsupported by case law. The 10<sup>th</sup> Circuit recognizes that responsibility for concluding administrative investigations, issuing NORTS, and determinations as to whether the federal government will litigate in a particular case lies with the EEOC and Department of Justice. *See generally Hiller v. Oklahoma ex rel. Used Motor Vehicle and Parts Com'n,*

327 F.3d 1247 (10<sup>th</sup> Cir. 2003). Further, courts are in agreement that complainants need not push the EEOC to issue a NORTS before the administrative investigation is complete. *See, e.g., Wyckoff v. Loveland Chrysler-Plymouth, Inc.*, No. 07-cv-01639-REB, 2008 WL 927664, at \*3 (D. Colo. Apr. 3, 2008) (“Plaintiff was entitled to allow the case to remain with the agency for further administrative review.”). Sister circuits are also in agreement that a complainant should not be punished for government delay. *See, e.g., Brown v. Continental Can Co.*, 765 F.2d 810, 815 (9<sup>th</sup> Cir. 1985) (“EEOC delays are not to be charged against private plaintiffs and . . . complainants are not required to terminate the administrative process by requesting a notice of right-to-sue.”); *Howard v. Roadway Express, Inc.*, 726 F.2d 1529, 1532–33 (11<sup>th</sup> Cir. 1984) (“The private remedy allowed by [section 706(f)(1)] is only an alternative method to obtain relief from discrimination. A plaintiff cannot be penalized for choosing to forego the alternative and electing instead to legislatively and judicially favored method of relying on the administrative processes of the EEOC.”) (quotations and citations omitted); *Holsely v. Armour & Co.*, 743 F.2d 199, 211 (4<sup>th</sup> Cir. 1984) (“decision to rely on the [EEOC’s] administrative process before initiating a private suit is not inexcusable delay”), *cert denied*, 470 U.S. 1028 (1985); *Rozen v. District of Columbia*, 702 F.2d 1202, 1204 (D.C. Cir. 1983) (holding that charging party not penalized where EEOC delayed issuance of right-to-sue notice for twenty-one months after reasonable cause determination).

### **3. No actual harm or prejudice has been demonstrated.**

Defendants chief complaint appears to be that Dr. Tudor did not immediately complain of “tortious conduct” in 2007 and that such delay “allow[ed] the passage of

time to potentially destroy or obfuscate evidence favorable to the University.” Doc. 30 at 10. Defendants further complain that the “University is now forced to muster its defenses and is deprived of the ability [to] address these concerns in a timely fashion that could have potentially averted litigation altogether.” *Id.* Neither point is sufficient to support application of laches.

Supposing that Defendants could demonstrate delay for which Dr. Tudor is personally responsible, mere delay, without demonstrating *actual* harm or prejudice, is not enough to warrant application of laches. *Garner v. Yellow Freight System, Inc.*, 19 Fed.Appx. 834, 836 (10<sup>th</sup> Cir. 2001) (unpublished). It is axiomatic that for laches to be applied, actual harm or prejudice must be demonstrated. Mere conjecture is insufficient. *EEOC v. Gard Corp.*, 795 F.Supp. 1066, 1070 (D. Kan. 1992) (“Generalized allegations of harm from the passage of time do not amount to a showing of prejudice sufficient to invoke the doctrine of laches.”).

Indeed, there is no reason to believe that Defendants’ are actually prejudiced. *See, e.g., EEOC v. Great Atlantic & Pacific Tea Co.*, 735 F.2d 69, 84 (3d Cir. 1984) (holding that prejudice must be shown by the party asserting laches). Defendants’ failure to point to specific witnesses or exculpatory evidence whose loss is attributable to the purported “delay” in prosecution speaks volumes.<sup>16</sup>

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<sup>16</sup> Defendants’ reliance on *Powell v. Zuckert*, 366 F.2d 634, 638 (D.C. Cir. 1966), an out of circuit case that carries at most persuasive value, is unavailing for at least two reasons. First, *Powell* deals with delay of sixteen months between the exhaustion of administrative remedies and initiation of litigation. There was no such delay in this case—Dr. Tudor initiated suit within *ten days* of the United States filing its complaint *and* Dr. Tudor was not privileged to file suit sooner since a NORTS was never issued

Defendants' claim that they have been "deprived of the ability [to] address these concerns in a timely fashion that could have potentially averted litigation altogether" is interesting, but unsupported by facts. Doc. 30 at 10. As discussed above, application of laches requires thorough development of facts supporting application. Though a motion to dismiss is an inappropriate vehicle, Defendants are free to pursue a motion for summary judgment. If such a motion is filed, Dr. Tudor is prepared to point to evidence showing that Defendants have been actively engaged in the administrative processes preceding this litigation which gave them ample opportunity to avoid this suit.<sup>17</sup> Given that Defendants actively engaged in administrative proceedings that delayed filing of this suit by the United States, equity cannot support application of laches. *See United States v. Guitierrez*, 839 F.2d 648, 650 (10<sup>th</sup> Cir. 1988) (recognizing circumstances in which defendant's conduct "disentitle him to the relief he seeks") (quotations omitted).

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for her sex discrimination claims. Second, the *Powell* court held that for laches to apply, the defendant must do more than point to prejudice "inherent in situations like the case, at bar" and suggested that to meet this standard defendants must point to the unavailability of specific witnesses and loss of evidence. *Powell*, 366 F.2d at 638. Just as the defendant in *Powell*, Defendants have failed to point to specific witnesses or even vaguely identify what evidence might have been lost.

<sup>17</sup> Dr. Tudor, the EEOC, and the United States have worked closely with Defendants since the letter of determination finding fault was issued in September 2012. For example, the parties attempted to conciliate in March 2013. In January 2014 Southeastern initiated settlement talks. In April 2014 mediation was attempted. Lines of communication remained intact for several months thereafter. In February 2015 the United States informed Defendants that it intended to file suit sometime in March if a settlement could not be reached. On March 9, 2015 Defendants' counsel sent a letter to the United States indicating interest in settlement and requested further information. The United States returned a letter to Defendants on March 18. It was determined by all parties shortly thereafter that a settlement could not be reached; the United States then filed suit.

**CONCLUSION**

For the foregoing reasons, Plaintiff/Intervenor Dr. Rachel Tudor respectfully asks this Court to deny Defendants' Motion to Dismiss.

Dated: June 16, 2015

Respectfully Submitted,

**/s/ Ezra Young**

Ezra Young (NY Bar No. 5283114)

Admitted *Pro Hac Vice*

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**/s/ Jillian T. Weiss**

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**/s/ Brittany M. Novotny**

Brittany M. Novotny (Okla. Bar No. 20796)

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**ATTORNEYS FOR PLAINTIFF/INTERVENOR**

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

1. UNITED STATES OF AMERICA, and	)	
	)	
2. DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
1. SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
2. THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
	)	
Defendants.	)	

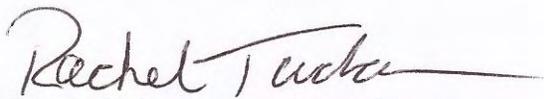
**DECLARATION OF PLAINTIFF/INTERVENOR**  
**DR. RACHEL TUDOR IN OPPOSITION TO MOTION TO DISMISS**

I, Dr. Rachel Tudor, do hereby declare as follows:

1. Annexed hereto as Exhibit A is a true and correct copy of a complaint I made to the Department of Education
2. Annexed hereto as Exhibit B is a true and correct copy of a complaint I made to the U.S. Equal Employment Opportunity Commission.
3. Annexed hereto as Exhibit C is a true and correct copy of a charge I signed and submitted to the U.S. Equal Employment Opportunity Commission.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing  
is true and correct.

June 15, 2015

A handwritten signature in cursive script that reads "Rachel Tudor". The signature is written in black ink and has a long, sweeping horizontal line extending to the right.

---

DR. RACHEL TUDOR

# Exhibit A

**Office for Civil Rights—Kansas City Office**  
**United States Department of Education**  
**8930 Ward Parkway**  
**Suite 2037**  
**Kansas City, MO 64114**

**Dr. Rachel Tudor**  
**Department of English, Humanities & Languages**  
**School of Arts and Sciences**  
**Southeastern Oklahoma State University**  
**1405 N. 4<sup>th</sup> Avenue**  
**Durant, OK 74701**  
**580.745.2588**  
**rtudor@se.edu**

SEP 7 10 6:15PM

**Re: Discrimination in Promotion and Tenure**

**Date: 31 August 2010**

Please investigate the administration of Southeastern Oklahoma State University for egregious violations of my civil rights under Federal law. Following is a brief synopsis of the pertinent dates, events, and personnel involved in violating my civil rights:

I was recommended for tenure and promotion by my department's Faculty Tenure and Promotion Committee in the Fall of 2009. Subsequently, Dean Scoufos and Interim Vice President for Academic Affairs McMillan denied my application for tenure and promotion. Dean Scoufos steadfastly refused to disclose her reasons for not supporting the recommendation of EHL's Tenure and Promotion Committee (Exhibit A). Dr. McMillan not only refused to disclose his reasons, he also refused to even meet with me (Exhibit B). I appealed to the Faculty Appellate Committee to review their behavior as inconsistent with Southeastern's policy and practice (Exhibit C). The Faculty Appellate Committee supported my point of view and issued a recommendation that Dean Scoufos and Dr. McMillan explain the rationales for their decisions. However, instead of respecting the common sense approach recommended by the Faculty Appellate Committee and honoring their wisdom, they contacted legal counsel and requested a legalistic legerdemain to avoid extending to me the same spirit of cooperation and collegiality that was recently freely extended to a white male candidate for tenure and promotion in my department (Exhibit D, para 3). At this point, I need to call your attention to Dr. Charles Weiner's (Assistant Vice President for Academic Affairs) role in events. The Faculty Appellate Committee met and rendered a judgment in my favor on March 22<sup>nd</sup>, however Dr. Weiner did not inform me of the Committee's decision until April 29<sup>th</sup> (Exhibit

D, see date). Policy states unequivocally that I have the right to be informed of the Committee's decision within ten days of the rendering of a verdict. It is not only inexcusable that Dr. Weiner waited five weeks to inform me of the Committee's decision, but his deliberate delay in violation of policy is evidence of collaboration between parties in the administration to delay and hinder my rights to due process and equal treatment. As a matter of fact, before I was informed of the Committee's decision the most egregious breach of my right to due process and equal opportunity for advancement in employment occurred. On April 6<sup>th</sup> I was summoned to Dean Scoufos' office. Dean Scoufos demanded that I immediately withdraw my application for tenure and promotion. When I asked for some time to think about it, she said that if I did not immediately withdraw my application, I would not be allowed to reapply in academic year 2010-2011. I mentioned that policy states tenure-track faculty have six years to apply for tenure, and I was only in my fifth year. She responded that the policy simply says tenure-track faculty "may" apply, it does not say that tenure-track faculty "must" be allowed to apply. When I did not immediately fold, she said, "you may think you are safe because the date for non-renewal of your contract without cause has passed, but you may still be non-renewed with cause if you don't withdraw your application." I asked her if she was speaking on her own authority or on behalf of Dr. McMillan. Dean Scoufos said that she was speaking on behalf of Dr. McMillan and President Minks. She said that they had met and decided to demand that I withdraw my application and to inform me of the consequences of refusing to comply with their demand. Although I was taken aback by the threats, I placed my faith in my colleagues' judgment, both the Faculty Tenure and Promotion Committee and the Faculty Appellate Committee, and refused to withdraw my application. To me, withdrawing my application would indicate that I was rejecting the good judgment of my colleagues in my department and did not have faith in the sound judgment of my colleagues in the Faculty Senate as well as surrendering to odious bullying. These events seem incredible, but Dr. John Mischo (Chair of English, Humanities, & Languages) was a witness to the meeting with Dean Scoufos and her attempts to coerce me into withdrawing my application. On April 21<sup>st</sup> President Minks denied my application for tenure and promotion. On April 29<sup>th</sup> Dr. Weiner informed me of the Faculty Appellate Committee's recommendation and of the administration's decision not to respect its judgment (Exhibit D). On April 30<sup>th</sup> Dr. McMillan composed a letter (in response to the Faculty Appellate Committee's recommendation) stating President Minks' reasons for denying my application (Exhibit E). And, here is where another egregious violation of my rights to due process and equal rights occurs, Dr. McMillan fails to mail the letter to me until June 9<sup>th</sup> (Exhibit F), almost six weeks later. Taken individually, any one of these events evidence a hostile attitude arising from discrimination; taken collectively, they demonstrate a pattern of calculated adversarial behavior intended to thwart my equal opportunity to advancement in employment—an opportunity protected by policy and law. As a matter of fact, the actions documented are in contradistinction to Regional University System of Oklahoma (RUSO) Affirmative Action policy

5.2 (c) “to reach out to all persons, including women and racial minority members, in recruitment, placement, development and advancement.” Instead of reaching out to me, I was stonewalled, threatened, and denied timely access to vital information at every step of the process. Finally, note should be made of the purported reasons for President Minks denying my application (Exhibit E). President Minks’ letter does not indicate any “compelling reason or exceptional case” for overruling the Faculty Tenure and Promotion Committee’s judgment as required by policy. Policy states explicitly that faculty are the best judges of what constitutes substantive and meritorious contributions in their area of expertise—policy specifically eschews the type of second guessing and micromanaging described in the letter (*Policy and Procedures* 3.7.4 Role of the Faculty). As indicated by the minutia cited in his letter, President Minks clearly usurped the rights and responsibilities of the Faculty Tenure and Promotion Committee as well as undermined the principles of shared governance defined in the *Policy and Procedures Manual*. Omitted from mention in his letter are many significant contributions I have made to the university, such as designing and co-teaching a course on Native American history, literature, and law under the auspices of OSLEP (Oklahoma Scholar Leadership Enrichment Program). Most telling is his attitude toward any activities and contributions with respect to Native Americans. President Minks minimizes not only my contributions to the Native American Symposium but demeans the Symposium itself. For example, President Minks summarily dismisses my presentation at the Native American Symposium, without so much as reading the text of my presentation in order to assess its merits or consulting the English faculty, as being neither “noteworthy nor excellent” simply because it was presented at the Symposium instead of another, presumably more respectable, venue. In addition, President Minks likewise dismisses the *Proceedings* of the Native American Symposium. Astonishingly, President Minks apparently has never so much as viewed a copy of the *Proceedings* since he repeatedly affirms in his letter that he was unable to verify that I was an editor of two editions of the journal. If he had glanced at the cover of the *Proceedings*, he would have seen my name prominently displayed in bold print on the cover, along with Dr. Spencer, as an editor (Exhibit G). Copies of the *Proceedings* are readily available in Southeastern’s Native American reading room. In re-reading President Minks’ letter, I continue to be startled by the callousness with which he dismisses all things Native American. The lack of cultural appreciation is made more troubling by the fact that the letter was composed by another administrator, Dr. McMillan, who is clearly as dismissive of the value of Native American contributions to Southeastern as President Minks.

In conclusion, please note how different the experience of applying for tenure was for a white man in my department, Dr. Mark Spencer. The university president (who was Dr. Jesse Snowden) and Dr. Doug McMillan repeatedly met with Dr. Spencer, went over his tenure portfolio, instructed him how to revise it, invited him to provide supplemental material which included articles that he had submitted or planned to

submit for publication, and allowed him to fully explain and discuss his contributions to the university as well as providing him ample opportunity to proffer any “verification” required. Dr. Spencer received not only cooperation but a welcoming hand, guidance, and support to shepherd him through, what in the best of times is, a path wrought with anxiety. I do not resent Dr. Spencer’s treatment, but affirm his experience as exemplary of the type of cooperation and collegiality between administration and faculty that characterizes a healthy university. With Dr. Spencer’s experience as an exemplar, the question must be asked: why did the administration cooperate with and facilitate the tenure and promotion of a white man while adopting an adversarial and hostile demeanor toward a Native American woman? I deserve an answer to that question; but, more importantly, law and justice demands it.

Signed,



Dr. Rachel Tudor

Dept of English, Humanities & Languages  
1405 N 4<sup>th</sup> Ave, PMB 4036  
Durant, OK 74701  
580.745.2588  
rtudor@se.edu

# **Exhibit B**

**US EEOC OKLAHOMA AREA OFFICE  
215 DEAN A MCGEE AVE STE 524  
OKLAHOMA CITY, OK 73102-9926**

**Dr. Rachel Tudor  
1124 NORTH 10<sup>TH</sup>  
DURANT, OK 74701  
racheltudor3731@gmail.com**

**Re: COMPLAINT AGAINST SOUTHEASTERN OKLAHOMA STATE UNIVERSITY (Charge  
#: 564-2011-00849)**

Please find the following detailed statement of facts concerning my complaint as well as a *Chronology of Events* to help you understand the events as they unfolded in my case. My wrongful termination was the outcome of a serious of egregious violations of my rights based on gender, racial discrimination, and retaliation.

I was recommended for tenure and promotion by my department's Faculty Tenure and Promotion Committee in the Fall of 2009. Subsequently, Dean Scoufos and Interim Vice President for Academic Affairs McMillan denied my application for tenure and promotion. Dean Scoufos steadfastly refused to disclose her reasons for not supporting the recommendation of EHL's Tenure and Promotion Committee. Dr. McMillan not only refused to disclose his reasons, he also refused to even meet with me. Their refusal to disclose their reasons for denying my application violated precedent and practice. I filed a grievance with the Faculty Appellate Committee to review their behavior as inconsistent with Southeastern's policy and practice. The Faculty Appellate Committee supported my point of view and issued a recommendation that Dean Scoufos and Dr. McMillan explain the rationales for their decisions. However, instead of respecting the judgment of the Faculty Appellate Committee and honoring their wisdom, they contacted legal counsel and requested a legalistic legerdemain to avoid extending to me the same spirit of cooperation and collegiality that was recently freely extended to a white male candidate for tenure and promotion in my department the previous year. At this point, I need to call your attention to Dr. Charles Weiner's (Assistant Vice President for Academic Affairs) role in events. The Faculty Appellate Committee met and rendered a judgment in my favor on March 22, 2010, however Dr. Weiner did not inform me of the Committee's decision until April 29, 2010. Policy states unequivocally that I have the right to be informed of the FAC's decision within ten days of the rendering of a verdict. It is not only inexcusable that Dr. Weiner waited five weeks to inform me of the Committee's decision, but his deliberate delay in violation of policy is evidence of collaboration between parties in the administration to delay and hinder my rights to due process and equal treatment. On April 21, 2010, President Minks denied my application for tenure and promotion. On April 29, 2010, Dr. Weiner informed me of the Faculty Appellate Committee's recommendation and of the administration's decision not to respect its judgment. On April 30, 2010, Dr. McMillan composed a letter stating President Minks' reasons for denying my application. However, Dr. McMillan fails to mail the letter to me until June 9, 2010, almost six weeks later. Taken individually, any one of these events evidence a hostile attitude arising from discrimination; taken collectively, they demonstrate a pattern of calculated adversarial behavior intended

to thwart my equal opportunity to advancement in employment—an opportunity protected by policy and law. As a matter of fact, the actions documented are in contradistinction to Regional University System of Oklahoma (RUSO) Affirmative Action policy 5.2 (c) “to reach out to all persons, including women and racial minority members, in recruitment, placement, development and advancement.” Instead of reaching out to me, I was stonewalled and denied timely access to vital information at every step of the process. Finally, note should be made of the purported reasons for President Minks denying my application. President Minks’ letter does not indicate any “compelling reason or exceptional case” for overruling the Faculty Tenure and Promotion Committee’s judgment as required by policy. Policy states explicitly that faculty are the best judges of what constitutes substantive and meritorious contributions in their area of expertise—policy specifically eschews the type of second guessing and micromanaging described in the letter composed by VP McMillan on President’s Minks behalf (*Policy and Procedures* 3.7.4 Role of the Faculty). As indicated by the minutia cited in his letter, President Minks clearly usurped the rights and responsibilities of the Faculty Tenure and Promotion Committee as well as undermined the principles of shared governance defined in the *Policy and Procedures Manual*. Omitted from mention in his letter are many significant contributions I have made to the university, such as designing and co-teaching a course on Native American history, literature, and law under the auspices of OSLEP (Oklahoma Scholar Leadership Enrichment Program). Most telling is his attitude toward any activities and contributions with respect to Native Americans. President Minks minimizes not only my contributions to the Native American Symposium but demeans the Symposium itself. For example, President Minks summarily dismisses my presentation at the Native American Symposium, without so much as reading the text of my presentation in order to assess its merits or consulting the English faculty, as being neither “noteworthy nor excellent” simply because it was presented at the Symposium instead of another, presumably more respectable non-Native American, venue. In addition, President Minks likewise dismisses the *Proceedings* of the Native American Symposium. Astonishingly, President Minks apparently has never so much as viewed a copy of the *Proceedings* since he repeatedly affirms in his letter that he was unable to verify that I was an editor of two editions of the journal. If he had glanced at the cover of the *Proceedings*, he would have seen my name prominently displayed in bold print on the cover, along with Dr. Spencer, as an editor. Copies of the *Proceedings* are readily available in Southeastern’s Native American reading room. In re-reading President Minks’ letter, I continue to be startled by the callousness with which he dismisses all things Native American. The lack of cultural appreciation is made more troubling by the fact that the letter was composed by another administrator, Dr. McMillan, who is clearly as dismissive of the value of Native American contributions to Southeastern as President Minks. It is clearly discriminatory to devalue contributions simply because they are Native American oriented.

Please note how different the experience of applying for tenure was for a white man in my department, Dr. Mark Spencer. The university president (who was Dr. Jesse Snowden) and Dr. Doug McMillan repeatedly met with Dr. Spencer, went over his tenure portfolio, instructed him how to revise it, invited him to provide supplemental material which included articles that he had submitted or planned to submit for publication, and allowed him to fully explain and discuss his contributions to the university as well as providing him ample opportunity to proffer any “verification” required. Dr. Spencer received not only cooperation but a welcoming hand, guidance, and support to shepherd him through what in the best of times is a path wrought with anxiety. I do not resent Dr. Spencer’s treatment, but affirm his experience as exemplary of the type of cooperation and collegiality between administration and faculty that characterizes a non-discriminatory process. With Dr. Spencer’s experience as an exemplar, the question

must be asked: why did the administration cooperate with and facilitate the tenure and promotion of a white man while adopting an adversarial and hostile demeanor toward a Native American woman? I deserve an answer to that question; but, more importantly, law and justice demands it.

There is also compelling evidence that the administration discriminated against me specifically because of my gender. Dr. Virginia Parrish and Dr. Margaret Cotter-Lynch, in addition to Dr. Spencer, were also awarded tenure and promotion by the administration even though their applications were not significantly different from mine. First, I want to state that Dr. Parrish and Dr. Cotter-Lynch are both deserving of tenure and promotion, and I have the utmost respect for them. The fact that an objective evaluation of their records demonstrates that my scholarship and service record is equivalent to theirs in no way demeans their accomplishments or value. Because our records are equivalent, it is entirely disingenuous for the administration to allege deficiencies in scholarship and service in denying my application. And, it is particularly onerous for Dr. Doug McMillan to deny me the opportunity to apply for tenure in the 2010-2011 academic year because of alleged deficiencies in my scholarship when it is an indisputable fact that I had more articles accepted for publication in peer-reviewed scholarly journals than the last **three** candidates which the administration granted tenure and promotion. The administration's decision to not allow my application for tenure and promotion to proceed is clearly not based on facts, but on discrimination. A candid analysis of his memorandum halting my tenure and promotion application demonstrates that the memorandum lacks knowledge, thought, and reasons—vital safeguards against illegal acts.

It is most important to note that the awarding of tenure and promotion to two cis<sup>1</sup> women in my department does not in any way diminish the fact that the administration has discriminated against me as a trans woman. As a matter of fact, the disparate treatment of cis women and a trans woman demonstrates a profound disregard for fair and equal treatment by the administration as required by policy and law. For example, if an employer discriminated against women who have children by denying them promotion while promoting women without children; then discrimination has occurred. There are many categories of women and it is not necessary that a party discriminate against **all** categories of women to be guilty of discriminating against women. It is also pertinent to bear in mind that Southeastern Oklahoma State University, and the other universities in Oklahoma, allowed some minorities to enroll and graduate while specifically discriminating against Ada Sipuel (*Sipuel v. Board of Regents of Oklahoma*) and later placed unequal obstacles in the way of the education of George McLaurin (*McLaurin v. Oklahoma State Regents*). It is simply beyond doubt that different policies, practices, and standards are being applied to me than to other candidates, white men (Dr. Mark Spencer) and white cis women (Drs. Cotter-Lynch and Parrish), for tenure and promotion.

Finally, I would like to call your attention to the issue of retaliation for filing a complaint with the Department of Education. On October 7, 2010 Dean Scoufos informed me that Dr. Doug McMillan decided to refuse to allow me to apply for tenure and promotion. Dr. McMillan's unprecedented action is not supported by policy, procedure, or practice—and an act specifically prohibited by law

Dr. McMillan claims in his letter delivered to me October 7, 2010 that his unprecedented decision is based on his BELIEF that (1) alleged deficiencies in scholarship and service in my 2009-2010 application have not been remedied, (2) allowing my application to proceed would be a waste of the time of faculty

and administration, and (3) that there would be an “inflammation” of relations between the administration and faculty. However, he offers no evidence except his unwarranted opinion to support his belief.

In reference to claims (1) and (2), I offer the following refutation. In Dr. McMillan’s letter dated April 30, 2010, Dr. McMillan claims that the administration was unable to verify that I was a co-editor of two editions of the Native American Symposium *Proceedings*. My 2010-2011 application provides unequivocal testimony from the other editor, Dr. Mark Spencer, that I did indeed co-edit two editions of the *Proceedings*. In fact, at the time of VP McMillan’s decision I had **eight** articles accepted by peer-reviewed scholarly journals, **three** conference papers, edited **two** editions of the Native American Symposium *Proceedings*, and **one** chapter in an anthology of postcolonial literature to my credit. It is an empirical and uncontestable fact that my scholarly record significantly exceeded the scholarly record of other candidates who were granted tenure and promotion by the administration: In reference to service, of course I had another year of service to the university since my 2009-2010 application, but more importantly I have letters of reference from the Tenure and Promotion Committee members that recommended me for tenure and promotion in 2009-2010 specifying in detail my service and value to the university.

In reference to the third point in Dr. McMillan’s letter, that allowing my application to proceed would result in an “inflammation” of relations between the administration and faculty. This claim contradicts Dr. McMillan’s first and second claims inasmuch as he assumes that the Faculty Tenure and Promotion Committee will recommend me for tenure and promotion on my merits and that the administration will reject their recommendation. Dr. McMillan’s assertion is troubling on many levels. For example, it demonstrates a conscious disingenuousness in reference to claims (1) and (2). The fact is, relations were “inflamed” by Dr. McMillan’s unprecedented act of arbitrarily and unilaterally suspending the right<sup>ii</sup> of tenure-track faculty to address any alleged deficiencies in an application in a subsequent application for tenure and promotion within the time limits provided by RUSO 3.3.4.

Therefore, since the alleged rationales for deciding to halt my application are demonstrably spurious, it is an unassailable fact that Dr. McMillan’s decision is simply an act of retaliation for my exercising rights afforded to faculty and citizens as well as a continuation of a previously established pattern of discrimination in respect to gender and race. Specifically, the administration retaliated against me for exercising my clearly delineated rights under policy and law to file a complaint with the Department of Education in reference to discrimination.

In addition, note must be made of the fact that on December 3, 2011 the Faculty Appellate Committee unanimously ruled that I should be allowed to apply for tenure. However, the administration rewrote policy to undermine their decision. The Faculty Senate passed a resolution on February 16, 2011 requesting President Minks to honor the FAC decision and allow me to apply for tenure. The President’s response was to inform me, on February 22, 2011, that my employment will terminate at the end of the semester “without cause.” And, on March 25, 2011 the president formally rejects my final appeal of the administration’s prohibiting my tenure application. A final fact for your consideration—on April 25, 2011 the Faculty Senate awards me the Faculty Senate Award for Excellence in Scholarship. Can there be a more compelling piece of evidence that the administration has acted with malice and bigotry than for the faculty to publically repudiate the administration’s claim that the sole motivation of their acts was to preserve the academic integrity of the institution?

For all of the foregoing reasons, there is no doubt that the administration of Southeastern Oklahoma State University has violated my rights in respect to race, gender, and protection from retaliation.

Sincerely,



Rachel Tudor

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<sup>1</sup> *Cisgender* can be used in place of less accurate terms such as *biological* or *genetic* male or female since transgender people are also "biologically" (and not made from some non-biological material), while the "genetically"-argument fails when one considers the genetic variations present in intersex people. *Born* male or female is equally inaccurate, since transgender and transsexual people feel that they are born with a male or female gender identity irrespective of their physiological sex. The use of the term *real* male or female is both inaccurate, because each and every point that is usually attributed to "real" (=cisgender) women either does not apply to all cisgender women either, or to transwomen and/or many intersex women as well, or to transmen as well, who are usually not counted as "real women". (The same of course applies to "real men".) When used comparatively these expressions are often seen as disrespectful to and by transgender and transsexual people. (From *WordIQ.com*)

<sup>ii</sup> A "right" in a democratic society may be defined as a practice which is routine and expected. Indeed civil society depends upon members of society interacting with one another in predictable and equitable ways.

## Chronology 2009-2011

**15 October 2009:** I apply for tenure and promotion.

**18 November 2009:** The Faculty Tenure and Promotion Committee recommends me for tenure AND promotion.

**29 November 2009:** Dr. John Mischo, the Chair of the Department of English, Humanities & Languages recommends me for tenure AND promotion.

**14 January 2010:** Dean Lucretius Scoufos recommends that I be denied tenure and promotion.

**10 February 2010:** Dr. Douglas McMillan, Interim Vice President for Academic Affairs recommends that I be denied tenure and promotion.

**February 2010:** Dean Scoufos and Dr. McMillan refuse to offer any explanation for their decisions.

**26 February 2010:** I file a grievance requesting that Drs. Scoufos and McMillan reveal why they rejected my application.

**22 March 2010:** The Faculty Appellate Committee recommends that Drs. Scoufos and McMillan reveal their rationale for rejecting my application.

**6 April 2010:** Dean Scoufos demands that I withdraw my application immediately. I decline. The administration later characterizes this as a "compromise" solution.

**21 April 2010:** President Minks denies my application for tenure and promotion.

**29 April 2010:** Dr. Charles Weiner officially informs me of the FAC's decision as well as the President's decision not to comply with their recommendation in reference to Scoufos and McMillan, but since policy specifically requires him to reveal his rationale—he commissions Dr. McMillan to compose a statement.

**9 June 2010:** I receive a letter from Dr. McMillan (**dated 30 April**) in the President's name informing me of the rationale for the President's decision—although policy states unequivocally that there must be "compelling reasons" or "exceptional circumstances" for the administration to reject the recommendation of the faculty, none is given (*Policy and Procedures Manual, Role of the Faculty 3.7.4*). Instead a brief paragraph demeaning my accomplishments and claiming that some of my publications could not be verified was proffered. One of the most preposterous claims was that the administration was "unable to verify" whether I edited two journals. What is ludicrous about the claim is that the co-editor is one of my senior, tenured colleagues, Dr. Mark Spencer.

**August 2010:** I inform the Chair of the Department of English, Humanities & Languages that I will be applying for tenure and promotion.

**31 August 2010:** I file a discrimination complaint with the US Dept of Education's Office for Civil Rights.

**September 2010:** The Department of English, humanities, and languages forms a Tenure and Promotion Committee to review my application.

**September 2010:** SOSU is informed by the Dept of Education of my discrimination complaint.

**5 October 2010:** Doug McMillan, Interim Vice President of Academic Affairs, issues a memo prohibiting my application for tenure and promotion.

**11 October 2010:** I file a grievance with the Faculty Appellate Committee to allow my application to proceed.

**3 December 2010:** The Faculty Appellate Committee unanimously recommends that my application be allowed to proceed and forwards its decision to the President's Appointee (Ross Walkup).

**3 January 2011:** Ross Walkup writes a letter notifying the FAC of his rejection of their judgment.

**19 January 2011:** The Faculty Senate passes a resolution to include "sexual orientation and transgender" in its antidiscrimination policy and identifies "gender based harassment" as a form of sexual harassment to be in compliance with Title IX (Dept of Education's 26 October 2010 *Colleague Letter*).

**31 January 2011:** Bryan Clark, the administrator handling SOSU's grievance paperwork, informs me that Ross Walkup does not concur with the decision of the FAC and that new policy has been written which requires me to appeal Ross Walkup's decision to the President.

**7 February 2011:** I send Bryan Clark a list of objections to the new policy as well as my objection to initiating new policy without informing faculty (*ex parte*).

**16 February 2011:** The Faculty Senate passes a resolution requesting President Minks to honor the decision of the Faculty Appellate Committee.

**22 February 2011:** I am informed that my employment at Southeastern will terminate 31 May 2011 "without cause".

**4 March 2011:** I file my appeal of Mr. Ross Walkup's "recommendation" with the President's office.

**25 March 2011:** President Minks rejects my appeal. This concludes all available remedies under SOSU policy.

**25 April 2011:** Presented with the Faculty Senate Recognition Award for Excellence in Scholarship.

# Exhibit C

### CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

FEPA

EEOC

**564-2011-00849**

### Oklahoma Human Rights Commission

and EEOC

State or local Agency, if any

Name (indicate Mr., Ms., Mrs.)

**Rachel Tudor**

Home Phone (Incl. Area Code)

Date of Birth

Street Address

City, State and ZIP Code

**1124 N. 10th, Durant, OK 74701**

Named is the Employer, Labor Organization, Employment Agency, Apprenticeship Committee, or State or Local Government Agency That I Believe Discriminated Against Me or Others. (If more than two, list under PARTICULARS below.)

Name

**SOUTHEASTERN OKLAHOMA STATE UNIVERSITY**

No. Employees, Members

**201 - 500**

Phone No. (Include Area Code)

**(580) 745-2500**

Street Address

City, State and ZIP Code

**1405 North 4th Ave., P.M.B. 4236, Durant, OK 74701**

Name

No. Employees, Members

Phone No. (Include Area Code)

Street Address

City, State and ZIP Code

DISCRIMINATION BASED ON (Check appropriate box(es).)

- RACE
- COLOR
- SEX
- RELIGION
- NATIONAL ORIGIN
- RETALIATION
- AGE
- DISABILITY
- GENETIC INFORMATION
- OTHER (Specify)

DATE(S) DISCRIMINATION TOOK PLACE

Earliest: **10-15-2009** Latest: **05-31-2011**

CONTINUING ACTION

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

- I. I have been employed with Respondent since on or about August 2004. I was on track to receive tenure and/or promotion.
- II. In the summer of 2007, I informed Dr. John Mischo, Chair of the Department of English, Humanities & Languages, that I was transitioning from male to female gender. In or around the Fall of 2007, I had changed my name and began outwardly presenting myself as a female.
- III. Dr. Mischo communicated my gender transition to members of the Administration, and the reaction was negative. At this time, I began to be subjected to different terms and conditions of employment, discriminated and harassed based on gender, and religion, and was required to use segregated restroom facilities. For example, Dr. Douglas McMillan, Interim Vice President for Academic Affairs, made an inquiry to Human Resources ("HR") to see if I could be terminated because "my lifestyle offends his [religious] beliefs." I also was instructed by HR to only use a single-stall handicap bathroom on a different floor than where my office is located.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

NOTARY - When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

*Rachel Tudor*

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

EEOC Form 5 (11/09)

### CHARGE OF DISCRIMINATION

This form is affected by the Privacy Act of 1974. See enclosed Privacy Act Statement and other information before completing this form.

Charge Presented To: Agency(ies) Charge No(s):

FEPA

EEOC

564-2011-00849

### Oklahoma Human Rights Commission

and EEOC

State or local Agency, if any

THE PARTICULARS ARE (If additional paper is needed, attach extra sheet(s)):

- IV. On or about October 15, 2009, I applied for tenure and/or promotion. Although qualified and recommended for tenure and/or promotion by the Faculty Tenure and Promotion Committee and my Department Chair, I was denied tenure and/or promotion on or about February 2010. No explanation was given. On or about February 26, 2010, I filed a grievance requesting that the Administration reveal why my tenure and/or promotion was denied. On or about June 9, 2010, I received a letter from Dr. McMillan demeaning my Native American heritage and contributions, but still with no legitimate reason for denying me tenure and/or promotion.
- V. On or about August 2010, I informed my Department Chair that I would again be applying for tenure and/or promotion. On or about August 31, 2010, I filed a discrimination complaint with the U.S. Department of Education's Office for Civil Rights. In or about September 2010, Respondent was informed of my complaint of discrimination. Shortly thereafter, I was subjected to further discrimination and/or unlawful retaliation, including when Dr. McMillan issued a memo prohibiting my re-application for tenure and/or promotion on October 5, 2010. On or about October 11, 2010, I filed a second grievance with Respondent, alleging unlawful discrimination and/or retaliation. On or about February 22, 2011, I was subject to continued discrimination and/or retaliation, including when I was informed that my employment with Respondent will terminate "without cause" on May 31, 2011.
- VI. No reason was given for the different terms and conditions of employment. No reason was given for the discrimination and harassment based on sex, or religion. No reason was given for the segregated facilities. No legitimate reason was given for denying me tenure and/or promotion. No reason was given for the retaliation. No reason was given for my termination.
- VII. I believe I have been discriminated against and harassed because of my sex (including gender stereotypes associated with my sex); religion; and retaliation for participating in protected activity, in violation of Title VII of the Civil Rights Act of 1964, as amended.

I want this charge filed with both the EEOC and the State or local Agency, if any. I will advise the agencies if I change my address or phone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the above is true and correct.

NOTARY - When necessary for State and Local Agency Requirements

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT

*X Rachel Stebbins*

SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE (month, day, year)

**CASE NO. CIV-15-324-C**

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

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**UNITED STATES OF AMERICA, Plaintiff,  
RACHEL TUDOR, Plaintiff/Intervenor**

**v.**

**SOUTHEASTERN OKLAHOMA STATE UNIVERSITY, and  
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,**

**Defendants.**

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**DEFENDANTS' SECOND MOTION IN LIMINE**

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**August 11, 2016**

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

**Case No. CIV-15-324-C**

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY SYSTEM  
OF OKLAHOMA,

Defendants.

**DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY  
AND THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S  
SECOND MOTION IN LIMINE**

In this case alleging that Defendants denied tenure to Dr. Tudor because of her sex, Plaintiffs offer the testimony of Dr. Robert Dale Parker as a purported expert seeking to testify that Dr. Tudor merited tenure based on her teaching, scholarship, and service, and based on the granting of tenure to some of Dr. Tudor's colleagues. But such "tenure experts" (if such a thing exists), who seek to testify that a candidate's employer objectively should have hired her, have consistently been rejected by courts. The decision to grant tenure, and the myriad components involved in that decision such as the evaluation of the merits of (sometimes arcane) scholarship, is an inherently subjective inquiry. Thus, courts have uniformly rejected invitations to determine whether a university's tenure decision was objectively "wrong" or to second-guess a school's

evaluation of candidates' relative merits for tenure, and have thus also consistently excluded or disregarded testimony from experts purporting to show the same. While a court must certainly inquire as to whether the reason for tenure rejection was unlawful discrimination, that is not the subject of the expert testimony offered here.

Instead, Dr. Parker seeks to perform the role of tenure overseer, evaluating four candidates who were granted tenure and Dr. Tudor and, from his opinion on the strengths of their portfolio, deciding whether Dr. Tudor too should have been granted tenure. But Dr. Parker has no expertise in the field of granting tenure—he is just an English professor, however accomplished. In any event, Dr. Parker's report is filled primarily with subjective determinations about the inherently subjective decision of whether to grant tenure. Such testimony does not meet the rigorous standards of reliability under Rule 702 for admissible expert testimony, especially where the expert, like Dr. Parker, compares so few candidates, ignores relevant information, and does not even attempt to compare Dr. Tudor with other candidates who were also denied tenure.

Even if such testimony could be considered objectively “reliable,” it is not relevant to this case. Courts have consistently rejected the argument that whether a particular candidate “deserved” tenure is relevant to whether they were invidiously discriminated against. Rather, the relevant question is whether university officials lied about their reasons for denying tenure, because their reasons were instead unlawful discrimination. Dr. Parker provides no testimony on that topic, and rightfully so, since any such testimony is also outside the parameters of appropriate expert testimony under Fed. R. Evid. 702. Finally, the simple compare and contrast between the portfolios of five

candidates done by Dr. Parker—measuring how many articles each published, or how many teaching awards they won, etc.—is a task easily performed and understood by a jury without need for an expert. Because Dr. Parker’s testimony does nothing to assist the trier of fact in interpreting or understanding the objective facts, the illusion of “expertise” being brought to bear would only serve to unfairly prejudice the case.

For these reasons, Defendants Southeastern Oklahoma State University (“SEOSU”) and The Regional University System of Oklahoma (“RUSO”) (collectively “Southeastern”) ask the Court to exclude the testimony of Dr. Parker because it is improper under Rule 702 and does not meet the applicable standard of admissibility for expert testimony.

### **ARGUMENT**

Rule 702, which governs the admissibility of expert testimony, provides that:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

This Rule “establishes a standard of evidentiary reliability” that “requires a valid connection to the pertinent inquiry as a precondition to admissibility,” mandating that the trial judge must evaluate the “testimony’s factual basis, data, principles, methods, or their application” to “determine whether the testimony has a reliable basis in the knowledge and experience of the relevant discipline.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137,

149 (1999) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 590-92 (1993)). The proponent of the proffered testimony bears the burden of establishing that it meets the admissibility requirements by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175 (1987).

As an initial matter, Dr. Parker is not qualified to testify as an expert as to whether SEOSU incorrectly (let alone unlawfully) denied tenure to Dr. Tudor, by their own standards or by national standards. Although Dr. Parker certainly appears to be an accomplished professor in English, he does not have any credentials as an expert on tenure decision making. He may or may not have sat on some tenure review committees, but the tenure process is not his field of study, nor does he go around the country consulting on how to make tenure decisions. But even if Dr. Parker is qualified to testify as a “tenure expert,” for the reasons given below, that testimony should not be permitted under Rule 702.

**I. DR. PARKER’S SUBJECTIVE OPINIONS DO NOT MEET THE RELIABILITY STANDARD OF RULE 702.**

**A. Tenure decisions are inherently subjective and thus not subject to expert analysis attempting to prove they were objectively incorrect.**

Under Rule 702, an expert’s testimony must be based on “knowledge,” which “connotes more than subjective belief.” *Daubert*, 509 U.S. at 590.<sup>1</sup> But court after court has held that the topic on which Dr. Parker offers his “expert” testimony—whether Dr.

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<sup>1</sup> See also *United States v. Charley*, 189 F.3d 1251, 1267 (10th Cir. 1999) (rejecting testimony that relied on subjective views); *Wayne v. Shadowen*, 15 F. App’x 271, 285 n.24 (6th Cir. 2001) (rejecting purported expert testimony on relative quality of schools because it contained “conclusory value judgements” and “subjective philosophical judgments”).

Tudor was more or less deserving of tenure than others who had received that promotion at SEOSU—is an inherently subjective inquiry.<sup>2</sup> Thus, “tenure decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions in general.” *Carlile v. South Routt School Dist. RE-3J*, 739 F.2d 1496, 1500 (10th Cir. 1984). Not surprisingly, Dr. Parker’s report is laden with subjective statements and evaluations of Dr. Tudor’s and others’ relative merits for tenure. Because such testimony is entirely outside any field of objective inquiry in which someone can provide “expert” testimony, and because it fails to meet the reliability standards of Rule 702, Dr. Parker’s testimony should be excluded.

The Northern District of Indiana recently issued a comprehensive opinion demonstrating why purported “tenure” experts do not meet the standards of Rule 702. In *Goswami v. DePaul University*, the court addressed proffered expert testimony on a behalf of a professor who was denied tenure and who alleged the denial was because of her gender, race, color, and national origin. 8 F. Supp. 3d 1019 (N.D. Ill. 2014). In support of her claim, the professor offered the testimony of six professors (four in her

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<sup>2</sup> See, e.g., *Thrash v. Miami University*, 549 F. App’x 511, 2014 WL 929152, 8-9 (6th Cir. 2014); *Adelman-Reyes v. Saint Xavier Univ.*, 500 F.3d 662, 667 (7th Cir. 2007); *Gupta v. Board of Regents of University of Wisconsin System*, 63 F. App’x 925, 928 (7th Cir. 2003); *Babbar v. Ebadi*, 216 F.3d 1086 (10th Cir. 2000) (Unpublished Table Opinion); *Jiminez v. Mary Washington College*, 57 F.3d 369 (4th Cir. 1995); *Gottlieb v. Tulane Univ. of Louisiana*, 809 F.2d 278, 283 n. 6 (5th Cir.1987); *Lovelace v. Southeastern Massachusetts University*, 793 F.2d 419, 422 (1st Cir.1986); *Namenwirth v. Board of Regents of University of Wisconsin System*, 769 F.2d 1235, 1243 (7th Cir.1985); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir.1984); *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir.1980); *Clark v. Whiting*, 607 F.2d 634, 639–40 (4th Cir.1979); *McNaught v. Virginia Community College System*, 933 F.Supp.2d 804, 823–24 (E.D.Va. 2013); *Leach v. Baylor College of Medicine*, 2009 WL 385450, 23–24 (S.D. Tex. 2009); *El-Ghori v. Grimes*, 23 F.Supp.2d 1259, 1268-1269 (D. Kan. 1998).

field) who offered their opinion that she deserved tenure, and who evaluated the merits of her scholarship, “describ[ing] her work in such undeniably subjective terms as: careful, innovative, vital, thought provoking, outstanding, [etc.].” *Id.* at 1022. In addition to evaluating the quality of her work, the plaintiff’s proposed experts noted the quantity of her publications, the prestige of the publications in which her works was published, the potential impact of her work, and that, in their experience as tenure reviewers, she would have received promotion and tenure at their respective universities, especially in comparison to other candidates they have reviewed. *Id.* at 1023-29.

The court rejected this testimony as inadmissible under Rule 702, noting “the uniform line of authority explicitly holding that evaluations of scholarship are inherently subjective” and “the absence of fixed, objective criteria for tenure decisions,” both of which meant that the proffered experts’ testimony failed to provide evidence that the Universities’ decision was objectively wrong, much less discriminatory. *Id.* at 1033-35. The court reached that conclusion after an exhaustive review of the case law, which has almost universally rejected such “tenure expert” testimony, and summed up the reasons for rejection with a simple analogy:

Suppose Dr. Goswami submitted a manuscript to a publisher 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—depending on ultimate sales—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. Accordingly, we must conclude that Dr. Goswami has not met her burden of demonstrating her proffered expert opinions are admissible under *Daubert* and Fed.R.Evid. 702.

*Id.* at 1039.

The same can be said of Dr. Parker's proposed expert report in this case. Dr. Parker claims to rank five SEOSU professors based on how much they deserved tenure according to his evaluation of their teaching, scholarship, and service, but each of those evaluations—and the ranking as a whole—cannot be described as anything but subjective. For example, on teaching, he gives Dr. Tudor high (but unquantified) marks for teaching because of her “impressively written” descriptions of the courses she taught that show “admirable adaptability” and “reveal a carefully reasoned teaching imagination.” *See Parker's Expert Report*, attached as Exhibit 1, at 6. He also comments on her “extraordinary syllabi,” which is “among the best I have ever seen,” though he notes that “the font of the syllabi is too small.” *Id.* at 7. Meanwhile, he criticizes another professor who was given tenure, Dr. Spencer, opining that his teaching was not as good as Tudor's 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 7-8.

Dr. Parker's evaluation of scholarship is, if possible, even more subjective. Although he attempts to inject some illusory objectivity into the analysis—the length of publication and the selectivity of periodicals in which scholarship is published—it is obvious that tenure decisions are not primarily made by stacking up the publications of candidates and seeing which one is taller. Dr. Parker admits that “actually reading [the candidate's] publications” is “the more responsible path.” *Id.* at 19. Thus, Dr. Parker's analysis focuses on his subjective evaluation of each candidate's work. But while he

claims to specialize in some of the same fields as Dr. Tudor, he admits that he is not a specialist in many of the genres of the other professors he is evaluating—such as Dr. Cotter Lynch’s work in early medieval women’s writings—and therefore it cannot be said he gives a reliable opinion as to the quality of their works (or the works’ comparative quality in relation to Dr. Tudor’s works). *See id.* at 13. Despite his admitted shortcomings, Dr. Parker provides subjective evaluations of the candidate’s work, describing Tudor’s publications as “sophisticated and well-informed,” “genuinely critical yet still sympathetic,” and “knowledgeable, intelligent, and wise,” while claiming that one of Dr. Barker’s articles was “slow-moving and too long.” *Id.* at 14, 19, 22. As the *Goswami* decision and the myriad cases it cites makes clear, such subjective opinions are not reliable evidence of an erroneous tenure decision—much less sex discrimination—that is admissible under Rule 702.

The lack of reliability is made more certain by applying any of the factors used in a *Daubert/Kumho* analysis. Dr. Parker’s rank-ordering system does not employ an objective methodology (1) that has been subjected to peer review; (2) that has a known or potential rate of error or has objective standards controlling the technique’s operation; (3) or that has been generally accepted by the tenure-review community. *Kumho*, 526 U.S. at 145. Nor does Dr. Parker, who is a professor of English and not part of any field that studies tenure practices, (5) “testify about matters growing naturally and directly out of research [he has] conducted independent of litigation, [rather than] hav[ing] developed [his] opinions expressly for the purpose of testifying,” nor has he (6) “accounted for obvious alternative explanations”; or demonstrated that (7) his ranking system is “known

to reach reliable results for the type of opinion the expert would give.” Fed. R. Evid. 702, Advisory Committee Notes.

“[T]here is no common unit of measure by which to judge scholarship.” *Zahorik v. Cornell Univ.*, 729 F.2d 85, 93 (2d Cir.1984). “[T]enure decisions have always relied primarily on judgments about academic potential, and there is no algorithm for producing these judgments.” *Namenwirth*, 769 F.2d at 1242-43. “A teacher’s competence and qualifications for tenure ... do not lend themselves to precise qualifications and are not susceptible to mechanical measurement.” *Clark v. Whiting*, 607 F.2d 634, 639-640 (4th Cir. 1979). For this reason, courts have repeatedly stated that “it is not the function of the courts to sit as ‘super-tenure’ committees,” nor is it a plausible role for Dr. Parker. *Thrash*, 549 F. App’x at 521. Given the inherently subjective nature of tenure decisions, Dr. Parker’s proffered expert opinion on the matter is fundamentally unreliable. Rather, it will only serve to confuse and unduly prejudice the jury by putting a veneer of objectivity on an inherently subjective topic.

**B. Numerous flaws in Dr. Parker’s analysis make it unreliable.**

Even assuming such subjective testimony could be countenanced under Rule 702, other factors demonstrate Dr. Parker’s lack of reliability. Under Rule 702 “any step that renders the analysis unreliable . . . renders the expert’s testimony inadmissible.” *In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 745 (3d Cir. 1994).

First, Dr. Parker attempts to prove that Dr. Tudor is deserving of tenure based on the granting of tenure to four other peers. But such a small sampling cannot be the basis of a meaningful comparison, especially in a process that involves so many subjective

variables as tenure selection. In cases involving comparisons of similarly situated individuals, sample sizes that are too small render the expert testimony unreliable. *See, e.g., 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) (citing *Mayor of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 621 (1974); *Martinez v. Wyoming*, 218 F.3d 1133, 1138-39 (10th Cir.2000)); *see also Blasdel v. Northwestern University*, 687 F.3d 813, 817 (7th Cir. 2012)(“[B]ecause so many factors influence the tenure process and because statistical inferences of discrimination are difficult to draw when there is only a small number of observations . . . , it can be difficult to infer the presence of an invidious influence such as the sex of the candidate merely by comparing successful and unsuccessful tenure applicants.”).

Second, Dr. Parker deliberately excludes certain important features of a theoretically robust analysis. For example, he does no analysis of those professors who were denied tenure (aside from Tudor), which might show that others with Tudor’s qualifications—or better qualifications—were also denied tenure. Similarly, Dr. Parker excludes from his consideration any scholarship performed by a candidate before arriving at the University as irrelevant to a tenure committee’s evaluation of a candidate’s ability as a scholar, Ex. 1 at 10, but he offers no evidence to show that this is the practice at Southeastern in particular, or even at most universities in general. Indeed, it would appear arbitrary for an institution to grant tenure to a candidate who has spent all of her profession at the university over another candidate who has made far greater contributions to their field but happened to be hired by the university at a later date.

Third, the lack of inclusion of potentially relevant considerations is not surprising because Dr. Parker has no personal knowledge regarding the tenure process and the deliberations at Southeastern. The sparse details provided in the Academic Policies and Procedures Manual cannot capture all the nuances in SEOSU's particular process and practice. Thus, Parker's attempt to craft a methodology regarding tenure qualifications is unreliable because of its entirely speculative nature. *Daubert*, 509 U.S. at 590.

For all these reasons, this Court should exclude Dr. Parker's testimony as unreliable and unable to meet Plaintiff's burden under Rule 702.

## **II. DR. PARKER'S TESTIMONY SHOULD BE EXCLUDED BECAUSE IT IS NOT RELEVANT.**

The reason most often given by courts rejecting "tenure expert" testimony time and time again is that it is simply not relevant to a discrimination case. As the Tenth Circuit has firmly established, courts "do not sit as 'super-personnel departments' free to second guess the business judgment of an employer." *Simms v. Oklahoma*, 165 F.3d 1321, 1330 (10th Cir. 1999), *cert. denied*, 528 U.S. 815; *see also Thrash*, 549 F. App'x at 521 ("[I]t is not the function of the courts to sit as 'super-tenure' committees" (quoting *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 129 (1st Cir. 1991))). This is especially true in this context because "[f]ederal 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." *Babbar*, 216 F.3d at 1086.

If courts are not to evaluate whether the reasons for denying tenure were incorrect, it follows that expert testimony on that topic is not relevant. Rather, the relevant inquiry

is whether Southeastern “honestly believed those reasons and acted in good faith on that belief.” *Bullington v. United Airlines*, 186 F.3d 1301, 1318 (10th Cir. 1999). In other words, “[t]he pretext inquiry focuses on whether the stated reason for the adverse employment action is in fact the reason for it—not on whether the stated reason is accurate or fair or even rational. It 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).

Dr. Parker offers no relevant testimony on this score. Rather, he proffers expert testimony purportedly showing that the university’s decision is incorrect, which, even if using the university’s own standards, is a task courts will not countenance and is irrelevant to a discrimination claim. At bottom, Dr. Parker’s proffered testimony simply seeks to express his own disagreement with the university officials’ evaluation of Dr. Tudor’s merits. 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 decision maker which is relevant.” *Ebadi*, 36 F.Supp.2d at 1279.<sup>3</sup>

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<sup>3</sup> *See also id.* (“At the very most, plaintiff’s evidence supports an inference that defendant may have misjudged plaintiff’s qualifications for tenure. Even if defendant erred in assessing plaintiff’s application for tenure, such an error is insufficient to support a showing of pretext.”); *Grimes*, 23 F.Supp.2d at 1268-1269 (“As far as his research accomplishments are concerned, plaintiff ... cites the opinion of his expert, Dr. Nelson, to support his position. Clearly, some academicians viewed the plaintiff’s research as significant. Others did not share that view ... The point here is not to determine which view is better.”); *Goodship v. University of Richmond*, 860 F.Supp. 1110, 1112 (E.D. Va. 1994) (“Goodship attempts to show that the University’s reason is pretextual by offering her own assessment that her research was satisfactory and the assessment of a purported

This is also the case because, as Judge Posner explains, the merits of a candidate may not be the only factor in making a tenure decision, and other factors—however inappropriate in a professional context—do not amount to discrimination:

[O]ffice politics frequently plays a role in the award or denial of tenure; friendships and enmities, envy and rivalry... can figure in tenure recommendations by the candidate's colleagues, along with disagreements on what are the most promising areas of research. In addition, many academics are hypersensitive to criticism, especially by younger academics, whom they suspect, often rightly, of wanting to supplant them. Although office politics and professional jealousy are bad reasons for denying tenure, an erroneous denial of tenure, as such, does not violate Title VII.

The decision making process in an academic hierarchy creates further complication. Granting tenure, like appointing a federal judge, is a big commitment. The final decision may be made by a committee, or an official such as a university provost or president, remote from the chairman and the other members of a candidate's department. Even if invidious considerations play a role in the department's recommendation for or against tenure, they may play no role in the actual tenure decision, made at a higher level.

*Blasdel*, 687 F.3d at 815-17.

For all these reasons, courts have consistently rejected or disregarded testimony as to whether a candidate deserved tenure, even in comparison to colleagues, because it is irrelevant to the determination of whether the reasons for denial of tenure are pretextual and instead the result of prohibited discrimination. *See, e.g., Babbar v. Ebadi*, 36 F.Supp.2d 1269, 1279 (D.Kan.1998), *aff'd* 216 F.3d 1086 (10th Cir. 2000); *Gupta*, 63 F. App'x at 928; *Goswami*, 8 F. Supp. 3d at 1035; *Goodship*, 860 F.Supp. at 1112-13;

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expert, not affiliated with the University, that her research is generally acceptable and certainly not deficient ... The opinions of Goodship and her expert ... have no bearing on whether the different opinions expressed by numerous University faculty members were not genuine.”).

*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). This Court should do the same.

### **III. DR. PARKER'S TESTIMONY SHOULD BE EXCLUDED BECAUSE IT WILL NOT ASSIST THE JURY AND IS UNFAIRLY PREJUDICIAL.**

Finally, to the extent that Dr. Parker's testimony relies on objective similarities and differences between Tudor and other professors granted tenure—like number of works published or number of teaching awards received—such testimony is not the proper subject of expert testimony under Rule 702 because the ease with which a lay person can observe and understand that information means that it will not “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. Expert testimony will not be admitted when it sets forth facts within “the juror's common knowledge and experience.” *United States v. Rodriguez-Felix*, 450 F.3d 1117, 1123 (10th Cir. 2006). Rather, an expert must rely on specialized knowledge and objective facts to “aid the trier of fact in his search for truth.” *Graham v. Wyeth Labs.*, 906 F.2d 1399, 1408 (10th Cir.1990).

Under this standard, Dr. Parker's proffered expert testimony is inappropriate under Rule 702. Counting and comparing the number of published articles and teaching award nominations, or parroting the tenure criteria from the Academic Policies and Procedures Manual, is “well within the ability of anyone with a grade-school education [and] is, in our opinion, more aptly characterized as a lay opinion,” not an expert opinion. *Bryant v. Farmers Ins. Exch.*, 432 F.3d 1114, 1124 (10th Cir. 2005). Dr. Parker himself admits at

the end of his report that, after observing all the information he has compiled, “the facts speak for themselves.” Ex. 1 at 26. If that is true, then Dr. Parker’s additional voice is wholly unnecessary.

The District of New Mexico rejected similar proffered expert testimony for these very reasons. In *Ram v. New Mexico Dept. of Environment*, No. CIV 05-1083, 2006 WL 4079623 (D.N.M. 2006), the plaintiffs argued that they were discriminated against on the basis of their Indian national origin. *Id.* at \*1. To support these allegations, plaintiffs submitted a statistician as an expert to analyze salary comparisons between the plaintiffs and fifty-two of their similarly situated peers. *Id.* The court found this proffered expert testimony improper under Rule 702 as both unhelpful and overly prejudicial. *Id.* at \*17. According to the court, the proffered comparison of salaries of fifty-two employees was not the type of expert testimony that helps a jury understand the facts of the case because “the magnitude of the relevant data in this case was [not] so large that a jury could not fairly analyze it without expert assistance or that the tabular and graphic representations of the data are so sophisticated that they required expert preparation.” *Id.* at \*18. Like Dr. Parker in this case, the expert in *Ram*, “[w]hile hired as an expert with impressive credentials, began to function as a paralegal, preparing descriptions or summaries of what is in the documents.” *Id.* More importantly, “expert endorsement of those tables and graphs may endow the evidence with a weight it does not deserve and which may exacerbate its tendency to mislead and amplify its prejudicial impact,” which is especially true because, as here, the testimony of the expert in *Ram* was “unreliable, and therefore the evidence’s overall probative value is diluted.” *Id.*

In the same way that the proffered testimony in *Ram* was improper, the testimony proffered by Plaintiff here fails to qualify as appropriate expert testimony. The proffered expert is certainly well-educated and has impressive credentials as an academic, but it is clear his expertise is not being utilized here for any *objective* analysis. Similar to the comparisons of salaries in *Ram*, the comparisons of portfolios here is not a proper form of expert testimony. Further, the proffered testimony is not the type that a jury needs help to understand; the data is far from sophisticated, and the sample size is five employees compared to fifty-two employees in *Ram*. For these reasons, Dr. Parker's objective testimony will not aid the trier of fact, as required by Rule 702, but will instead serve to unduly prejudice the jury, as prohibited by Rule 403.

#### **CONCLUSION**

For the foregoing reasons, Defendants SEOSU and RUSO respectfully request that this Honorable Court bar the reports, testimony, and opinions of Plaintiff's proffered tenure expert, Dr. Parker, and grant any other relief this Court deems just and proper.

Respectfully submitted,

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**Expert Report of Robert Dale Parker, Ph.D.**

*U.S. et al. v. Southeastern Okla. St. Univ. et al.*, 5:15-cv-00324-C (W.D. Okla.)

This report compares the qualifications for promotion and tenure of Professor Rachel Tudor of Southeastern Oklahoma State University (which I will refer to as “Southeastern”) to the qualifications of other faculty in Professor Tudor’s department who were granted tenure and promotion. The comparison is based on the materials in the list attached to this report. They include the promotion portfolios of Professor Tudor and of four other faculty in the Department of English, Humanities, and Languages at Southeastern: Professors Janet Leigh Barker, Margaret Cotter-Lynch, Virginia A. Parrish, and Mark Spencer. (Professor Tudor’s complete 2009 portfolio was not available. I reviewed those portions of her 2009 portfolio that were available, and I also reviewed her 2010 portfolio.)

I recognize and respect that Professors Barker, Cotter-Lynch, Parrish, and Spencer each earned promotion and tenure at Southeastern. In no way do I question their qualifications or Southeastern’s decision to recognize their qualifications. Rather, I take it as self-evident that Southeastern’s decision to award Professors Barker, Cotter-Lynch, Parrish, and Spencer promotion and tenure defines a level of qualifications that Southeastern, by its own standards, has decided merits promotion and tenure. My charge in this report is to address whether, in my carefully considered professional judgment, Professor Tudor met Southeastern’s standards for promotion and tenure, based on a comparison between her qualifications and the qualifications of her colleagues. Therefore, my assignment was not to question the qualifications of any of Professor Tudor’s colleagues. Instead, my assignment was to apply Southeastern’s official written policies for promotion and tenure to a comparison between the qualifications of Professor Tudor and the qualifications of her colleagues whose achievements were recognized as meriting promotion and tenure. In the end, I believe Tudor’s portfolios indicate that she was more qualified for promotion and tenure than some of her colleagues who received promotion and tenure, but that opinion should not be interpreted to mean that any of her colleagues whose portfolios I have reviewed here should not have received promotion and tenure.

**Credentials of the Reviewer**

I have been asked to begin this report by summarizing my credentials. I am a professor of English at the University of Illinois, where I have taught since 1984. After completing a PhD in English in 1980 at Yale University, I taught at Yale and then at the University of Michigan. A widely published scholar and a recipient of the University of Illinois’s highest awards for both undergraduate and graduate teaching, I have also received our Department of English’s award for distinguished service, been named as a University Scholar, and been awarded a named appointment (a recognition for the university’s most distinguished faculty). My teaching and scholarship have focused on the study of American literature, including Native American literature, the specialty of Professor Tudor, and on the overall study of how we can best teach about literature, interpret it, and research about it. I have participated in the deliberations for over a hundred promotions at my own university and served a two-year term on the appeals committee for promotions in the College of Liberal Arts and Sciences (serving as acting chair for part of the first year and as chair in the second year). Several times the Dean of the College or

the Provost (who oversees the entire university's faculty) have asked me to serve on special appeals committees to advise them regarding rejected cases for promotion. Colleges and universities across the United States routinely ask me to review the records and publications of faculty under consideration for promotion. I have also been elected to five-year terms on the Executive Committee of the Division on Twentieth-Century American Literature and the Division on American Indian Literatures of the Modern Language Association, and have served as chair of each of those committees. I have served as well on the faculty board of the University of Illinois Press, the scholarly book publisher housed at my university, and on the editorial or advisory boards of 5 different scholarly journals, including such distinguished journals as *American Literary History*, *Modern Fiction Studies*, and *Studies in American Fiction*. Editors working for scholarly book publishers and for scholarly journals routinely ask me to review the work of scholars whose manuscripts they are considering for possible publication. I therefore have a wide acquaintance with the expectations for college and university faculty in departments of English, with the protocols for faculty promotions, and with the evaluation of scholarship in English. (For more information about my experience and background, please see the copy of my curriculum vitae attached to this report as Exhibit 1.<sup>1</sup>)

### **Faculty Ranks, Tenure, and the Criteria for Faculty Promotions**

According to Southeastern's Academic Policy and Procedures Manual, "The academic ranks of the University are professor, associate professor, assistant professor, and instructor" (section 4.5.1 Academic Rank). While some colleges and universities have more than just the "instructor" rank for non-professorial faculty, Southeastern's distribution of faculty ranks conforms to national standards. Professorial faculty at Southeastern (assistant professors, associate professors, and professors) are on what is called the tenure track (4.6 Tenure), meaning that they either have tenure or may eventually become eligible for tenure (4.6.2 Periods of Appointment and Tenure). Nationally, promotion from assistant professor to associate professor ordinarily includes the awarding of tenure. While Southeastern does not require promotion to associate professor to accompany the award of tenure, its policies make it likely that promotion to associate professor and tenure would come together. The policies stipulate that faculty members must serve for 5 years before receiving tenure, and they normally serve those 5 years in a professorial rank (4.6.2 and 4.6.5), which for beginning professors means the rank of assistant professor. The criteria for promotion (4.5.2 Promotion in Rank) and for achieving tenure (4.6.1 Academic Tenure) are similar (although the "noteworthy achievement" standards in 4.6.5 and 4.5.2.1 differ), and the same "Promotion and Tenure Review Committee" considers candidates for promotion and for tenure (4.6.3). In each of the cases under review in this report, a decision to promote an assistant professor to associate professor has accompanied a decision to award tenure, and the same portfolio was submitted for both purposes.

According to Southeastern's Policy and Procedures Manual, "Tenure is defined as continuous reappointment which may be granted to a faculty member in a tenure-track position" (4.6.1 Academic Tenure). At Southeastern, therefore, as at other colleges and universities in the United States, when faculty earn tenure, that means that they cannot be dismissed except in the

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<sup>1</sup> For information about my hourly rate for services in connection with this case, please see Exhibit 2.

rare case of extreme circumstances (4.6.7 Causes for Dismissal or Suspension of Tenured Faculty). Tenure provides job security, but job security is not the ultimate purpose of tenure. Instead, in the American university system, tenure provides job security so that faculty will feel free to experiment and take risks in their teaching and scholarship without fearing that their experiments will put their employment at risk. For that reason, tenure lies at the foundation of the bold, innovative teaching and ambitious academic standards that have made American colleges and universities the envy of the world.

College and university professors work in three areas: teaching, research/scholarship, and service. This standard national practice matches the stated policy of Southeastern, which says that “Teaching, research, and service are the triad of professional responsibilities at the University” and that “Evaluation of faculty performance considers these three areas” (4.4.1). In that vein, Southeastern’s policies base promotions on “the faculty member’s performance in the categories of (1) effective classroom teaching, (2) scholarship, (3) service to institution, profession, and public, and (4) performance of non-teaching/administrative duties/assignments” (4.4.2 Faculty Evaluation System). Similarly, “all evaluations for tenure shall address at a minimum whether each candidate has achieved excellence in (1) teaching, (2) research or creative achievement, (3) professional service, and (4) University service” (4.6.1 Academic Tenure). As at any other school, therefore, when Southeastern considers a candidate for promotion from assistant professor to associate professor with tenure, or from associate professor to full professor, it reviews the candidate’s record in teaching, research/scholarship, and service.

Some schools define themselves as teaching schools. In teaching schools, the faculty usually teach more classes and have more modest expectations for research. Teaching schools focus decisions about promotion and tenure primarily on teaching and secondarily on research and service.

Southeastern’s “Faculty Development and Evaluation Policies” define it as “primarily a teaching University” (4.4.1 Introduction), which is the norm for regional universities. Except for faculty who are assigned non-teaching administrative duties, Southeastern faculty are supposed to be evaluated primarily on teaching. The written policies say that 15-25% of the evaluation should be based on scholarship and 15-25% on service, with the exact percentages to be negotiated, and with the remaining 50-70% of the evaluation based on teaching (4.4.2.1 Procedures). Southeastern’s policy statement consistently and repeatedly lists teaching as the first criterion for decisions about promotion and tenure. For example, it says that faculty appointed to associate professor must show “Demonstrated effective classroom teaching, research/scholarship, contributions to the institution and profession, and, in appropriate instances, successful performance of non-teaching or administrative duties” (4.5.2.1 General Guidelines). The same policy statement includes a review of the principles of “Effective Classroom Teaching” (4.5.2.2) before its parallel sections reviewing the principles of “Research/Scholarship” (4.5.2.3) and service, which it describes under the two categories of “Contributions to the Institution and Profession” (4.5.2.4) and “Performance of Non-Teaching or Administrative Duties” (4.5.2.5). The Guidelines for Achieving Tenure also list teaching first, naming “Demonstrated effective classroom teaching” before “research/scholarship, contributions to the institution and profession, and, in appropriate instances, successful performance of non-teaching or administrative duties” (4.6.5). Indeed, the same section of the Guidelines (4.6.5)

requires “Noteworthy achievement in classroom teaching,” while only requiring “at least one” of “research/scholarship, contributions to the institution and profession, or, in appropriate instances, performance of non-teaching or administrative duties.” By making noteworthy achievement in teaching a requirement without requiring noteworthy achievement in each of the other categories, Southeastern’s policies underline the central role of teaching over every other category of faculty work.

The central focus on teaching is repeated many times across the Academic Policy and Procedures Manual, with teaching always listed first, as it is in every document that I have seen from Southeastern and relating to this process. For example, the “Southeastern Oklahoma State University Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet” form begins with a section for teaching before it provides sections for scholarship and service. Southeastern’s central focus on teaching more than on scholarship and service is standard for a regional university.

### **Comparing the Portfolios: An Overview**

How then does the picture of Tudor’s teaching, scholarship, and service, as represented by her 2009 and 2010 portfolios, compare to the picture of teaching, scholarship, and service in the promotion portfolios of the other candidates? To make that comparison, we must take into account the results of the promotion process for each candidate.

Overall, Cotter-Lynch’s portfolio indicates the strongest case for promotion and tenure among all the portfolios. After that, with Tudor’s 2009 portfolio as a gauge for comparison, I rank Professor Spencer’s and Tudor’s portfolios tied for second strongest, followed closely by Professor Barker’s portfolio. Spencer’s portfolio indicates the strongest service record, with a record equal to Tudor on teaching and below Tudor on scholarship.

As I will indicate below, Barker’s portfolio presents a slightly less convincing case for the strength of her teaching than we see in the portfolios of Tudor or Spencer. It also presents a scholarly profile stronger than Spencer’s, roughly equivalent to or slightly stronger than Tudor’s in 2009, while not nearly as strong as Tudor’s in 2010.

Next, I rank Parrish’s portfolio fifth out of the five portfolios (or sixth out of six, when we include Tudor’s 2010-2011 portfolio). Parrish ranks roughly in the same range as Barker, Spencer, and Tudor in the factual information provided about teaching, lower than Spencer in service, and lower than all the others in scholarship. As noted above, I do not question Parrish’s qualifications for promotion and tenure. Quite the contrary. I trust Southeastern’s decision to award her the promotion and tenure that she earned. But the portfolios show an even stronger record for Tudor than they show for Parrish. Given that Parrish’s record was recognized as worthy of promotion and tenure, it follows logically that a reasonable observer of the portfolios would conclude that Tudor’s even stronger record would also win recognition as worthy of promotion and tenure.

The comparisons change when Tudor’s 2010 portfolio, with its additional publications and testimonials from colleagues, is considered in place of her 2009 portfolio. While Cotter-

Lynch still ranks first, I see Tudor as a strong second, well above Spencer, Barker, and Parrish. I see no reasonable grounds for ranking Tudor's 2010 portfolio anywhere below second. The comparisons below will explain the observations and logic behind these conclusions.

<b>Summary of rankings</b>				
	<b>Overall</b>	<b>Teaching</b>	<b>Scholarship</b>	<b>Service</b>
1	Cotter-Lynch	Cotter-Lynch	Cotter-Lynch	Cotter-Lynch
2	Tudor 2010-2011	Tudor 2010-2011	Tudor 2010-2011	Spencer
3	Spencer, Tudor 2009-2010	Parrish, Spencer, Tudor 2009-2010	Barker, Tudor 2009-2010	Everyone else, roughly
4	(tie, as noted in row 3 above)	(tie, as noted in row 3 above)	(tie, as noted in row 3 above)	(tie, as noted in row 3 above)
5	Barker	(tie, as noted in row 3 above)	Spencer	(tie, as noted in row 3 above)
6	Parrish	Barker	Parrish	(tie, as noted in row 3 above)

### **Teaching**

None of the documents anywhere in the array of documents I have been provided questions the high quality of Tudor's teaching. In Tudor's 2010 promotion portfolio, there is extensive documentation of her effective teaching from before the date of the 2009 portfolio, including two very favorable letters reporting classroom observations of her teaching by her department chair, Professor John Brett Mischo, one from February 2007 and one from March 2009. The 2010 portfolio also includes very favorable reports of classroom visits by Professor Randy Prus from April 2006 and February 2009 as well as an unsigned 2008 department chair's summary of student evaluations, presumably written by Mischo. The summary is very favorable. For example, it twice reports that "Responses were overwhelmingly positive."

The 2010 portfolio also provides yet more testimony in praise of Tudor's teaching in a very favorable letter reporting a May 2010 classroom observation from Professor F. Daniel Althoff, as well as extremely favorable letters from September 2010 reporting on Tudor's

teaching (and on her scholarship and service) from Professors Paula Smith Allen, Parrish, and Spencer and from the director of the Honors Program, Professor Lisa L. Coleman. Collectively, these letters and evaluations, along with nominations for a teaching award in both 2008 and 2009, present an extremely strong picture of Professor Tudor's excellence in teaching at Southeastern.

The question arises, then, how the record of Tudor's teaching, as represented by her 2009 and 2010 portfolios, compares to the record of teaching in the portfolios of the other candidates for promotion, namely, Professors Barker, Cotter-Lynch, Parrish, and Spencer. While I have done my best to compare the different portfolios' records of teaching, the evidence in their portfolios does not point to large differences between most of the candidates. All the candidates show strong teaching records.

### Cotter-Lynch

I rank Cotter-Lynch's teaching more highly than Tudor's primarily because Cotter-Lynch was nominated for a teaching award each year she has taught at Southeastern, and in 2007 she also won the teaching award. The nominations and the award seem like a strong sign of excellent teaching. Other evidence also testifies to a strong record of teaching for Cotter-Lynch. The letters from senior colleagues who have observed her teaching are strong, as they are for Tudor. Like many of the other candidates' portfolios, Cotter-Lynch's portfolio includes sample syllabi. (Syllabi are course plans distributed to the students. They typically describe course goals, procedures, assignments, schedules, and other information about the course.) Cotter-Lynch's sample syllabi, representing 3 of the 9 different courses she has taught, are excellent. They are professionally composed and clearly, practically organized. They show a convincing sense of how to address her students at the point where the students begin and then bring them into the goals of her courses. The printouts of her computerized course evaluations show consistently high ratings, above institutional averages. While printouts are provided for only a small number of her courses, and only from one semester (Spring 2007), leaving open the question of how representative they may be, the printouts nevertheless show that she has attracted extremely high student evaluations for at least some of her courses. I attach little significance to the individual student evaluation forms selected from many different courses, because submitting only selected evaluation forms allows the instructor to pick and choose evaluations, whether they are representative or not. Similarly, I attach little significance to testimonies from a small number of individual students, because with so many students taught over a number of years, individual student testimonies could easily be unrepresentative.

### Tudor

Similarly, we have ample evidence that Tudor is an excellent teacher. Unlike Cotter-Lynch's portfolio, Tudor's 2009 portfolio provides considerable information about her teaching for each course, in the form of substantial paragraphs of description. These **impressively written paragraphs reveal a carefully reasoned teaching imagination** and an impressive depth and breadth of thought and knowledge about teaching and about the humanities. They also show an **admirable adaptability**, both in general and regarding the needs of the particular students who enroll in her courses and at Southeastern in general. Her courses look extremely well adapted to

the specific population of students who take each different course. Tudor's portfolio documents an unusually extensive pattern of seeking out training in the use of technology for teaching, and the descriptions of her courses, both from her and from her colleagues, back up her extensive use of teaching technologies. The commitment to seek out additional training shows an impressive dedication to teaching. Tudor says that she "welcomed any interested colleagues to observe my classrooms." She also says that reports from those observations are included in her portfolio, but they are not included in the version of the 2009 portfolio that I was provided, which I understand is incomplete. They do appear in the 2010 portfolio, and—as noted above—they are very favorable and convincing. Like Cotter-Lynch, Tudor includes selected individual student evaluations, but again, I attach little significance to selected individual evaluations, as compared to a complete set of evaluations from every student in a course, or still better, from every student in every course. But none of the portfolios under review provides complete sets of evaluations. Tudor explains that she asked to have her classes evaluated by "statistical data analysis" but was told by Professor Mischo "that the department could not afford it." She acknowledges that "statistical data . . . is available from" her "first year of teaching at Southeastern," but says that it "does not accurately present my present skills or abilities and will not be included in my application." That seems reasonable, because statistical data reporting student evaluations from a teacher's first year of teaching at a new institution do not provide a reliable picture of that teacher's effectiveness in future years. None of the other candidates' portfolios provide statistical data reporting student evaluations from their first year at Southeastern. Barker and Cotter-Lynch include such data from a later year, but only for one semester, which (as noted above) puts in question whether the data they provide is representative. Tudor's 2009 portfolio includes no syllabi, perhaps because she includes an extensive description of each course, as noted above, or perhaps because the version of the portfolio that I have is incomplete. Her 2010 portfolio includes 2 syllabi. While the font of the syllabi is too small, they are extraordinary syllabi, among the best I have ever seen and certainly the best I have seen from Southeastern (with no disrespect to the others). They do not include the reading schedule, which she provides online, but they are extremely well-pointed to the particular body of students, to their level of experience, to what will help them learn procedurally and intellectually, and to what will help them learn to understand the value of what they study.

### Spencer

Like Tudor, Spencer has an excellent teaching record. He provides helpful descriptions of each course, as Tudor does in her 2009 portfolio. While the descriptions do not show the depth of thought and imagination visible in Tudor's descriptions, they indicate a responsible, successful, hard-working teacher. He also provides a letter reporting a favorable classroom observation by Assistant Professor Caryn M. Witten. It seems unusual to rely on an evaluation from another professor of the same rank. The letter may be sincere, but one assistant professor evaluating another assistant professor could find that their shared circumstances make it difficult to provide a frank evaluation. Spencer also submits several selected individual student evaluation forms. As noted above for the other portfolios, selected individual evaluations are nice, but they are not very meaningful, because there is no way to tell whether they accurately represent other students' experience. Nevertheless, Spencer also lists two teaching award nominations and provides strong summaries from the department chair of the course evaluations for two different courses. Spencer's portfolio includes excellent sample syllabi. They are well-thought-through

and clear. In the courses that focus on novels, however, he may assign too much reading for students to complete and absorb in one course. He also gives a large proportion of class time to student presentations and to essays that the students write while in class. The student presentations and essays written during class may leave too little time for class discussion of the large number of books that Spencer requires the students to read. If I were evaluating his teaching, I would ask him to make sure that he had thought through the advantages and disadvantages of assigning so much reading and using so much class time for student presentations and writing, but I would also defer to his judgment about how to design a course that best matches his teaching style with the material for the course. Overall, both Tudor and Spencer have strong teaching records, without sufficient information in their portfolios to rank either above the other.

### Parrish

Like Tudor and Spencer's portfolios, Parrish's portfolio shows a strong teaching record. Parrish was nominated once for a teaching award. She fills out her list of courses with itemized, bulleted, brief descriptions. Later in the portfolio, she also provides extremely detailed, professional descriptions of each course. In the realm of supporting documents, she provides a selection of seemingly unsolicited emails testifying to her good teaching, including 4 from students and one from a teacher of her past students. As indicated above, I do not put much weight on such documents, because with so many students taught over a number of years, individual student testimonies could easily be unrepresentative. They are like the selected individual student evaluation forms that I also put little weight on. Parrish provides several of those as well. Perhaps a poor teacher would not have such documents to submit, but I would expect that any decent teacher would have many documents like that to choose from. You can have one appreciative student in an otherwise unsuccessful class, so a letter or evaluation from one student does not prove much. Nevertheless, Parrish also submits reports of teaching evaluations by Professor Allen and Professor Witten (who by the time of her report is an associate professor). Both reports are confidently favorable and indicate high competence in Parrish's teaching. Parrish provides a large selection of extremely thorough syllabi. Her syllabi are well-designed to speak to the population of business-oriented students who typically take her classes in technical and professional writing. She also shows an appealing range as a teacher, for she skillfully adapts her thorough organization and sense of her students' needs to the very different needs of the students who take her screen-writing classes.

### Barker

Barker's portfolio includes concrete, favorable reports about her teaching from Professors Allen, Mischo, Parrish, and Witten. Like her colleagues, she provides individual student evaluations and complimentary emails from students. But as described above, such documents cannot reliably testify to an overall record of good teaching. Barker has taught only 3 different courses during her years at Southeastern, far fewer than her colleagues. Tudor has taught 13 different courses, Cotter-Lynch 9 different courses, and Parrish and Spencer have each taught 7 different courses. Barker's portfolio includes syllabi and accompanying materials for 2 of her 3 courses. The materials for her course in Technical and Professional Writing are clear and practical. Her syllabus seems to think through every concern and issue without getting heavy-

handed about its foresight and advice. The materials for her Children's Literature course are imaginative, rigorous, and demanding. They skillfully address an audience of students who may not be experienced with as much reading as she assigns and may have difficulty fitting it into their schedules. She gives them precise directions while still leaving them space to use their imagination to work within those directions. The sample assignments look helpful for inexperienced students, and Barker even provides a handout of advice from previous students about how to do the work. The range and quantity of assigned reading are impressive. I wonder what would happen with a looser structure, but I much respect the careful thought that went into the design of this course. Students should learn a great deal from Barker's classes.

Like Cotter-Lynch, Barker provides statistical printouts of teaching evaluations, but also like Cotter-Lynch, she provides such statistics for only a small selection of courses. In a letter recommending Barker for promotion with tenure, Lucretia C. Scoufos, Dean of the School of Arts and Sciences, writes that Barker's "student ratings are consistently excellent, well above the university and national norms." The data in the portfolio are not consistent with this claim. The portfolio provides two sets of evaluation statistics, each following a different set of questions and a different pattern of reporting the results. For one course from 2010, the printouts report responses to two key questions. Specifically, for the "overall evaluation of this class," they report a mean (an average) of 4.56 on a scale of 1 to 5. For "Overall, I would rate the teaching ability of the instructor," they report a mean of 4.88. These are extremely high numbers, though no information is provided to indicate how they compare to university or national norms. For 3 courses in 2007, a different system of printouts reports responses to one key question, "Overall, I rate this instructor a good teacher." On that question, Barker's 3 courses had a mean of 4.50. Course by course, they received a 4.53, 4.33, and 4.55. (The printouts also report a unit mean (presumably referring to Barker's department) for that question of 4.62, higher than Barker's mean, and they report an institutional mean (presumably referring to Southeastern) of 4.46, just under Barker's mean. All these numbers are remarkably high for Barker as well as for the unit and the institution, which raises a question about whether enough faculty members' courses were surveyed to produce a reliable sample for comparison. Regardless, these numbers do not match Scoufos's claim that Barker's "ratings are consistently . . . well above the university and national norms." 4.50 is not "well above" 4.46, and it is lower than the mean for Barker's own departmental colleagues.

Scoufos also repeats a claim that appears in a letter recommending promotion and tenure from department chair Randy Prus, who writes that "In the department's recent Assessment Report for Distance Learning, Dr. Barker's on-line classes have the highest rate of retention." As in the case of isolated course evaluations that may not represent a consistent pattern, the information provided here is too selective for us to determine its value. When we have information about only one candidate, from only one short period (in this case, one isolated detail from a "recent" report), we cannot tell whether the information carries weight, or whether unrepresentative information has been cherry-picked so that, intentionally or not, it misrepresents the larger picture.

Amid the uncertainty caused by the inconsistent statistics, I do not feel confident about ranking Barker's teaching compared to the other candidates. There is no doubt that Barker's portfolio presents a strong teaching record. Even so, I would cautiously rank her teaching below

the teaching of most of her colleagues, so far as one can see from the limited evidence of the portfolios. Specifically, the comparative statistics indicate that Barker's courses attracted evaluations slightly below the unit mean. And unlike Cotter-Lynch, Parrish, Spencer, and Tudor, Barker was not nominated for a teaching award. I am therefore inclined to rate Barker's teaching highly, but not as highly as the teaching of the other faculty in this pool of portfolios.

### **Scholarship**

For research/scholarship (which I will refer to as scholarship), I will review the portfolios of Professors Cotter-Lynch, Barker, Spencer, and Parrish and then compare them to the portfolio of Professor Tudor.

It may help to review the standards for judging scholarship before looking at the scholarly records of the individual candidates. When a college or university considers a candidate for promotion and tenure, it judges the record of scholarship on the basis of what the candidate has done since arriving at that college or university. Earlier work may serve as a potential predictor of future work and, in that light, may help an institution decide to hire someone. **But when it comes to deciding whether to award a professor promotion or tenure, an institution considers what the candidate has done since arriving at that institution.**

In contemporary college and university English departments, scholarship is an umbrella term that includes publishing critical discussions about literature, publishing research about literature or related topics, or publishing creative writing. It also includes presenting such work at professional conferences. These standard procedures for characterizing scholarship match Southeastern's written policies, which describe faculty scholarship as "research or creative achievement" (4.6.1 Academic Tenure; see also 4.5.2.3 Research/Scholarship). We can judge scholarship by considering one or more of five different markers of scholarly accomplishment:

#### 1) Number and length of publications and presentations.

- Books. A book counts far more than an article, not only because it includes more writing but also because it requires more research and a larger scale of thinking.
- Articles. A substantial article counts more than a brief, minor article.
- Conference presentations. A conference presentation counts far less than an article, because conference presentations are unpublished, so that they are not available for other scholars to consult. They are presented orally and heard only by whoever happens to show up for the presentation, sometimes a very small number of people. They are also typically shorter than articles and not as fully backed up with cited evidence, because cited evidence is difficult to provide orally. While they are usually peer-reviewed (see #2 below), peer reviewers for conference presentations typically review only a short summary of the presentation, in part because at the time of peer review the full presentation has often not yet been written.

- Book reviews. A book review that simply reports on a book may prove useful for readers but carries almost no value as a scholarly accomplishment and as a credential for promotion and tenure. A book review that includes a serious scholarly discussion may count for a little more but does not usually represent original scholarship.

- 2) Peer-review. Peer-reviewed publication is the gold standard of scholarly achievement. When scholars complete a manuscript of their writing, they submit it to a scholarly journal or a scholarly book publisher. If the editors at a journal or publisher that uses peer review believe that the manuscript is promising, then they will send it to scholarly experts to review. Often, to ensure the experts' objectivity, they include no indication of who wrote the manuscript. The scholarly experts, known as peer reviewers, review the manuscript to determine if it meets the standards of the journal or publisher, and then to recommend that the journal or publisher publish the manuscript or decide not to publish it. Typically, at least two experts must agree that the manuscript deserves publication before the editors will decide to accept it for publication. Publications that are not peer-reviewed usually receive little or no credit for a promotion unless they are invited (as in number 3 below) or actually read (as in number 4 below) and seriously responded to by other scholars (as in number 5 below). More prestigious journals and book publishers tend to set higher standards and conduct more intense peer review. Most peer-reviewed manuscripts are not accepted for publication, because they do not survive the process of peer review successfully. Proposals for conference presentations also go through peer review, except, sometimes, when they are invited. By contrast, book reviews are not peer-reviewed.

In this report, I provide documented evidence, whenever it is available, to indicate whether a journal or other publication uses peer review, taking such evidence from the *Modern Language Association Directory of Periodicals* (as described below) or from a journal's own website. All such documents (including websites) are itemized in the list of accompanying documents attached to this report.

- 3) Invitations to contribute to a scholarly journal, to a book that includes chapters or articles by different scholars, or to a scholarly conference. For well-established scholars, that is to say, scholars who have published extensively and whose publications have attracted widespread respect from other scholars, invitations can replace peer review.
- 4) Actually reading the work and judging its quality and importance.
- 5) Published responses by other scholars.

Numbers 3 and 5 do not apply to the portfolios under consideration for this report, as none of them provides any evidence of invitations to contribute or of published responses to the work under examination. I will therefore compare the candidates' scholarship by focusing on categories 1, 2, and 4.

Cotter-Lynch

At the time she submitted her portfolio in 2009, Professor Cotter-Lynch's scholarship seemed to be on an upward trajectory, though it had not yet led to much publication. She had published one article about teaching, published without peer review by an online education company that I was not familiar with, a company that nevertheless gave the article an award. She provides a web address for the article, but the link is dead, and the article no longer appears elsewhere on that website. I found it, nevertheless, on the Wayback Machine (<https://web.archive.org/web/20080509122634/http://ablemedia.com/ctcweb/consortium/cotterlynchancientbiography.html>), an online archive of websites removed from their original locations and otherwise no longer available. This article reports Cotter-Lynch's day-by-day teaching strategy, including lesson plans and lecture notes, for part of one course, a part that focuses on the ancient historians Plutarch and Suetonius. While it makes no original scholarly contribution, it is an exceptional report and model of teaching, as good as any report of a professor's teaching strategy that I have seen. It speaks in sympathetic and practical terms to Southeastern freshman at the skill and knowledge level they bring to her class, and it also stretches them to develop skills of reading, interpretation, and reflection on writing and on civics that they can take with them to other courses and to the remainder of their lives. I learned several teaching strategies about how to get beginning students to expand their curiosity and their skill at interpretation. While it is unfortunate that this article is not easier to find, a publication of this kind suits a teaching-centered university such as Southeastern especially well. When Southeastern's policies describing faculty scholarship list what counts as scholarship at Southeastern, they begin with "adaptations of knowledge to the learning environment" (4.5.2.3 Research/Scholarship). Cotter-Lynch's article does not provide original scholarship, but it skillfully adapts already existing knowledge to the learning environment.

In 2009, when Cotter-Lynch submitted her portfolio, she was also the coeditor of a nearly complete book that collects scholarly essays from ten different scholars, a book that had a contract with Palgrave-Macmillan, a very respected publisher. When her promotion was under consideration, the book manuscript was scheduled to go through peer review soon. The contract reflects the publisher's expectation that the manuscript would pass successfully through peer review, but that process had not yet taken place when Cotter-Lynch was under consideration for promotion. She lists her own article in the book as peer-reviewed, but says the book had not yet gone through peer review, so it is not clear whether the peer review for the article was completed or anticipated. Most schools would not count an article in a book edited by the candidate as a credential toward that candidate's own promotion, but if the article successfully passes through peer review, then it seems to me worth crediting. Cotter-Lynch had another article manuscript undergoing peer review at the time she submitted her portfolio. She also reports that a Palgrave-Macmillan editor had expressed interest in the book manuscript she was working on. Such interest is a good thing, but the project had not yet reached the concrete stage of a finished book manuscript, let alone a manuscript that had gone through peer review and been accepted for publication. Therefore, it was far too early for that manuscript to count as a publication. Cotter-Lynch had also published one additional article and one book review, but they were published before she arrived at Southeastern. Her only publication since arriving at Southeastern was thus the article about teaching Plutarch and Suetonius.

Without any published work included in the portfolio for me to read and evaluate, I read the series of unpublished manuscripts included in the portfolio. They are excellent work. They offer a concrete, imaginative, and professional contribution to active discussions in current scholarship. As specialized studies of the history of early medieval women, early medieval women's writings, and the interpretation of early medieval accounts of dreams, they would require a specialist in those areas to provide a full evaluation of exactly how they fit into recent scholarship. **But even someone such as myself, a non-specialist in those areas** who has a more general acquaintance with medieval studies and a broad acquaintance with the history of literary criticism and with contemporary literary criticism, can see that these are very promising works. They consist of 3 conference presentations, somewhat repeating each other and not in the final forms they might eventually take in published work, plus the manuscript of the article to be included in the book that Cotter-Lynch was co-editing, and the other article manuscript then under consideration at a journal. Here and there they have a minor rough passage, especially (as one might expect) in the conference papers. For example, the article for the co-edited book confuses the theoretical concept of interpellation with another term, interpolation, which has a completely different meaning. (A peer reviewer should catch such things.) Nevertheless, Cotter-Lynch understands the concept well and uses it rigorously, and all her work seems imaginatively and constructively keyed to advancing active interests in the contemporary scholarly study of medieval women, their writings, and other writings about them, key areas in contemporary medieval studies.

Through the South Central Modern Language Association, Cotter-Lynch received a grant for a one-month residency at the Newberry Library, a major research library. Such a grant is an indicator of serious scholarship in progress. Since her arrival at Southeastern, she presented her work at 7 different conferences (her statement says she gave 4 presentations, but 7 appear on her list of presentations), including such major conferences as the International Medieval Congress, which is the major conference for medieval studies, and the conferences of the American Comparative Literature Association and the Modern Language Association. She also took a leadership role by organizing sessions at the Medieval Congress and leading a seminar at the Comparative Literature Conference. No one else in this set of portfolios has nearly so strong a record of presenting work at conferences. That record of strong conference presentations contributes to the impression that Cotter-Lynch's work was on an upward trajectory, with publications perhaps about to appear, even though, during her years at Southeastern, and by the time of this promotion, she had only one publication.

#### Barker

During her time at Southeastern, Professor Barker presented 4 papers at the major conference for the study of children's literature and volunteered to chair a session at that same conference. She does not provide her actual conference papers, but she does provide summaries of them. Her paper on the popular novel *Holes* is clever, smart, and well-informed. Her paper on three historical novels by Christopher Paul Curtis shows a keen understanding of the novels' racialized contexts. And her paper on Curtis's novel *The Watsons Go to Birmingham—1963*, which she expanded into an article, shows an excellent sense of the novel's tone and its changes in tone. The earliest of these conference papers, on girls in nineteenth-century fiction, seems less

original and rather forced into the theme of the conference, but otherwise relatively soundly conceived.

During her time at Southeastern, Barker also published a deeply researched, deeply thought-through article, “Racial Identification and Audience in *Roll of Thunder, Hear My Cry* and *The Watsons Go to Birmingham—1963*.” This article appeared in *Children’s Literature in Education*, an established education journal and a good venue for a scholar from a teaching-focused university such as Southeastern. **Barker’s article is slow-moving and too long**, but it is thorough and useful. Drawing on a wide range of surprisingly detailed research, Barker builds well-observed interpretations of the two novels she discusses. Noting that African American readers have received more attention in discussions of these novels, she also attends to white and, more broadly, non-black readers, and she compares the different contexts of response for differently positioned readers. Unlike many other critics who write about racially-inflected topics, Barker genuinely has read and understood the body of scholarship known as “critical race theory,” and she imaginatively brings it to bear on strategies for interpreting children’s literature. She concludes with a thoughtful, practical discussion of strategies for teaching racially conscious children’s literature to readers who may believe that we live, or should live, in an age of race-blind teaching. This article will serve as a valuable reference for teachers from middle school through high school, and for university teachers of future teachers.

Barker’s portfolio includes a letter testifying to the strength of her scholarship from Professor Lynne Vallone, a distinguished scholar of children’s literature at Rutgers University—Camden. Dean Scoufos’s letter recommending promotion and tenure for Barker makes much of the letter from Vallone, and the Faculty Promotion and Tenure Evaluation worksheet names the letter from Vallone, along with Barker’s published article, as the two facts testifying to Barker’s outstanding scholarship. But Vallone’s letter notes frankly that Barker was Vallone’s student, and that Vallone directed Barker’s dissertation, which disqualifies the letter as a reliable indicator of Barker’s credentials. Relying on that letter is the academic equivalent of relying on a parent testifying to the wonders of her own child. Vallone has a conflict of interest, because Barker’s success in winning promotion and tenure would provide a credential testifying to Vallone’s own success.

### Spencer

Professor Spencer published a 326-page scholarly book and a 20-page scholarly article before arriving at Southeastern, but publications from before his arrival at Southeastern are not relevant to his consideration for promotion and tenure at Southeastern. When he applied for promotion and tenure, he had published only one book review during his time working at Southeastern. His portfolio provides a link for the review. The link no longer works, but I found it at another address (<https://scholarworks.iu.edu/journals/index.php/tmr/article/view/16706/22824>). It is professional and thoughtful work, but as a brief and modest book review, it does not represent a substantial contribution to original scholarship.

He also had 2 articles accepted for publication and scheduled to appear. His portfolio does not provide copies of the articles, but I acquired them through my university library. They

appeared in peer-reviewed journals, *The Explicator* and *Eureka Studies in Teaching Short Fiction*. According to the *Modern Language Association Directory of Periodicals*, *Eureka Studies* accepts a high percentage (60%) of the manuscripts submitted for its consideration, making it a comparatively easier journal to publish in, and thus making an article in *Eureka Studies* a less impressive credential than an article in most other journals. (For more about the *Modern Language Association Directory*, see below.) *The Explicator* had a certain vogue in the 1940s and 1950s, when it was new and represented a new trend sometimes known as “explication,” but for many decades now it has had a reputation for publishing undistinguished work. Department chair Mischo writes, in his December 1, 2006 letter to Dean Mangrum about Spencer: “there is a question as to the research significance of a venue such as *Explicator* and its standards of scholarly depth.” I believe that most informed scholars share that skepticism. It is difficult for a journal that publishes extremely short articles, as *The Explicator* does, to publish scholarship with ambition and depth.

Spencer’s article in *The Explicator*, a short, thoughtful reading of a famous poem by Emily Dickinson, argues skillfully for a new interpretation of the poem’s understanding of the Christian afterlife. The article is only one page long, however, and it does not address any other critics’ interpretations of the poem, even though a great many previous critics have written about the poem, as Spencer acknowledges. My own view is that Spencer’s plausible interpretation needlessly narrows the poem to one model of the Christian afterlife, but I would like to see the advantages and disadvantages of Spencer’s interpretation played out, in relation to other critics’ interpretations, at greater length.

The other article works on a larger scale both in length (10 pages) and in research. It offers a point-by-point comparison of William Faulkner’s most famous short story, “A Rose for Emily,” Robert Bloch’s novel *Psycho*, and Alfred Hitchcock’s film made from the novel. Spencer notes that others have mentioned similarities among these works, but he sets out to describe the similarities more extensively. He suggests that Hitchcock’s film makes few changes to the novel, but that those few changes heighten the film’s similarity to Faulkner’s story. Spencer grounds the article in his own experience teaching the 3 works together and implies that others might try the same in their own teaching, an approach that makes the article speak to the teaching-centered focus of Southeastern. As a Faulkner scholar myself, I would like to see a little more engagement with other critics’ interpretations of the story, but this is a reasonably well-researched article, proficiently executed with modest but interesting and plausible claims.

As I will indicate in the next paragraph, Spencer had a third article accepted while he was under consideration for promotion and tenure, an article about George Garrett’s novel *Death of the Fox*. In this article, Spencer draws on wide knowledge and research but has nothing new to say about his topic. Most of the article summarizes the novel’s plot. We teach our students not to summarize plot, because if people want plot, they can just read the novel. The task of the critic is not to describe the novel, but to interpret it. When Spencer is not describing plot, he mostly just describes the novel’s approach to its topic or focuses on recounting what Garrett himself or others have said about the novel, sometimes noting whether he agrees, but not providing any fresh or extended interpretation. Spencer shows a vast knowledge of materials and issues in and around *Death of the Fox* and a vast knowledge of other novels to compare it to. While this article shows more knowledge than Spencer’s other articles, it is nevertheless weaker work.

According to a May 18, 2016 letter from the Department of Justice to the writer of this report, “In the Spring of 2007, Dr. Spencer sent out four articles for publication and supplemented his portfolio with that information.” These 4 article manuscripts “were all ultimately published.” After Spencer submitted the article manuscripts, Southeastern President “Snowden, based on Dr. Spencer’s supplemented portfolio, recommended that Dr. Spencer receive tenure and promotion.” Only one of the 4 articles was accepted before Snowden’s decision, the article on *Death of a Fox*, though Spencer “is not sure whether he informed President Snowden” of that acceptance before Snowden’s decision. One of the articles was published by a journal that Spencer submitted to after Snowden’s decision.

After this precedent was set, providing decisive credit to Spencer’s submission of 4 article manuscripts, Tudor’s 2009 portfolio listed 11 submitted article manuscripts. It looks extremely peculiar that Spencer would be given so much credit for 4 submitted manuscripts, reported late in the process, that the mere report of submitting those manuscripts would reverse a recommendation against promotion and turn it into a recommendation for promotion, and yet Tudor was not given the same credit for nearly 3 times as many submitted manuscripts, reported 4-6 months earlier in the promotion-and-tenure-review process.

One could understand if Tudor were not credited for submitting article manuscripts, so long as the same standard had applied to Spencer. But it appears that Spencer was given a great deal of credit for a category of scholarly production when Tudor was not given the same credit for a great deal more production in the same category. That glaring contradiction stands out even when we consider only Tudor’s 2009 portfolio, without even taking into account her far more extensive 2010 portfolio.

### Parrish

During her time as an assistant professor at Southeastern, Professor Parrish produced nothing that can count for a record of scholarly publication within Southeastern’s definition of “Scholarship/Research” (4.5.2.3). Like many of her colleagues, she published a number of items before she arrived at Southeastern, but after she began working at Southeastern she did not publish work that would count as scholarship. She did write 2 government reports, together totaling 4 pages. They are not peer reviewed, and they are not items I would consider scholarship or publications. They are work done on the side, not as part of her job as a professor. She also reviewed a textbook manuscript and a textbook proposal for commercial publishers. Being asked to do those reviews is not a sign of scholarly distinction. Textbook publishers do not ordinarily ask professors to review such things based on the distinction of the professors. Rather, they look for people who teach courses that might assign the published textbooks, trying to find professors at all different types of schools in different regions of the country. They hope to get useful suggestions for the manuscripts from a variety of different markets, but they also hope that the manuscript reviewers will themselves assign the books if they are published. In that context, Parrish’s completion of those manuscript reviews may indicate good citizenship, but it does not count as scholarship. Parrish lists 10 presentations at conferences or other events before she arrived at Southeastern, but only one since arriving at Southeastern, and that one is a local presentation at Southeastern itself, which usually disqualifies a presentation from counting as

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scholarship in a promotion portfolio. A presentation of that kind counts as service, not as scholarship.

Parrish's sole publication from her time at Southeastern that comes even close to being scholarship consists of one three-page, non-peer-reviewed book review that merely summarizes the book. As noted earlier, in line with standard procedures, a book review that simply reports on a book does not count as scholarship. That standard procedure for judging book reviews matches Southeastern's written definition of scholarship, which describes scholarship as "the pursuit of new knowledge," and which provides a list of the different kinds of faculty scholarship, a list that does not include book reviews. It does include "articles in refereed [meaning peer-reviewed] or editor-evaluated publications" (section 4.5.2.3 Research/Scholarship). But book reviews are not articles, are not refereed or peer-reviewed, and are rarely editor-evaluated. Parrish's book review, which simply describes the book she reviews without providing any notable research or thinking of her own, does not advance the pursuit of new knowledge. Because Parrish's record shows no scholarship produced during her time at Southeastern, I see no reasonable cause for rating her record of scholarship above the record of scholarship for Professor Tudor, whose record as a scholar is far stronger both in quantity and in quality.

As noted earlier, I am not suggesting that Parrish did not deserve to receive promotion to associate professor with tenure. I have described her record of scholarship here merely so that I could compare her record to the record of Tudor and the other professors whose portfolios I have reviewed.

### Tudor

In comparing Professor Tudor's record of scholarship to the scholarly records of her colleagues, I will first consider her 2009 portfolio and then her 2010 portfolio. In her 2009 portfolio, Tudor reports one presentation at a regional conference and one at Southeastern. The presentation at Southeastern would count toward service rather than scholarship. She also reports one article accepted for publication by *The Texas Review*, "Romantic Voyeurism and the Idea of the Savage." *The Texas Review* is not well-known outside its region, but it is a peer-reviewed journal. It is also a selective journal, meaning that it accepts a low percentage of submissions. I was not provided a copy of that article for the 2009 portfolio. (I was provided a copy for the 2010 portfolio, which I will address below.) As noted above, she also lists an unusually large number of articles submitted but not yet accepted. I was provided a copy of one of those articles, "Historical and Experiential Postmodernism: Native American and Euro-American," published in a peer-reviewed journal, the *Journal of Contemporary Thought* in 2009 (and added to Tudor's 2009 portfolio in February, 2010, according to emails from Southeastern provided by the Department of Justice). Just as a matter of counting, let us put these two peer-reviewed articles from the 2009 portfolio into comparative perspective. Aside from Tudor, only Barker had a published, peer-reviewed article. Cotter-Lynch had one accepted and published article, not peer-reviewed. Spencer had 2 accepted and not yet published articles (or 3, if we count the supplementary information that, as noted above, Spencer cannot recall whether he provided), each of them peer-reviewed, one of them extremely short, and none of them in highly selective journals. Spencer also had a book review. Parrish, with only a book review that merely

summarizes the book under review, had no publications that count as scholarly publication within Southeastern's definition of "Scholarship/Research" (4.5.2.3).

In that context, it is hard to see any good reason why the worksheets from the Dean of the School of Arts and Sciences, Lucretia Scoufos, and the Interim Executive Vice President for Academic Affairs, Douglas N. McMillan, assign Tudor's scholarship the possibly fatal rating of "needs improvement" (3 on a scale of 1 to 5). Granted, Scoufos dated her worksheet on January 14, 2010, before the news of Tudor's second accepted article in February, 2010. Scoufos writes in her January 12, 2010 letter that "there appears to be only one peer-reviewed paper . . . accepted, but not yet published." (In an English department, it could sound demeaning to refer to an article as a "paper," as if it were only a conference paper, but that is not the case in all fields, and I do not know Scoufos's field.) As noted above, Cotter-Lynch had no peer-reviewed articles. Barker had only one. And Spencer, at the same point in the process, had two accepted but not yet published peer-reviewed articles, short enough so that together they total less production than Tudor's one article, even without taking into account Tudor's report of many submitted articles. Less than a year earlier, on February 12, 2009, Scoufos recommended Parrish for promotion and tenure, even though Parrish had no articles. In those comparative contexts, I find Scoufos's evaluation of Tudor puzzling.

McMillan's evaluation of Tudor stands out as even more puzzling. McMillan signed the transmittal form for Tudor's 2009 portfolio on February 10, 2010. The next day, February 11, an email from Scoufos indicates that McMillan approved the decision to add to Tudor's portfolio the new information that she had a second accepted article. Indeed, McMillan's April 30, 2010 letter purporting to explain the reasons for the decision to deny Tudor's application for promotion and tenure acknowledges that Tudor has "two publications" that "do appear to be examples of work which meet[s] the excellent and noteworthy standard" required for promotion and tenure. As noted above, McMillan's worksheet, which is undated, assigns Tudor's scholarship the same possibly fatal rating assigned by Scoufos. Either McMillan completed the worksheet before learning of Tudor's additional publication, in which case the comparatively low rating on the worksheet should not have been relevant to McMillan's decision reached after learning the new information, or he completed the worksheet later and yet gave Tudor's scholarship the same rating that Scoufos gave it even though by that point Tudor had doubled her production of accepted, peer-reviewed articles. Either way, the rating and the decision are strikingly inconsistent with the decisions reached about the other candidates.

I have also seen one worksheet for Barker (undated and unsigned, so that I cannot tell whose ratings it records). Barker published less than Tudor, but this worksheet gives Barker an "outstanding" for scholarship (5 on a scale of 1 to 5). I have not seen worksheets for the other candidates, and reasonable people could debate the comparison between Tudor's 2009 and Barker's, and possibly Spencer's, records of published scholarship or scholarship accepted for publication. But even though different evaluators could reasonably rank Barker's, Spencer's, and Tudor's 2009 records of scholarship in different sequences, they could not reasonably put them in entirely different categories. And by no reasonable measure can Tudor's scholarship in 2009 rate lower than Parrish's scholarship, let alone so much lower that it lands in an entirely different category. And all that applies only if we simply *count* the publications.

If we take **the more responsible path** of actually reading Tudor's publications, then her scholarship stands out still more for its serious substance. The article about "Historical and Experiential Postmodernism" does not break major new ground, and it was published in a journal published in India that does not appear to be very selective and is not widely distributed in the United States. But it provides a **sophisticated and well-informed** synthesis, very valuable for teachers, and a more convincing sign of Tudor's own preparation for teaching than the usual pattern of articles that say something more original but not very meaningful. I appreciate the way that this article provides a **genuinely critical yet still sympathetic** distance on what other scholars and critics of Native American writing have said before Tudor. It has a substance equaled in these portfolios only in the article by Barker and in Cotter-Lynch's excellent work in progress, which at the time of her portfolio was not yet completed or accepted for publication. It is exactly the kind of scholarship that best serves a faculty member at a teaching-centered university.

While Tudor's 2009 portfolio already places her scholarly record second (roughly tied with Barker) among the 5 candidates' portfolios, her 2010 portfolio shows an even much stronger scholarly profile, stronger than Cotter-Lynch's in terms of actual accomplished publication, and far stronger than Parrish's and Spencer's portfolios, if still not as strong as Cotter-Lynch's, in terms of my own judgment of the actual written work. In addition to the 2 articles mentioned above, the 2010 portfolio includes another 6 articles published or accepted for publication, making a total of 8 articles. (It also includes a ninth article that editors asked her to revise for additional consideration, a standard practice that most accepted article manuscripts go through before they are accepted for publication.) Nothing in the pool of portfolios compares to this burst of publication from Tudor. The articles are relatively rather than completely up-to-date with current scholarship. Nevertheless, she did the work and had the skill and talent to do it well, both according to my own judgment and according to the judgment of objective peer reviewers. The journals (and in one case, edited book of essays) where these articles were slated to appear vary, and none of them is a top-flight journal. It is difficult for a scholar with the limited scholarly resources of a teaching-centered university like Southeastern to publish with a top-flight publisher or journal. The only publisher or journal in the entire set of portfolios that is even in the realm of a distinguished place to publish would be Palgrave-Macmillan, where Cotter-Lynch has a contract for her not yet peer-reviewed co-edited book manuscript. At the same time, 7 of the 8 places where Tudor has published articles or had articles accepted for publication rely on peer review (*ASEBL Journal*, *The Atrium*, *Diesis*, *Journal of Contemporary Thought*, *Research and Criticism*, *Teaching American Literature*, and *The Texas Review*). The remaining article was published in a book called *Diasporic Consciousness*, published by a German publisher, VDM Verlag, which does not use peer review, though the editor of the book would still have done her own review before deciding whether to accept the article. The peer review that Tudor's publications went through provides an objective standard of outside judgment unparalleled across the pool of portfolios under consideration. And it provides that objective standard of outside judgment for a total of 7 different publications. Perhaps someone could get lucky once or maybe even twice and slip an unworthy manuscript through the process of peer review. But that could not happen repeatedly. It could not happen 7 times.

I am extremely familiar with the process of peer review. I regularly peer review scholarly manuscripts for distinguished academic journals and book publishers. My own scholarly writing has gone through peer review numerous times, and I have coached and advised numerous less

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experienced colleagues and former graduate students through the process. But I do not ask you merely to rely on my professional judgment. Instead, to illustrate the process of peer review in objective terms that do not rely on my own professional judgment, I have consulted the Modern Language Association Directory of Periodicals, the largest and most authoritative database of information about scholarly journals of literature and language. The Modern Language Association is the premier professional organization for the study of languages and literatures, and I have access to their database through EBSCO (a collection of electronic databases) at our library at the University of Illinois. EBSCO is also available at Southeastern, as I know because Tudor's syllabi indicate that she requires her students to use it through the Southeastern Library. Of Tudor's 8 articles, one appears in a book collection, which would not be listed in a directory of periodicals. The other 7 articles were published or accepted for publication in journals. Five of those journals appear in the directory. Of the remaining 2 articles, one appears in *Research and Criticism*, which is not listed in the directory, but which says on its website (<http://www.pencraftinternational.com/bookclub.htm>) that it conducts blind peer review (meaning that the reviewers do not see the names of the scholars whose work they review, the most objective form of peer review). The other appears in *Diesis*, which says on its website that it conducts blind peer review (<http://www.diesisjournal.org/submissions>). The Modern Language Association Directory of Periodicals also includes the 3 journals where Spencer had work accepted for publication and the one journal where Barker published.

The charts below show the directory's information about peer review for the 5 listed journals where Tudor has published, followed by the journals where Spencer and Barker have published. As neither Cotter-Lynch nor Parrish published in any journals between the time they arrived at Southeastern and the time they submitted their applications for promotion and tenure, the charts below are complete. I have calculated the acceptance rate based on the number of articles published per year divided by the number of article manuscripts submitted per year. Attached to this report, you will find copies of the printouts from the directory, the source of the information in the charts below, as well as copies of the websites listed above for *Research and Criticism* and *Diesis*.

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Journals for Tudor's published articles	Article manuscripts submitted per year	Articles published per year	Acceptance rate	Number of peer readers
ASEBL Journal	13	3	23%	2
The Atrium	100	24	24%	4
Journal of Contemporary Thought	30-40	25	63-83%	2
Teaching American Literature	100	20-25	20-25%	2
The Texas Review	250	6	2%	5

Journals for Spencer's published articles	Article manuscripts submitted per year	Articles published per year	Acceptance rate	Number of peer readers
Eureka Studies in Teaching Short Fiction	50	30	60%	3 minimum
Explicator	300	100	33%	2-3
Lamar Journal of the Humanities*	50	10	20%	4

\*As described earlier, Spencer had an article accepted in *Lamar Journal of the Humanities* late in the process of his consideration for promotion and tenure, and he does not remember whether he notified administrators of the acceptance. Therefore, it is not clear whether this journal is relevant for the chart above, but it is included, nevertheless, in the interest of considering the full range of possibly relevant data.

Journal for Barker's published article	Article manuscripts submitted per year	Articles published per year	Acceptance rate	Number of peer readers
Children's Literature in Education	"Varies"	20	Not calculable without information about the number of manuscripts submitted per year.	2

The information in these charts is far more reliable as an objective measure of Tudor's scholarship than the hunch of an administrator at Southeastern, who may not know the field and who may bring non-objective considerations into the decision-making process.

As an experienced scholar in the field, I will also provide brief evaluations of the 5 additional publications included in Tudor's 2010 portfolio and not in her 2009 portfolio, as well as brief evaluations of her other 2 new articles listed in the 2010 portfolio but not provided in that portfolio.)

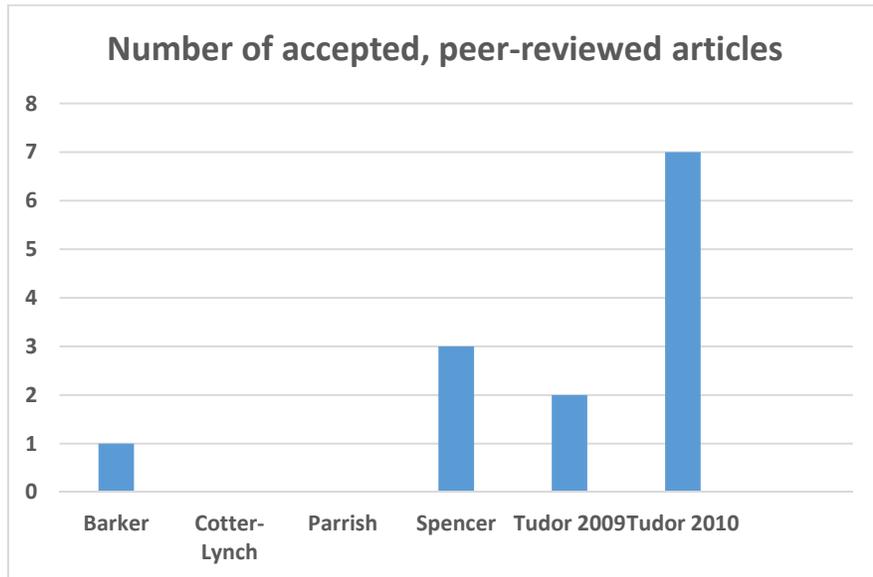
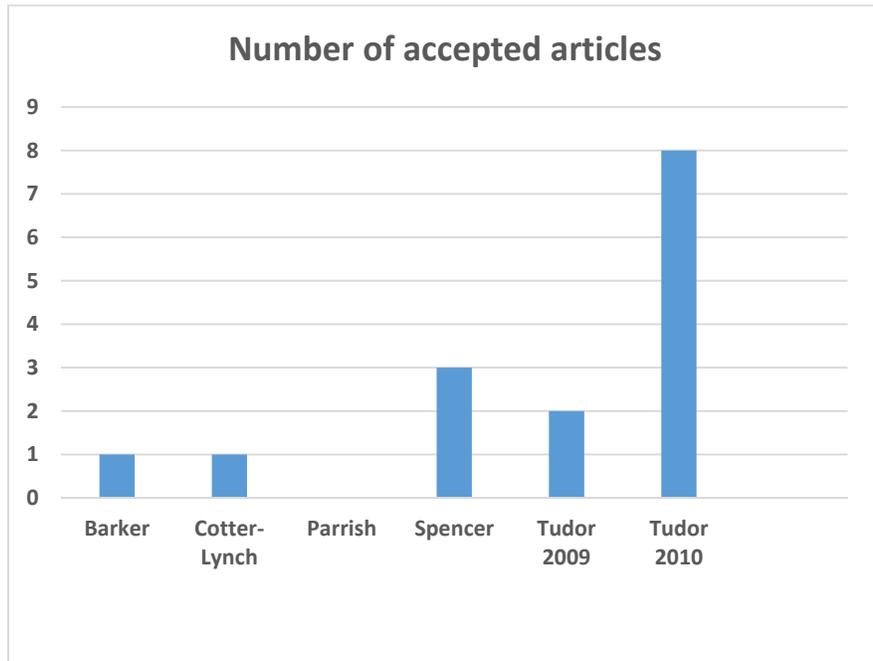
- "Latin American Magical Realism and the Native American Novel." This article is knowledgeable, intelligent, and wise. It has a narrow focus, zeroing in on a critique of one particular scholarly book that may not need such a careful consideration, but the consideration is very well done.
- "Pearl: A Study in Memoir and First Person Narrative Poetry." This is an intelligent and proficient article, well researched through 2000. Some individual comments in the article could use revision to point them better at a scholarly audience, but the work overall shows genuine promise for a young scholar.
- "Romantic Voyeurism and the Modern Idea of the Savage." This article is intelligent, knowledgeable, and wide-ranging, more useful for teachers than we might find in the tight focus of a typical scholarly article. A few individual points could use revision, but again, the wisdom and ability stand out.
- In "The Ethics and Ethos of Eighteenth-Century British Literature" Tudor compares two eighteenth-century novels, *Pamela* and *Evelina*, to a postcolonial twentieth-century novel, *Wide Sargasso Sea*, which itself revises the nineteenth-century novel *Jane Eyre*. Tudor discusses how differences in social power shape these novels, focusing on gender, class, and race, a fairly predictable approach in contemporary criticism. The distinctiveness of the article comes in the comparison across centuries, including the argument that ideas made explicit in the later novel also play a large role in the earlier novels, even though the earlier novels show less awareness of those ideas.

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- “A Reading of Jonathan Swift’s ‘A Modest Proposal’ Using Roman Jakobson’s Poetic Function” offers a skillful, intelligent, and sophisticated reading of Swift’s rhetoric and style. The grafting of Jakobson’s famous essay with Swift’s most famous essay comes across like a teaching exercise by a smart and ambitious beginner, though in that sense it helpfully addresses strategies for teaching Swift to undergraduates. I would like to see the impressively detailed reading of Swift’s language complemented by more dialogue with what other critics have said about it, but this is smart and imaginative work.
- “The Memoir as Quest: Sara Suleri’s *Meatless Days*.” A very solid article that can prove useful to people who teach or write about Suleri’s popular memoir. While this article is published in a South Asian journal that few readers in the United States will find, it makes sense to publish there about Suleri’s memoir of growing up in South Asia.
- “*The Ancient Child and House Made of Dawn: A New Interpretation*.” This article about N. Scott Momaday, a Pulitzer-Prize-winning, widely taught Native American novelist, is Tudor’s best work. It provides a strong interpretation deeply engaged with other critical responses. With updating, a more specific title, and perhaps an occasional cut of more personal reflections, this article definitely has the potential to appear in a distinguished journal of literary criticism.

Overall, Tudor’s articles move across a wide range of materials, with a focus on Native American studies and fiction. They also address related topics such as colonial and postcolonial writers, including Suleri and the Irish writer Jonathan Swift, in line with the common tendency of scholars to interpret Native American writing together with other postcolonial writing.

The charts below illustrate the number of accepted articles and the number of accepted, peer-reviewed articles for each candidate. (These charts include Spencer’s third article even though the administrators at Southeastern may not have known of its acceptance when they decided to recommend him for promotion and tenure.)



**Service**

Based on the portfolios available for consideration, it is difficult to draw meaningful distinctions among the service records of the 5 different candidates for promotion. The only meaningful differences I can readily identify come from Cotter-Lynch’s nomination for an award for excellent service, and her service beyond Southeastern in organizing conference panels and leading a seminar of other scholars. I do not know how difficult it is to receive a nomination for excellent service, but the other candidates have not listed such a nomination or provided leadership in national settings beyond campus. Much of Barker’s service seems to follow from

her classroom role as a teacher of future teachers of English, but I do not have enough information to judge how much such work goes routinely with the courses she taught or indicates an extra contribution on her own initiative, except to say that she also volunteered at the community elementary schools. Apart from those considerations, all the candidates seem to have similar records of service. Except for Barker, they all played roles on their department's Assessment, Planning, and Development Committee, which both Spencer and Tudor have chaired. Barker and Tudor also served on the Five-Year program Review committee, while Spencer and Tudor played key roles in organizing Southeastern's biannual Native American Symposium. Tudor's 2010 portfolio also indicates that she began working to organize a Gay Straight Alliance on campus and to provide other support and resources for LGBT students at Southeastern. Tudor and Cotter-Lynch both served on committees that hire new faculty, a crucial and extremely time-consuming task. All the candidates pitched in to help with the Honors program or other more or less routine tasks here and there. Spencer served as faculty advisor for the local chapter of Sigma Tau Delta, the international English Honor Society. Parrish and Tudor each served on the Faculty Senate, elected by their colleagues from across the University.

Given the difficulty of making meaningful distinctions among the service records of the various candidates, it seems perplexing that all the candidates except Tudor were considered by the administrators beyond their department to have served the University with distinction. Probably no one was better qualified to judge Tudor's service than those colleagues who worked with her most closely. Here is what they say.

- Professor Paula Smith Allen's 2010 letter says that "As a colleague, Dr. Tudor endeavors to carry (at least) her share of the workload within the department. I recall that, while still a relative newcomer . . . , Dr. Tudor led an assessment effort by the department with alacrity and foresight over a several-year period. She participates on committees and participates actively in planning and assessment. She works effectively with both faculty and staff members, and her demeanor is always professional regardless of the circumstances."
- Professor Lisa L. Coleman's 2010 letter praises Tudor's contribution to designing new courses, working on the Native American Symposium, serving the community, serving as a Faculty Senator, and working on department committees.
- Parrish's 2010 letter says that "Dr. Tudor has been instrumental in the preparation of assessment documents," praises her work on department committees, and says that "She is a vital member of the department through her service, astute thinking, contributions, and collegiality." She also praises Tudor for service "beyond the department as she currently serves on the Faculty Senate, has served and participated in the Oklahoma Scholar Leadership Enrichment Program . . . , and has been a tireless supporter, worker, and committee member for the Native American Symposium."
- Spencer's letter joins the chorus of praise for Tudor's service. "She is in her second year," he writes, "as a member of the Southeastern Faculty Senate, and before that she served for three years as chair of our Assessment, Planning, and

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Development Committee, compiling and writing the annual assessment report. This is by far the most important departmental committee, as it oversees all aspects of curriculum development and assessment, potentially charting the course for years to come." Spencer calls Tudor "one of the key members of the Native American Symposium Committee," which he chairs. He praises her for "helping to plan and stage the event every other year. For the 2005 and 2007 symposia," he adds, Tudor "served as co-editor with me of the published proceedings, reading and commenting on all the papers submitted, and joining in the selection of those to include."

Surely it means a great deal that these colleagues who have worked so closely with Tudor think so highly of her contributions to service. The evidence in the portfolios indicates that Tudor and her colleagues work together to distribute the service more or less equally among themselves. Indeed, the similarity among the different candidates' service records throws into doubt the very possibility of seeing Tudor's service as less than the service of her colleagues. To judge her service as deficient would require a similar conclusion for at least 3 of the 4 other candidates who were deemed qualified for promotion and tenure. Therefore, I see no reasonable grounds for ranking Tudor's service in such a way that it would contribute to denying her the promotion and tenure that her colleagues were granted for the same level of work for the University that they all served.

Once we put all this information and all these comparisons together across the 5 candidates' records of teaching, scholarship, and service, **the facts speak for themselves.** The facts show no reasonable, objective, or fair grounds for denying Professor Tudor the same promotion that was granted to her colleagues.



Robert Dale Parker  
Professor of English  
University of Illinois

June 6, 2016

### List of Documents Considered for This Report

This report was based on the following documents.

- Article by R. J. Tudor, “Historical and Experiential Postmodernism: Native American and Euro-American.” OAG/DLC/USA v. SOSU – CIV-15-324/004931-50.
- Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet, evaluating Rachael J. Tudor, submitted by Lucretia C. Scoufos, 1/14/10. OAG/DLC/USA v. SOSU – CIV-15-324/001137-38.
- Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet, evaluating Rachel J. Tudor, submitted by John Brett Mischo, 11/29/09. OAG/DLC/USA v. SOSU – CIV-15-324/001133-34.
- Memorandum on the subject of promotion and tenure recommendation (regarding Virginia A. Parrish), submitted by Lucretia C. Scoufos, 2/12/09. OAG/DLC/USA v. SOSU – CIV-15-324/007384.
- Memorandum of notification of promotion and tenure status (regarding Virginia A. Parrish), submitted by Larry Minks, 2/16/09. OAG/DLC/USA v. SOSU – CIV-15-324/007383.
- Letter approving promotion of Virginia Parrish, from Michael D. Turner, 4/20/09. OAG/DLC/USA v. SOSU – CIV-15-324/007381.
- Letter recommending Margaret W. Cotter-Lynch for promotion and tenure, from Lucretia C. Scoufos, 1/14/10. PI001960.
- Memorandum of notification of promotion status (regarding Margaret Cotter-Lynch), submitted by Douglas N. McMillan, 2/15/10. OAG/DLC/USA v. SOSU – CIV-15-324/007437.
- Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet, evaluating Virginia Parrish, submitted by John Brett Mischo, 11/30/08. OAG/DLC/USA v. SOSU – CIV-15-324/007389-90.
- Letter recommending tenure and promotion for Virginia Parrish, from John Brett Mischo, 11/26/08. OAG/DLC/USA v. SOSU – CIV-15-324/007386-87.
- Letter recommending tenure and not promotion for Mark Spencer, from John Brett Mischo, 12/1/06. OAG/DLC/USA v. SOSU – CIV-15-324/007506-07.
- Letter recommending tenure and promotion for Mark Spencer, from C. W. Mangrum, 1/11/07. OAG/DLC/USA v. SOSU – CIV-15-324/007505.

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- Letter recommending tenure and not promotion for Mark Spencer, from Douglas McMillan, 2/12/07. OAG/DLC/USA v. SOSU – CIV-15-324/007504.
- Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet, evaluating Rachel J. Tudor, submitted by Douglas N. McMillan, not dated. OAG/DLC/USA v. SOSU – CIV-15-324/007703-04.
- Letter not recommending tenure and promotion for Rachel J. Tudor, from Lucretia C. Scoufos, 1/12/10. EEOC000855.
- Faculty Promotion and Tenure Evaluation Summary Confidential Analysis Worksheet, evaluating Janet Barker, not attributed or dated. OAG/DLC/USA v. SOSU – CIV-15-324/007470-71.
- Letter notifying Janet Barker of the decision to approve her promotion to associate professor with tenure, from Larry Minks, May 1, 2011. DOJ000156-57.
- Excerpt from Southeastern Academic Policies and Procedures Manual regarding the “Role of the Faculty” and “Faculty Participation.” EEOC000300-01.
- Letter recommending tenure and not promotion for Mark Spencer, from Douglas McMillan, 2/12/07. A different version of the other letter on the same topic from the same day. OAG/DLC/USA v. SOSU – CIV-15-324/012992.
- Excerpt from Southeastern Academic Policies and Procedures Manual regarding “Rank and Promotion” and “Tenure.” EEOC000327-35.
- Memorandum to Rachel Tudor from Douglas N. McMillan regarding denial of application for tenure and promotion, 4/30/10. EEOC000892-93.
- Promotion and Tenure Portfolio of Virginia A. Parrish. EEOC001676-2238.
- Promotion and Tenure Portfolio of Margaret Cotter-Lynch. EEOC002239-2474.
- Promotion and Tenure Portfolio of Rachel Tudor, 2010. EEOC003086-3271.
- Promotion and Tenure Portfolio of Mark Spencer. EEOC003521-3576.
- Portions of Promotion and Tenure Portfolio of Rachel Tudor, 2009. PI001308-35.
- Promotion and Tenure Portfolio of Janet L. Barker, 2010. DOJ000158-330.
- Letter recommending tenure and promotion for Margaret Cotter-Lynch, from John Brett Mischo, 11/29/09. PI001959.

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- Letter recommending tenure and promotion for Margaret Cotter-Lynch, from Douglas McMillan, 1/14/10. OAG/DLC/USA v. SOSU – CIV-15-324/007437.
- Excerpt from Southeastern Academic Policy and Procedures Manual regarding “Faculty Development and Evaluation Policies.” EEOC000317-21.
- Letter approving tenure and promotion of Mark Spencer, from Jesse O. Snowden, 4/18/07. OAG/DLC/USA v. SOSU – CIV-15-324/007503.
- Letter to Robert Dale Parker from the Department of Justice, 5/18/16.
- Copies of emails from Prafulla Kar, Rachel Tudor, John Mischo, and Lucretia Scoufos documenting a new publication by Tudor, February 4 and February 11, 2010, and November 30, 2010. EEOC000063-64.
- Letter to Robert Dale Parker from the Department of Justice, 6/2/16.
- Southeastern’s “Faculty Senate Awards Policy,” Southeastern PDF provided by the Department of Justice.
- Article by Mark B. Spencer, “Dickinson’s Because I Could Not Stop for Death.”
- Article by Mark B. Spencer, “William Faulkner’s ‘A Rose for Emily’ and *Psycho*.”
- Article by Mark B. Spencer, “Recreating the Early Modern in the Postmodern: George Garrett’s *Death of the Fox*.”
- Article by Rachel Tudor, “A Reading of Jonathan Swift’s ‘A Modest Proposal’ Using Roman Jakobson’s Poetic Function.”
- *The Atrium* (journal) Fall 2010.
- Article by Rachel Tudor, “The Ethics and Ethos of Eighteenth-Century British Literature.”
- Article by Margaret Cotter-Lynch, “Teaching Ancient Biography.”
- Article by Jani L. Barker, “Racial Identification and Audience in *Roll of Thunder, Here My Cry* and *The Watsons Go to Birmingham—1963*.”
- Entries from the *Modern Language Association Directory of Periodicals* for the following journals: *ASEBL Journal*, *The Atrium*, *Journal of Contemporary Thought*, *Teaching American Literature*, *The Texas Review*, *Explicator*, and *Eureka Studies in Teaching Short Fiction*, accessed March 2, 2016

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- Entry from the *Modern Language Association Directory of Periodicals for Children's Literature in Education*, May 4, 2016
- Entry from the *Modern Language Association Directory of Periodicals for Lamar Journal of the Humanities*, accessed May 18, 2016
- Website of journal *Research and Criticism*, <http://www.pencraftinternational.com/bookclub.htm>, accessed May 10, 2016
- Website of journal *Diesis*, <http://www.diesisjournal.org/submissions>, accessed May 10, 2016
- *The Atrium* (journal) website from 2013, accessed June 4, 2016.
- *Diesis* (journal) website from 2010, accessed June 4, 2016.
- *Teaching American Literature* website (journal) from fall 2009, accessed June 4, 2016.

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.

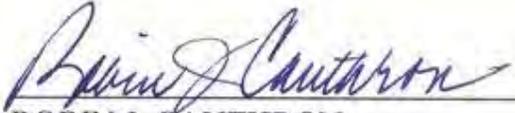
After the consideration of the arguments raised by the parties, the Court finds that Dr. Parker will be permitted to offer expert testimony in this matter. While he certainly could not offer an opinion on the ultimate issue – that is, did Defendants improperly discriminate against Dr. Tudor – he certainly 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

**CASE NO. 15-cv-324-C**

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

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**UNITED STATES OF AMERICA,**

**Plaintiff,**

**RACHEL TUDOR,**

**Plaintiff/Intervenor**

**v.**

**SOUTHEASTERN OKLAHOMA STATE UNIVERSITY and  
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA**

**Defendants.**

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**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
AND BRIEF IN SUPPORT**

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**September 22, 2017**

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

UNITED STATES OF AMERICA,

Plaintiff,

RACHEL TUDOR,

Plaintiff-Intervenor,

v.

**Case No. 15-cv-324-C**

SOUTHEASTERN OKLAHOMA STATE  
UNIVERSITY, and

THE REGIONAL UNIVERSITY  
SYSTEM OF OKLAHOMA,

Defendants.

**DEFENDANTS SOUTHEASTERN OKLAHOMA STATE UNIVERSITY AND  
THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S  
MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT**

Defendants, Southeastern Oklahoma State University, ("SEOSU"), and The Regional University System of Oklahoma ("RUSO"), (collectively "University Defendants" or "the State"), and pursuant to Fed. R. Civ. P. 56(a) and LCvR 56.1 move this Court for summary judgment in their favor<sup>1</sup>, showing the Court as follows:

**INTRODUCTION**

In 2004 Dr. Robert Tudor was hired at SEOSU in the English, Humanities, and Languages Department ("EHL") as a tenure-track professor. In 2007 Dr. Tudor began using the name "Rachel," and transitioned from presenting himself as a man

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<sup>1</sup> The sole remaining party adverse to Defendants is Intervenor, Dr. Rachel Tudor. If the Court later determines that Plaintiff, United States of America, should

to presenting herself as a woman. In 2008 Dr. Tudor (“Intervenor” or “Tudor”) made an abortive attempt to apply for tenure. At a most preliminary level the EHL committee voted 0-5 against recommending her for tenure. Then after a conversation with her department chair, Intervenor withdrew her application before it could be sent to the Dean and higher administration for consideration. In 2009 Intervenor again submitted her application for tenure, this time receiving enough committee votes (4-1) for her application portfolio to be sent up for administrative consideration. Intervenor’s portfolio was then reviewed independently first by the Dean, and then by the Vice-President for Academic Affairs, both of whom had concerns about Intervenor’s application and recommended against the granting of tenure. In an attempt to assist Intervenor, the administration decided to offer her an opportunity to withdraw her portfolio prior to denial, and then to have an extra time period in which to improve her portfolio. At the time, she was warned that if the portfolio were allowed to continue being considered, tenure would be denied. Intervenor ignored the academic and professional advice she received from administrators (the decision makers) at SEOSU, and pushed forward with a deficient tenure application, with full knowledge she would not succeed. The result of Tudor’s selfish and cavalier approach to the tenure process was that Intervenor’s application for tenure was denied. Rather than accept personal responsibility for her own inadequacies in a very detail-oriented process, Tudor began first by submitting internal procedure grievances at the university, and then by filing external charges of discrimination against the State with the United States of

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continue in this litigation then Defendants reserve the right to file a separate

America's ("Plaintiff" or "USA") "Department of Education" ("DOE"), even claiming racial discrimination. After nearly five (5) years Plaintiff finally filed its lawsuit. Intervenor then joined the lawsuit. While USA and Defendants have resolved their dispute via a mutually acceptable settlement agreement, Intervenor's claims remain. Given that no material facts are genuinely disputed at this point, Defendants SEOSU and RUSO move this Court for summary judgment on all counts.

### STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Intervenor was born a male, Robert Tudor, in 1963. *Deposition of Intervenor* at p. 118, ln. 4-8, attached as Exhibit 1.

2. Intervenor began work at SEOSU the fall of 2004. *Id.* at p. 86, ln. 19-24.

3. Intervenor presented herself as a male from 2004-2007, then presented herself as a female from 2007 to 2016. *Id.* at p. 131, ln. 5-9.

4. From 2007 until after the denial of her tenure portfolio in 2010, Intervenor submitted no written complaints (to any person or entity) alleging unlawful harassment, hostile work environment, discrimination, or retaliation against SEOSU, RUSO, or any of their employees. *Intervenor's Response to RUSO's Interrogatory No. 2*, attached as Exhibit 2.

5. The tenure and promotion portfolio review process at SEOSU is a multi-tiered process going up from academic department, to dean, then to

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dispositive motion *vis a vis* that entity.

vice-president for academic affairs, then to the university president. *Deposition of Jesse Snowden* at p. 45, ln. 24 – p. 46, ln. 6, attached as Exhibit 3.

6. During the 2008-2009 academic year, (“AY08-09”), Intervenor submitted her portfolio to the English, Humanities, and Languages Department (“EHL”) for promotion and tenure consideration. Ex. 1 at p. 31, ln. 9-11.

7. During AY08-09, the EHL promotion and tenure committee voted unanimously against Intervenor receiving further tenure consideration. *Deposition of Lucretia Scoufos* at p. 64, ln. 14-20; p. 152, ln. 21-23, attached as Exhibit 4.

8. After the vote against her portfolio, and followed by her conversation with the EHL Department Chair during AY08-09, Intervenor withdrew her tenure application from further consideration. Ex. 1 at p. 175, ln. 6-21.

9. During the 2009-2010 academic year, (“AY09-10”), Intervenor again submitted her portfolio to the (“EHL”) Department for promotion and tenure consideration. *Id.* at p. 31, ln. 9-11.

10. During the AY09-10, the EHL promotion and tenure committee voted 4-1 in favor of allowing Intervenor’s portfolio to receive tenure consideration from the SEOSU administration. *Deposition of Randy Prus* at p. 145, ln. 5-7, 25 - p. 146, ln. 5, attached as Exhibit 5.

11. After Intervenor’s AY09-10 portfolio left the EHL committee it was reviewed by then-Dean Lucretia Scoufos (“Dean Scoufos”), who did not recommend Intervenor for promotion and tenure because Intervenor did not have the credentials. Ex. 4 at p. 103, ln. 23-25.

12. After Intervenor's AY09-10 portfolio moved from Dean Scoufos up the administrative chain it was reviewed by then-Interim Vice-President for Academic Affairs Douglas McMillan ("VP McMillan"), who did not recommend Intervenor for promotion and tenure. *Deposition of Doug McMillan* at p. 114, ln. 21-23, attached as Exhibit 6.

13. Among reasons cited by VP McMillan for not recommending Intervenor's portfolio for promotion and tenure was that in his "professional judgment, [Intervenor's scholarship] didn't reach that noteworthy and exceptional standard that the service did not meet the [] requirement from policy." *Id.* at p. 115, ln. 16-18.

14. After VP McMillan completed his review of Intervenor's AY09-10 portfolio, he sent it to then-President Dr. Larry Minks on or about February 10, 2010. *Id.* at p. 109, ln. 4-11.

15. Prior to a final denial of Intervenor's tenure application in AY09-10, Intervenor was given the opportunity by SEOSU to withdraw and improve her portfolio, to be reconsidered in a later academic year. Ex. 4 at p. 152, ln. 10 – p. 153, ln. 6.

16. VP McMillan, Dean Scoufos, and Dr. John Mischo (then-Chair of the EHL Department) agreed that this was a generous offer, amounting to a "gift" to Intervenor. *Id.* at p. 152, ln. 10-12; p. 153, ln. 6, 13-15.

17. On April 6, 2010, Intervenor rejected SEOSU's offer to withdraw and improve her portfolio before final rejection. *Id.* at p. 153, ln. 6-20.

18. Prior to April 30, 2010, Intervenor was informed by then-President of SEOSU, Dr. Larry Minks, that her AY09-10 request for tenure and promotion had been denied. *April 30, 2010 McMillan Memo to Intervenor*, attached as Exhibit 7.

19. Once an application for tenure moves through the administration, if the portfolio is not withdrawn prior to denial by the president, then the professor cannot reapply. Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2 and Ex. 6 at p. 189, ln. 21-24.

20. Intervenor filed her first discrimination charge with the U.S. Department of Education in September 2010 alleging her tenure denial was due to discrimination because she was female and Native American. There was no mention of her transgender status. *September 2010 DOE Charge*, attached as Exhibit 8.

21. In AY09-10 and AY10-11, both men and women received tenure. *Excerpts from SEOSU's Response to EEOC Request for Info.* at Bates No. 459, attached as Exhibit 9.

22. At the time of Intervenor's application, once the tenure and promotion process ended the portfolios were returned to the faculty members and no copies were retained by SEOSU. *Id.* at Bates Nos. 1949-1950.

23. After leaving SEOSU, Intervenor claims that she applied for employment at over one hundred (100) institutions of higher education across the United States. *Intervenor's Response to RUSO's Interrogatory No. 11*, attached as Exhibit 10.

24. Despite reportedly applying at over one hundred (100) institutions of higher education across the United States after leaving SEOSU, Intervenor only received one (1) offer of employment. Ex. 1 at p. 90, ln. 8-19.

25. Intervenor's only offer of employment was at Collin College, a community college in Texas. She accepted that offer. *Id.* at p. 90, ln. 8-19; p. 100, ln. 10-14.

26. During her employment at Collin College, Intervenor received a "notable number of evaluations that described her instruction as unclear and her classroom management as inadequate," and having a "need for improvement." *Excerpts from Intervenor's Collin College Personnel File*, at CC270, attached as Exhibit 11.

27. During her employment at Collin College, Intervenor received notification that her "service to Collin College does not meet Collins' standard of excellence." *Id.* at CC268.

28. During her employment at Collin College, Intervenor received notification that her "professional development does not meet Collins' standard of excellence." *Id.* at CC268.

29. During her employment at Collin College, Intervenor received notification that her "simply maintaining membership on committees does not constitute substantive service." *Id.* at CC270.

30. During her employment at Collin College, Intervenor received notification of student complaints about her instruction, and that these complaints were consistent with prior student complaints. *Id.* at CC270.

31. During her employment at Collin College, Intervenor received notification that while “she does not see a need for improvement in her instruction or classroom management” that “stance [] is inconsistent with the dean’s assessment.” Further, it was noted that “[t]he service she has provided continues to be adequate, not outstanding.” *Id.* at CC270.

32. Intervenor started work at Collin College in 2012, and was then non-renewed by that school in spring 2016. Ex. 1 at p. 90, ln. 4-6; Ex. 11 at CC1059-CC1065.

33. Unable to take responsibility for her own shortcomings as an instructor, Intervenor accused Collin College of discriminating against her based on her transgender status. Ex. 11 at CC1061-1065.

34. SEOSU had an anti-sexual harassment policy in effect, including a grievance procedure, during Intervenor’s employment. *SEOSU Anti-Sexual Harassment Policy*, attached as Exhibit 12.

35. SEOSU had an equal opportunity and anti-discrimination policy in effect during Intervenor’s employment. *SEOSU Equal Opportunity and Anti-Discrimination Policy*, attached as Exhibit 13.

36. Intervenor never submitted a complaint or grievance about any allegedly harassing statements. Ex. 1 at pp. 306-307.

37. In June 2007, Intervenor had a conversation with HR Director, Ms. Cathy Conway, during which Conway offered optional use of a single-occupancy, unisex, handicap accessible restroom in Intervenor’s building, (as well a family

restroom in the student union), should Intervenor want or need it during her transition. *Deposition of Cathy Conway*, at p. 48, ln. 15-21, attached as Exhibit 14.

38. Intervenor thanked Ms. Conway for her professionalism at the end of her conversation about restroom options. *Id.* at p. 48, ln. 21-22.

### STANDARD OF REVIEW

Summary judgment shall be granted when the moving party demonstrates that it is entitled to judgment as a matter of law because there is no evidence – considering the pleadings, depositions, answers to interrogatories, along with affidavits – to support the claims of the nonmoving party or that there is no genuine issue as to any material fact. Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). An issue is “genuine” only if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). “A fact is ‘material’ if, under the governing law, it could have an effect on the outcome of the lawsuit.” *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1190 (10th Cir. 2000). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted.” *Anderson*, 477 U.S. at 248. The moving party bears the burden of showing that no genuine issue of material fact exists. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1190. The court must “view the evidence and draw all reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.” *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000) (quotation omitted). Although

Intervenor is entitled to all reasonable inferences from the record, she must still marshal sufficient evidence requiring submission of the matter to the jury in order to avoid summary judgment. *Piercy v. Maketa*, 480 F.3d 1192, 1197 (10th Cir. 2007). Thus, if Intervenor bears the burden of persuasion on a claim at trial, then summary judgment may be warranted if (a) Defendants point out a lack of evidence to support an essential element of that claim, and (b) Intervenor cannot identify specific facts that would create a genuine issue. *Water Pik, Inc. v. Med-Systems, Inc.*, 726 F.3d 1136, 1143-44 (10th Cir. 2013).

### ANALYSIS AND AUTHORITY

#### I. INTERVENOR HAS NOT ESTABLISHED A PRIMA FACIE CLAIM OF HOSTILE WORK ENVIRONMENT. (COUNT ONE)

##### a. The *prima facie* case

A hostile work environment is one which is permeated with discriminatory intimidation and ridicule sufficiently severe or pervasive as to be abusive to a reasonable individual. *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367, 370 (1993). To establish a *prima facie* case of hostile work environment based on sex, a plaintiff must establish that (1) she was discriminated against because of her sex; and (2) that the discrimination was sufficiently severe or pervasive such that it altered the terms or conditions of her employment and it created an abusive working environment. *Medina v. Income Support Div., New Mexico*, 413 F.3d 1131, 1134 (10th Cir. 2005).

In order to be actionable, a sexually objectionable environment must be both objectively and subjectively offensive: one that a reasonable person would find

hostile or abusive, and one that the particular plaintiff in fact perceived to be so. *Id.* at 370-371. Title VII does not establish a general civility code for the workplace, and a plaintiff may not predicate a hostile work environment claim on run-of-the-mill boorish, juvenile, or annoying behavior that is not uncommon in the workplace. *Lounds v. Lincare, Inc.*, 812 F.3d 1208, 1222 (10th Cir. 2015). “Therefore, to avoid summary judgment at the prima facie stage, a plaintiff must present evidence that creates a genuine dispute of material fact as to whether ‘the workplace is permeated with discriminatory intimidation, ridicule, and insult[] that is sufficiently severe or pervasive to alter the conditions of the victim’s employment.’” *Id.* (citing *Hall v. U.S. Dep’t of Labor*, 476 F.3d 847, 851 (10th Cir. 2007)).

Based solely upon the false and unsupported allegations in Intervenor’s Complaint, one might mistakenly conclude the existence of a hostile work environment. But these claims can quickly be put to rest because they have absolutely no factual basis or evidentiary support, despite the seven years of discovery conducted by the EEOC, U.S.A., and/or Intervenor. Intervenor’s vague, conclusory allegations include:

Southeastern’s administrators instituted a campaign of harassment and bullying on the basis of sex and sex stereotyping...

[Doc. 24, ¶ 131].

Dr. Tudor was targeted for harassment by administrators because of her sex...

[Doc. 24, ¶ 132].

The work environment was permeated with discriminatory intimidation, ridicule, and insult, sufficient severe or pervasive...

[Doc. 24, ¶ 135].

However, a review of the **specific occurrences** upon which Intervenor relies reveal a complete lack of evidentiary support for her claim that these incidents occurred or that they created a hostile work environment:<sup>2</sup>

- 1) A one-time incident (for which Tudor is uncertain of either date or year) of a double hearsay statement, allegedly made by Dr. McMillan to Jane McMillan, who then allegedly repeated it to Dr. Tudor, that Dr. McMillan “objected to the transgender lifestyle.”

(Ex. 1 at p. 298, ln. 25 – 299, ln. 24); [Doc. 24, ¶ 136].

- 2) A one-time incident in June 2007 when SEOSU’s Human Resources Director, Cathy Conway, supposedly told Tudor she was prohibited from using the multi-stall women’s restrooms on campus;

(Ex. 1 at p. 305, ln. 20-24); [Doc. 24, ¶ 137];

- 3) A one-time incident in June 2007 of SEOSU’s Human Resources Director, Cathy Conway, supposedly counseled Tudor about not wearing short skirts or inappropriate make-up

(Ex. 1 at p. 305, ln. 3 – p. 306, ln. 4);

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<sup>2</sup>None of these alleged harassing events can be considered because none of them occurred within 300 days of Intervenor’s initial discrimination charge, filed with U.S. Department of Education, in September 2010. [Doc. 1, ¶ 59]. Under Title VII, an employee must file a charge with the EEOC within 300 days of the discriminatory conduct. 42 U.S.C. §2000e-5(e)(1). While certain circumstances permit hostile work environment claims to rely in part on conduct that occurred outside the 300 day limitations period, those circumstances are not present here. To consider pre-limitations period conduct, those acts must comprise “part of the same actionable hostile work environment practice” that continued into the limitations period. *Duncan v. Manager, Dep’t of Safety*, 397 F.3d 1300, 1308-1309 (10th Cir. 2005) The pre- and post- limitations period incidents must involve the same type of employment actions, occur relatively frequently and have been perpetrated by the same managers. Here, there are no post-limitations period incidents, much less incidents that occurred with frequency.

- 4) Hearsay statements of a couple of comments in 2007 that may have included misgendering, i.e. someone referring to Dr. Tudor as “he,” or using masculine pronouns after Tudor’s gender transition; and
- 5) Defendants provided a health insurance plan with an exclusion for transgender health care (Tudor submits this allegation despite the fact she never sought coverage for any transgender-specific health care).

(Ex. 1 at p. 283-285, 312-313); [Doc. 24, ¶ 146].<sup>3</sup>

All of these alleged comments are untrue, and it is significantly telling that at no time over the remaining four (4) year period of employment at SEOSU did Intervenor complain or submit any type of grievance regarding any of these supposed incidents. (Ex. 1 at pp. 306-309). Health coverage was never denied by SEOSU or RUSO. Even if one assumed the alleged comments were true, these instances fail to demonstrate a work environment permeated with intimidation and ridicule. *See Morris v. City of Colo. Springs*, 666 F.3d 654, 669 (10th Cir. 2012) (failure to complain of incident for several days and continuing to work for employer for three months suggests incident not subjectively severe.) A “few isolated incidents” of “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. *Id.* at 665-668; *See also Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) (“five separate incidents of allegedly sexually-oriented, offensive comments either directed to [the plaintiff] or made in

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<sup>3</sup> Intervenor never raised the issue of health care exclusions in her DOE/EEOC charges, and therefore, this claim cannot be considered because Intervenor failed to exhaust her administrative remedy regarding this claim.

her presence in a sixteen month period” were not sufficiently pervasive to support a hostile work environment claim); *cf. Witt v. Roadway Exp.*, 136 F.3d 1424, 1428-29, 1432 (10th Cir. 1998) (two incidents over two years where employee was called a “n\*\*\*\*r,” including “F\*\*\* that n\*\*\*\*r, he don’t have no rights” in response to the employee’s complaint, did not constitute a hostile work environment).

The Court must analyze the conduct at issue here with the aforementioned guidelines in mind and determine whether a reasonable jury could find that the subjective and objective effects of the conduct were to pollute the environment with harassing conduct that was, *inter alia*, sexually humiliating, offensive, or insulting, to the extent it is sufficiently severe or pervasive. *Lounds*, 812 F.3d at 1228.

In making the determination of whether an environment is hostile, courts consider all the circumstances, such as frequency and severity of the discriminatory conduct; whether it was physically threatening or humiliating; and whether it unreasonably interfered with an employee’s work performance. *Harris* at 370. Isolated incidents, unless extremely serious, will not amount to a discriminatory change in the terms and conditions of employment. *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 2283 (1998); *Morris v. City of Colorado Springs*, 666 F.3d 654, 664 (2012). In attempting to define the severity of the offensive conditions necessary to constitute actionable sex discrimination, the *Faragher* court looked to prior cases of discriminatory harassment based on race, and noted, “[d]iscountenance or rudeness should not be confused with racial harassment;” “a lack of racial sensitivity does not, alone, amount to actionable harassment.” *Faragher* at 787; citations omitted. The U.S. Supreme Court has made it clear that conduct must be extreme to amount

to a change in the terms and conditions of employment. *Id.* at 788. Without question, the evidence here falls so far short of discriminatory harassment that **no reasonable person** could find it to be objectively or subjectively hostile or abusive.

**b. Remedial measures not pursued**

If a hostile work environment is established, then liability is imputed to the employer through a theory of vicarious liability, subject to the defense that the employer took reasonable care to prevent (and promptly correct) harassing behavior and the employee unreasonably failed to take advantage of the preventative and corrective opportunities available. *Faragher* at 2292-2293 (1998); *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 2270 (1998). The hostile environment methodology effectuates Congressional preference for conciliation rather than litigation by balancing the imposition of vicarious liability with the preventative and remedial measures defense. This encourages the employer in its obligation to prevent violations, and encourages the employee to report harassment before an environment becomes severe and pervasive. *Ellerth* at 2270; *Faragher* at 2292.

Preventative measures include adoption and dissemination of a harassment policy. Remedial measures require prompt investigation once proper notice of harassment is received. *Helm v. Kansas*, 656 F.3d 1277, 1290 (10th Cir. 2011). While an employee of SEOSU, Intervenor ***never*** submitted a complaint or grievance regarding the allegedly harassing statements. Hence, Intervenor never gave Defendants notice (proper or otherwise) of any such supposed harassment, and thus, Defendants were deprived of any opportunity to conduct an investigation of the alleged harassment. Not only did Intervenor deprive Defendants of the

opportunity to employ remedial measures, she also deprived Defendants of the ability to address the veracity of Intervenor's allegations. Of course, this presupposes the statements were ever actually made, and there is no evidence of that. Intervenor's claims of hostile work environment were never brought to Defendants' attention during her SEOSU employment. Had Intervenor given Defendants proper notice then the university or RUSO board would have had the opportunity to investigate the situation, remediate it if necessary, and avoid litigation altogether. Thus, even if the alleged statements occurred, which Defendants deny, Intervenor failed to avail herself of appropriate remedial measures, despite her excessive and extensive use of the university's grievance processes for multiple other reasons.

For example, Cathy Conway, SEOSU Human Resources Director admitted she had a telephone discussion with Intervenor relating to which bathroom Intervenor might initially feel the most comfortable utilizing after beginning her transition. In the single conversation between Ms. Conway and Intervenor, Ms. Conway proposed to Intervenor the option of using the single-occupancy, unisex, handicap accessible bathroom in Intervenor's office building because it was a single-occupant option with more privacy. In response, Intervenor thanked Ms. Conway for the suggestion and for her professionalism. Ms. Conway's notes of this conversation substantiate her recollection. In Intervenor's deposition, she claimed that as a result of this singular conversation in June 2007 she was forced to run all over campus for the next four years, in search of unisex bathrooms, and that she thus endured great embarrassment and humiliation as a result. However, despite

Intervenor's intricate knowledge of SEOSU's grievance process, and her innate willingness to complain, Intervenor never submitted any type of complaint about the alleged bathroom restriction, or about attire, make-up, or any other restrictions supposedly placed upon her by Ms. Conway. There is simply no evidence that these occurred, but more importantly, no evidence of SEOSU's awareness of any harassing conduct. Thus, vicarious liability cannot be imposed on Defendants.

In summary, Intervenor fails to illustrate a hostile work environment. Take the totality of the circumstances, in a light most favorable to Intervenor, her unsubstantiated allegations of isolated instances of harassment fail to show a workplace permeated with sexually based intimidation and ridicule. Furthermore, Defendants were deprived of any opportunities to address Intervenor's accusations, while at the same time Intervenor did not exercise reasonable care to avoid harm. Summary judgment in favor of Defendants should be granted.

**II. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF DISCRIMINATION. (COUNT TWO)**

Title VII of the Civil Rights Act of 1964 makes it unlawful to discriminate against an employee based on their sex:

It shall be unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex . . .

42 U.S.C. § 2000e-2(a)(1).

Initially, Intervenor bears the burden of proving a *prima facie* case of sex discrimination. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973);

*Perry v. Woodward*, 199 F.3d 1126, 1135 (10th Cir. 1999). A *prima facie* case of discriminatory discharge (or non-renewal in this case) requires Intervenor to show, “(1) she belongs to a protected class; (2) she was qualified for her job; (3) despite her qualifications, she was discharged; and (4) the job was not eliminated after her discharge.” *Perry*, 199 F.3d at 1135 (citation omitted); *see also Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012) (recharacterizing the fourth factor as “she was treated less favorably than others not in the protected class”). At every stage, Intervenor retains the burden of persuasion under Title VII that she was intentionally discriminated against. *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 120 S.Ct. 2097, 2016 (2000); and Fed. R. Evid. 301.

If Intervenor “establishes her *prima facie* case, a rebuttable presumption arises that the defendants unlawfully discriminated against her.” *Perry*, 199 F.3d 1135 (citation omitted). The burden then shifts to the State to “articulate a legitimate, nondiscriminatory reason for the adverse employment action suffered by the plaintiff.” *Id.* (citing *McDonnell Douglas*, 411 U.S. at 802). This is only a burden of production. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993). If such reason is produced, then the presumption created by a *prima facie* case is rebutted and falls away. *Id.* at 507. Once the defendant articulates any valid reason, “the plaintiff can avoid summary judgment only if she is able to show that a genuine dispute of material fact exists as to whether the defendant’s articulated reason was pretextual.” *Perry*, 199 F.3d at 1135 (citing *Randle v. City of Aurora*), 69 F.3d 441, 451 (10th Cir. 1995)), or not the true reason, *Hicks*, 509 U.S. 508.

**a. Intervenor fails to establish a *prima facie* case of discrimination.**

Intervenor's Complaint somewhat confusingly asserts either conjunctively or disjunctively that for purposes of Title VII protection her protected status is either (a) that she is specifically a woman, or (b) that she is a woman, thereby potentially cloaking herself with the protected status designation to meet criterion number (1) under *McDonnell Douglas*. However, to the extent Intervenor relies on her status as a transgender person, her *prima facie* case crumbles from the outset. The courts have consistently told us that transgender status is not, by itself, a protected class. The Tenth Circuit Court of Appeals has explicitly stated, “. . . transsexuals are not a protected class under Title VII,” *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220 (10th Cir. 2007). That decision remains undisturbed in this Circuit.

The United States of America, in a recent *amicus curiae* filing in the Second Circuit Court of Appeals case of *Zarda v. Altitude Express*, 15-3775, submitted the following:

The term “sex” is not defined in Title VII, but as Judge Skyes observed in *Hively* without dispute from the majority, “[i]n common, ordinary usage in 1964 – and now, for that matter – the word ‘sex’ means biologically *male* or *female*.” 853 F.3d at 362 (dissenting op.) (citing dictionaries). As for the term “discrimination,” the Supreme Court has held that Title VII requires a showing that an employer has treated “similarly situated employees” of different sexes unequally. *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

*Brief for Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation as Amici Curiae Supporting*

*Appellees and Affirmance, Zarda v. Altitude Express*, (2015) (No. 15-3775) (United States Court of Appeals for the Second Circuit)<sup>4</sup>.

Under *Etsitty*, one's transgender status does not place a person in a protected class. Under the authority and reasoning recently offered by the United States of America, 'sex' means a person's biological status and male or female. Intervenor has not plead, nor can she show, that she is biologically female. This fact precludes her from proving she belongs to the protected class of "female," which precludes her from satisfying the first element under *McDonnell Douglas*.<sup>5</sup>

Intervenor also fails to show that her case meets the second element under *McDonnell Douglas*. Under *Khalik*, Intervenor has not shown that she was treated less favorably than similarly situated employees outside of her protected class. A similarly situated employee is one who shares the same supervisor and is subject to the same standards governing performance along with other relevant employment circumstances. *Green v. New Mexico*, 420 F.3d 1189, 1194-1195 (2005). The law shows us that transgender is not a protected class. If Intervenor hangs the proverbial hat on the notion of membership in the protected class of "female," then the evidence shows us that (a) Intervenor is not biologically female, and (b) that other females were, in fact, given tenure in the same time frame as Intervenor's application. Thus, the second element of *McDonnell Douglas* cannot be met.

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<sup>4</sup> Attached for the Court's convenience.

<sup>5</sup> Intervenor was born biologically male, (*See* UMF 1.), and male is not a protected class under Title VII.

Intervenor's *prima facie* case falls further apart at element four of the *McDonnell Douglas* test. A plaintiff has no *prima facie* case if she fails to demonstrate that the job was filled by someone outside the protected class. *U.S. v. N.L. Industries, Inc.*, 479 F.2d 354 (8th Cir. 1973); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981). In *Fuentes v. Perskie*, the Third Circuit ruled that “[i]n a case of failure to hire or promote under Title VII, the plaintiff must first carry the initial burden . . . by showing . . . (iv) that, after [her] rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.” 32 F.3d 759, 763 (3rd Cir. 1994) (internal citations omitted). In *Brown v. Delaware River Port Authority*, the district court there held that once an applicant was rejected for the position, the opening was closed. 10 F.Supp. 3d 556, 561-62 (D.N.J. 2014). Because the position was closed, the plaintiff failed to meet the fourth prong of the *McDonnell Douglas* test.

In *Houston v. Independent School Dist. No. 89 of Oklahoma*, this Court determined that the plaintiff therein failed to make a *prima facie* case because she failed to demonstrate that her position was not eliminated. 2010 WL 988414, at \*9 (W.D.O.K). In fact, the *Houston* court found that there was no other person that held the position in question after that plaintiff had left the employer, and that there was no “evidence that the position remained open and available to others.” *Id.* Here, Intervenor has failed to show that the tenure position which she sought was either left open after her separation from the University, or that it was filled by any other person outside the protected class.

Interevenor must show that after her non-renewal the job was not eliminated. But Intervenor cannot do that. The tenure position to which Intervenor aspired ceased to exist after her separation from the University. Intervenor cannot show the tenure-track position in that department was filled by any new hire or existing employee. Instead, the classes Intervenor formerly taught were split up among existing faculty.

**b. Intervenor was denied tenure for legitimate, nondiscriminatory reasons.**

Despite exhaustive (bordering on abusive) Discovery practice, Intervenor has produced zero direct evidence of discrimination. If Intervenor had demonstrated a *prima facie* case (which she has not), then under the *McDonnell Douglas* formula, the burden would shift to the State to demonstrate its legitimate nondiscriminatory reasons for Intervenor's non-renewal. In addition to Intervenor's failure under the University's multi-stage tenure review process - which progresses upward from (a) a committee in the English, Humanities and Languages Department to (b) the Dean of Arts & Sciences, to (c) the Vice-President for Academic Affairs, to (d) the University President, who then makes a recommendation to the RUSO Board - Intervenor demonstrated her lack of qualification by being unable to attain renewal at Collin College, a two-year community college, the only job she was apparently offered after allegedly applying at over one hundred (100) colleges and universities across the nation.

The burden for the State at this point is one of production, not persuasion, and involves no credibility assessment at all. *Reeves v. Sanderson Plumbing*

*Products, Inc.*, 530 U.S. 133, 142 (2000). The State meets “this burden by offering admissible evidence sufficient for the trier of fact to conclude that Intervenor] was [denied tenure] for legitimate, nondiscriminatory reasons.” *Id.* (citations omitted). Once legitimate, nondiscriminatory reasons are offered, then the presumptions and burdens against Defendants fall away, and Intervenor still must prove that she was actually discriminated against. *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 507-508 (1993).

In situations like the present case’s determinations of academic tenure, courts have generally made determinations of liability along a sliding scale. According to an article in the *Harvard Law Review*, “as a court’s estimation of a particular job’s mental difficulty, communication and educational requirements, prestige, and social important increases, the more apt it becomes to require complex, particularized, and convincing evidence [from a plaintiff] before finding that a *prima facie* or conclusive case of discrimination has been established.” Tenure and Partnership As Title VII Remedies, 94 Harv. L. Rev. 457, 472 (1980). *See also Sweeney v. Board of Trustees*, 569 F.2d 169, 176 n. 14 (1st Cir.) (“[j]udicial tolerance of subjective criteria seems to increase with the complexity of the job involved”), *vacated on other grounds*, 439 U.S. 24 (1978).

Courts have also found that denials of tenure in particular are inherently subjective, but at the same time courts have repeatedly affirmed a great deference to the decision-makers in tenure determinations. *See Lewis v. Chicago State College*, 299 F.Supp. 1357, 1359 (N.D. Ill. 1969) (“A professor’s value depends upon his creativity, his rapport with students and colleagues, his teaching ability, and

numerous other intangible qualities which cannot be measured by objective standards.”) *See, e.g. Johnson v. University of Pittsburg*, 435 F.Supp. 1328, 1371 (W.D. Pa. 1977) (“In determining qualifications in [these] circumstances the court is way beyond its field of expertise and in the absence of a clear carrying of the burden of proof by the plaintiff, we must leave such decisions to the PhDs in academia.”)

In seeking to rebut a plaintiff’s *prima facie* case, a “defendant need not persuade the court that it was actually motivated by the proffered reasons.” *Burdine*, 450 U.S. at 254. It is clear from the evidence noted above that there were multiple reviewers of Intervenor’s tenure application, and that there were multiple determinations that the University had legitimate, nondiscriminatory reasons for denying Intervenor tenure. And it is also clear that any court reviewing those determinations should grant great deference to the decision makers in academia.

- c. Denial of Intervenor’s tenure application was not pretextual since she was given the professional judgment of university administrators and an extended period in which to improve her portfolio, coupled with her rejection of those opportunities.**

“[S]hould the defendant carry this burden of production of legitimate, nondiscriminatory reasons], the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Burdine*, 450 U.S. at 253; *see also Hicks*, 509 U.S. at 510-11 (holding presumption of discrimination disappears once defendant carries its burden of production). “A plaintiff may establish pretext by showing ‘such weaknesses, implausibilities inconsistencies, incoherencies, or contradictions in the employer’s proffered

legitimate reasons for its actions that a reasonable factfinder could rationally find them unworthy of credence and hence infer that the employer did not act for the asserted non-discriminatory reasons.” *Santana v. City & Cnty. of Denver*, 488 F.3d 860, 864-65 (10th Cir. 2007) (quoting *Morgan v. Hilti, Inc.*, 108 F.3d 1319, 1323 (10th Cir. 1997)). “However, ‘mere conjecture that [an] employer’s explanation is a pretext for intentional discrimination is an insufficient basis for denial of summary judgment.’” *Id.* (quoting *Branson v. Price River Coal Co.*, 853 F.2d 768, 772 (10th Cir. 1998)).

“In determining whether the proffered reason for a decision was pretextual, we examine the facts as they appear *to the person making the decision*” not “the plaintiff’s subjective evaluation of the situation.” *Luster v. Vilsack*, 667 F.3d 1089, 1093 (10th Cir. 2011) (emphasis in original) (internal quotation marks and citation omitted). “But a reason cannot be proved to be ‘a pretext for discrimination’ unless it is shown both that the reason was false, and that discrimination was the real reason.” *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993). Intervenor must come forth with evidence that would convince a reasonable finder of fact that State’s proffered reasons are unworthy of credence. *Mackenzie v. City & Cnty. of Denver*, 414 F.3d 1266, 1278 (10th Cir. 2005) (citations omitted).

Tenure is not to be given lightly. Tenure carries with it significant protections against termination, and is, in effect, a contract for life. *See Huang v. College of the Holy Cross*, 436 F.Supp. 639, 653 (D. Mass. 1977); *Labat v. Board of Higher Educ.*, 401 F.Supp. 753, 756 (S.D.N.Y. 1975). In the present case, Intervenor submitted her tenure portfolio for consideration twice. In her 2008-2009 application,

on her first attempt to receive tenure, the vote in her departmental committee against her portfolio was 0-5. Her second attempt a year later (2009-2010), was given a 4-1 vote, allowing her portfolio to proceed up out of the department. But that vote was not a guarantee of tenure, only permission from her departmental colleagues to seek tenure from the administration above.

During administrative review, first by the Dean of the college, second by the Academic Vice President, and then third by the University President, Intervenor's tenure portfolio was found to be deficient. After it became clear to the administration that Intervenor's portfolio did not merit tenure, a decision was made to offer Intervenor an opportunity to withdraw her current application, take extra time to improve her portfolio, and then resubmit a satisfactory application portfolio.<sup>6</sup> She declined that invitation. The University administration was surprised by Intervenor's decision, but it was hers to make. And she must live with the detrimental effects of her personal and professional decision. The multiple stages of review, coupled with the extraordinary opportunity given to Intervenor (which she rejected), demonstrate without genuine contravention that the University's decision against granting tenure was not pretextual. Intervenor has no evidence to the contrary, and certainly not a preponderance of the evidence. It seems likely that Intervenor regrets her decision to not withdraw her portfolio and improve it, and perhaps she made that decision out of hurt feelings rather than cool

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<sup>6</sup> While there may be some dispute as to the length of time Intervenor was offered to improve her portfolio, there is no dispute that she was offered the opportunity to withdraw her application for tenure prior to its denial so that she could reapply after a period of time with an improved portfolio.

deliberations. But, her refusal to accept the university's gift-like offer does not amount to unlawful discrimination by SEOSU.

Lest Intervenor claim that SEOSU and its administrators were merely conspiring against her unfairly, the evaluation of Intervenor's professional quality was also borne out by the post-separation evidence. Setting aside the great deference courts historically have granted, and should continue to grant, to academia about such issues, Intervenor was judged less than deserving by what she claims are over one hundred (100) higher education institutions, all of which declined to offer her a job. Further, the only one that did offer her a job, (Collin Community College), ultimately did not renew her employment due to its determination that her work performance and product was not sufficient. This third-party, real-world employer's determination about Intervenor's quality as a professor in a higher education setting is telling, and it is supportive and corroborative of SEOSU's determination about Intervenor.<sup>7</sup> Summary judgment should be granted in favor of the University and RUSO.

### **III. INTERVENOR HAS NOT CARRIED HER BURDEN TO ESTABLISH A TITLE VII CLAIM OF RETALIATION. (COUNT THREE)**

“Under [*McDonnell Douglas*] familiar framework, [Intervenor] must first establish a *prima facie* case of retaliation by showing “(1) she engaged in protected opposition to Title VII discrimination; (2) she suffered an adverse employment action; and (3) there is a causal connection between the protected activity and the adverse employment action.” *Fye v. Oklahoma Corp. Comm'n*, 516 F.3d 1217, 1227

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<sup>7</sup> Intervenor has been unable to obtain academic employment since her March 2016 nonrenewal by Collin College.

(10th Cir. 2008) (*citing Meiners v. Univ. of Kan.*, 359 F.3d 1222, 1229 (10th Cir. 2004)). In the case at bar, Intervenor cannot genuinely show that she was subjected to retaliation by RUSO or SEOSU.

As noted above, transgender is not a protected status under Title VII. Therefore, any purported discrimination on that basis is not prohibited by Title VII and could not serve as the basis for step one of the *prima facie* retaliation analysis under *Fye*, described above. Further, to the extent Intervenor contends she was a woman who suffered gender stereotyping discrimination, there is zero credible evidence of that. The exhaustive Discovery conducted in this case yielded no direct or indirect evidence of gender stereotyping.

It is clear that Intervenor makes no claim of retaliation prior to her not being allowed to reapply for tenure after her portfolio was denied. In fact, Intervenor's Complaint [Doc. 24] makes exactly one (1) factual allegation in purported support of her retaliation claim: that she was denied the opportunity to reapply for tenure during the 2010-2011 academic year, despite that her tenure application the year before had been allowed to proceed to the University President's review without first being withdrawn. However, any such allowance of repetition of application, (after denial), would have been extraordinary, and contrary to administrative practice. The testimony of multiple witnesses confirms that once an application for tenure moves up out of the department and through the administration, if the portfolio is not withdrawn *prior to denial* by the President then the professor cannot reapply. For example, former interim-president and vice-president for academic affairs, Dr. Jesse Snowden, testified in pertinent part, as follows:

Q. At Southeastern while you were interim president, could the candidate apply in the fifth year, get denied by the president, and the reapply in their sixth year?

A. No.

Q. Why not?

A. One – the policy, once you went through the process, that was it. You were either granted tenure or not.

Q. Was that also true when you were vice-president for academic affairs?

A. Yes.

...

A. I don't know of any university that allows you to apply again after you've been denied tenure.

(Ex. 3 at p. 56, ln. 9 – p. 57, ln. 2).

In another instance, former vice-president for academic affairs, Dr. Douglas McMillan, testified in pertinent part, as follows:

Q. And is it your understanding that this policy prohibited reapplication for tenure after denial by the president?

A. Yes.

(Ex. 6 at p. 189, ln. 21-24).

To the extent Intervenor was not allowed to reapply after she ignored University leadership's advice, but instead let her tenure portfolio and application go all the way up through the administration knowing it would be denied, Intervenor neither engaged in protected activity nor suffered an adverse employment action. She made a choice, and that choice had consequences. She was treated no less fairly than anyone else. Summary judgment in favor of RUSO and SEOSU should be granted.

## CONCLUSION

Intervenor does not belong to a class protected under Title VII. Intervenor has not produced reliable evidence of unlawful treatment by SEOSU or RUSO, because such evidence does not exist. Defendants have produced legitimate, nondiscriminatory reasons for their decisions and actions, and those determinations were even corroborated by Intervenor's employment (and search therefore) after her departure from SEOSU. Intervenor has not shown that Defendants' reasons were pretextual because there is no evidence of pretext. Tenure is a significant commitment of time and taxpayers' resources, and it is not to be given lightly. Intervenor was not unlawfully discriminated against or subjected to a hostile work environment; she merely failed to meet the requirements for attainment of tenure. Summary judgment should be granted in favor of the Regional University System of Oklahoma and Southeastern Oklahoma State University.

Respectfully submitted,

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

UNITED STATES OF AMERICA, and)

DR. RACHEL TUDOR,

Plaintiffs,

vs.

NO. 5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA  
STATE UNIVERSITY, and

THE REGIONAL UNIVERSITY  
SYSTEM OF OKLAHOMA,

Defendants.

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME I  
TAKEN ON BEHALF OF THE DEFENDANTS  
IN OKLAHOMA CITY, OKLAHOMA  
ON MARCH 7, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

1 Q (By Ms. Coffey) Let me go back to -- my  
2 question, though, was whether or not -- well, I'm  
3 sorry. You were going to identify everyone that you  
4 were aware of, whether it's firsthand knowledge or  
5 your understanding, based on what you hear from  
6 others, of people who have voted against you for  
7 tenure.

8 So the -- and let me -- I'm going to narrow  
9 it to various years. You first submitted a tenure  
10 application in 2008, correct?

11 A Yes.

12 Q That tenure application didn't make it past  
13 the tenure review committee, did it?

14 MS. WEISS: Objection; confusing.

15 THE WITNESS: Could you rephrase the  
16 question?

17 Q (By Ms. Coffey) What's confusing about that  
18 question?

19 MS. WEISS: My objection was based on "make  
20 it past."

21 THE WITNESS: Yes, could you explain what  
22 you mean by "make it past"?

23 Q (By Ms. Coffey) What is your understanding  
24 of what happened in the 2008 tenure process?

25 A The tenure and promotion committee reviewed

1 agree that you were denied unemployment -- that you  
2 were denied unemployment benefits and that's why the  
3 State took them back?

4 A That was the determination that I filed, my  
5 point of view of why I thought I was eligible for  
6 them.

7 Q And the best that you can recall, this was  
8 the summer of 2008 or 2009?

9 A Yes.

10 Q When did you come to work at Southeastern?

11 A 2007.

12 Q Are you sure? And I'm not trying to trick  
13 you. I think that the documents show that you came  
14 to Southeastern in 2004. You began teaching at  
15 Southeastern in 2004.

16 A Oh, I misunderstood the question. I was  
17 still thinking about the unemployment. It would be  
18 helpful to see the document for my employment dates.

19 Q Okay. So as you sit here today, you don't  
20 remember when you started working at Southeastern?

21 A I do remember.

22 Q Okay. When was that?

23 A In the fall of 2000 -- I'm counting  
24 backwards now. The fall of 2004.

25 Q Why did you file for unemployment in the

1 unemployment in 2011?

2 A I'm not aware.

3 Q Okay. You indicated that you now are  
4 employed at Collin College. When did you get that  
5 job?

6 A 2012.

7 Q Did you begin teaching there -- when did --  
8 when were you notified that you had been hired by  
9 Collin College?

10 A That was the summer of 2012.

11 Q Did you begin teaching in the fall of 2012?

12 A Yes.

13 Q Why did you go to work there?

14 A Could you be more specific?

15 Q Do you have any reasons for accepting the  
16 job offer from Collin College?

17 A Because I was unemployed.

18 Q Was that the only offer that you received?

19 A Yes.

20 Q When did you begin -- when did you begin  
21 searching for a job?

22 A 2011.

23 Q When in 2011?

24 A I believe it was sometime in the late  
25 spring. I'd like to request for me to see a copy of

1 you give me some frame of reference? I can look  
2 at -- discuss the historical reason, the State of  
3 Texas, higher education, what -- what frame of  
4 reference would you like for me to --

5 Q (By Ms. Coffey) I have no idea why Collin  
6 College doesn't have tenured positions, so I'm asking  
7 you if you know. If you don't know, that's fine.

8 A It would all be -- it would all be  
9 speculation, each one of those frames of reference.

10 Q What type of an institution is Collin  
11 College?

12 A It's a community college.

13 Q Are you aware of other community colleges  
14 in Texas which offer -- that offer tenured positions?

15 A Right now, I couldn't -- right now, I  
16 don't -- in 2016, I don't have that information.

17 Q Okay. Did you at one point, or you just  
18 aren't sure of what --

19 A Oh.

20 Q -- of what that status is in Texas?

21 A I don't know what the status of tenure in  
22 community colleges is at present.

23 Q Okay. Does Collin College offer four-year  
24 programs, four-year degrees?

25 A I don't know.

1 going by Rachel Jona?

2 A No.

3 Q Okay. Let me be clear, though, because I  
4 added a qualifier to that. You're born as Robert Joe  
5 in 1963, and you went by that name consistently and  
6 no other name until you started using the name of  
7 Rachel Jona in the early '90s; is that correct?

8 A Yes.

9 Q Then you've told me that you went by Rachel  
10 Jona in the early '90s for how long?

11 A It had been two or three years,  
12 approximately.

13 Q And after that you started going by T.R.?

14 A Yes.

15 Q For a couple of years?

16 A Yes.

17 Q And then that takes us to possibly the late  
18 '90s, and that's when you began -- no. So after you  
19 went by T.R. for a couple of years, then what name  
20 did you go by?

21 A After T.R., I was Rachel Jona.

22 Q Okay. We're up to the early '90s when you  
23 went -- you switched from Robert Joe to going by  
24 Rachel Jona.

25 A Yes.

1 they actually --

2 Q Any other names you've gone by that we  
3 haven't discussed?

4 A No.

5 Q So you presented as a female for two to  
6 three years in the early '90s, and then did not  
7 present again as a female until 2007; is that  
8 correct?

9 A Yes.

10 Q Okay. Did somebody tell you that your  
11 Texas license would expire at some certain time, or  
12 what -- what caused you to seek out obtaining an  
13 Oklahoma license -- driver's license?

14 A Because I was a resident of Oklahoma at the  
15 time.

16 Q So you just decided, since you were an  
17 Oklahoma resident, that you would go get an Oklahoma  
18 license, or did some authority tell you that you  
19 needed to obtain an Oklahoma license?

20 A My understanding is that I need an Oklahoma  
21 license to operate a motor vehicle in Oklahoma.

22 Q Okay. Why did you move to Norman?

23 A To attend the University of Oklahoma.

24 Q How long were you a student at OU,  
25 University of Oklahoma?

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1 A If the ans- -- if the question is, did I  
2 apply for tenure and promotion in 2008 --

3 Q Yes.

4 A -- the answer to that specific question is  
5 yes.

6 Q Okay. How did that process conclude? Did  
7 your tenure -- let me -- okay. Can you answer that,  
8 how it concluded?

9 A Yes.

10 Q What was the end of it? What marked the  
11 end of that process in 2008?

12 A A collegial and collaborative conversation  
13 between me and my department chair about -- about  
14 fortifying my application for the subsequent year.

15 Q Okay. So you do not view it as -- that you  
16 withdrew your application for tenure at any stage in  
17 2008?

18 A Well, I --

19 Q Did you or did you not withdraw your  
20 application?

21 A Well, yes, of course.

22 Q So now -- you've withdrawn it in 2008, so  
23 2009 is a significant year for you, right? With  
24 respect to tenure and promotion.

25 A I don't understand. Can you explain how --

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

UNITED STATES OF AMERICA, and)

DR. RACHEL TUDOR,

Plaintiffs,

vs.

) NO. 5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA  
STATE UNIVERSITY, and

THE REGIONAL UNIVERSITY  
SYSTEM OF OKLAHOMA,

Defendants.

DEPOSITION OF RACHEL JONA TUDOR, Ph.D., VOLUME II  
TAKEN ON BEHALF OF THE DEFENDANTS  
IN OKLAHOMA CITY, OKLAHOMA  
ON MARCH 8, 2016

REPORTED BY: JANA C. HAZELBAKER, CSR

1 you were suggesting I'm reading outside of  
2 professional items.

3 So with respect to hobbies, outside of your  
4 teaching, your research, professional reading,  
5 what -- do you have any hobbies?

6 A No.

7 Q Okay. When you were applying for jobs, did  
8 you investigate as to the health benefits that were  
9 offered by various colleges and universities?

10 A No.

11 Q One of your claims in this lawsuit is that  
12 Southeastern and/or Regional -- the RUS- -- the  
13 acronym RUSO, discriminated against you because of  
14 the health benefits that were excluded from the  
15 plan; is that right?

16 A Yes.

17 Q And to be more specific, what health  
18 benefits are you claiming were excluded and,  
19 therefore, were discriminatory toward you?

20 A Trans-related healthcare benefits.

21 Q And describe which -- what benefits you're  
22 referring to.

23 A Any healthcare benefits which transgender  
24 people require for their well-being.

25 Q But not -- I mean, that's -- but that's not

1 accurate. I mean, if you had -- if you need dental  
2 care, are you claiming that your dental care was  
3 excluded under their health policy? You know, so I'm  
4 asking you specifically what -- you're claiming that  
5 certain health benefits were excluded from  
6 Southeastern's policy and that such exclusion was  
7 discriminatory towards you as a transgender, right?

8 A Yes.

9 Q Okay. So is hormone therapy for  
10 transgenders, is that one benefit you're referring  
11 to?

12 A Hormone therapy is one benefit.

13 Q So identify other benefits for me, please.

14 A They're regularly -- regular monitoring of  
15 hormone levels in the blood.

16 Q Does that differ from hormone therapy or is  
17 it part -- I mean, is it all part of the same  
18 exclusion?

19 A I believe they're part of the same  
20 exclusion since they are both transgender healthcare  
21 related.

22 Q All right. Any other specific benefits  
23 that you're claiming you were denied?

24 A Yes.

25 Q What?

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1 A Vaginal reconstruction surgery.

2 Q Anything else?

3 A Breast reconstruction surgery.

4 Q Anything else?

5 A Facial reconstruction surgery.

6 Q Anything else?

7 A Those are the ones that I recall at the  
8 moment.

9 Q When you were job searching, did you make  
10 any attempt to determine whether any of these  
11 benefits you just identified were offered by these  
12 other -- by any college that you wished to apply to?

13 A No.

14 Q Why not? Was it not important to you?

15 A It was important to me. I was thinking  
16 about how to answer your question.

17 Q Are you aware of any college or university  
18 in the United States that provides -- in their health  
19 plan, provides for the benefits -- any of the  
20 benefits you just identified?

21 A I believe that some do.

22 Q Which colleges or universities do?

23 A I don't recall at the moment.

24 Q Okay. Have you ever done any research on  
25 this issue?

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1       symposium committee, and so I could have clar- -- I  
2       could have discussed that with him and --

3           Q       Would it be a fair statement that you  
4       believe Doug McMillan did not place the same  
5       significance on your involvement and your writings  
6       with respect to the Native American symposium?

7           A       Yes.

8           Q       Would the same be true with respect to Dean  
9       Scoufos?

10          A       Yes.

11          Q       You said that one of the reasons -- one of  
12       the facts you were relying upon for Doug McMillan's  
13       discrimination is that his sister Janet disclosed  
14       that Doug had bias toward you or toward transgender.  
15       I'm not sure if you used that term, but is that  
16       your -- is that what you're claiming, is that Doug  
17       McMillan's sister Janet told you that Doug had a bias  
18       toward transgenders?

19          A       Yes.

20          Q       Okay. Now, first -- her name's Jane,  
21       correct?

22          A       Her name is Jane, that's correct. I --

23          Q       When did Jane tell you that?

24          A       When we had lunch together.

25          Q       Tell me specifically, the best that you can

1 recall verbatim, what Jane McMillan told you with  
2 respect to her brother and this discrimination you're  
3 accusing him of.

4 A Could you rephrase the question, please?

5 Q Tell me, to the best of your recollection,  
6 and verbatim, if possible, but if not, the best that  
7 you can recall, of what Jane McMillan said to you  
8 with regard to Doug McMillan's bias against  
9 transgenders.

10 A She said that her brother had bias against  
11 transgender people, but she didn't share that bias.

12 Q She told you, "My brother has bias against  
13 transgenders"?

14 A Words to those effect.

15 Q What do you recall her words being?

16 A To the effect that he objected to the,  
17 quote, "transgender lifestyle," or words to that  
18 effect.

19 Q Okay. You've used that term now a few  
20 times. What do you recall -- as you're sitting at  
21 lunch with Jane McMillan, what words do you recall  
22 her telling you with respect to her brother's bias?

23 A As I stated before, that her brother had  
24 bias against transgender people.

25 Q How did the conversation come up?

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1 your tenure denial in 2009?

2 A I don't recollect at present.

3 Q Okay. So your conversation with Cathy  
4 Conway, fall of 2007, what did she tell you about  
5 Doug McMillan?

6 A That he had inquired whether or not I could  
7 be summarily terminated because I'm transgender, that  
8 he had placed some odious conditions on my continued  
9 employment at Southeastern.

10 Q Cathy Conway told you that Doug McMillan  
11 placed odious conditions on your continued employment  
12 at Southeastern?

13 A No. She defined -- she gave me the  
14 conditions and I will characterize them as odious.

15 Q Cathy Conway told you that Doug McMillan  
16 placed certain conditions on your continued  
17 employment?

18 A Yes.

19 Q Okay. What conditions were those?

20 A That I may only use the single-stall  
21 handicap restroom on the second floor of the building  
22 where I work; that I was prohibited from using any  
23 other multi-stall restrooms -- women's restrooms on  
24 campus.

25 Q Anything else?

1 A Yes.

2 Q What?

3 A That I should not wear short skirts that  
4 might -- or makeup which may be considered excessive.

5 Q Anything else?

6 A That's what I can recollect at this time.

7 Q How many written grievances did you file  
8 regarding those -- with Southeastern regarding those  
9 conditions that you claim Doug McMillan placed on  
10 your continued employment?

11 A Okay. Restate the question, please.

12 Q Let me ask it this way. Did you ever  
13 submit a written complaint or a written grievance  
14 concerning the conditions that Doug McMillan  
15 supposedly placed on your continued employment at  
16 Southeastern?

17 A I'd have to refresh my memory by looking at  
18 the details of the complaint that I filed with Claire  
19 Stubblefield to accurately answer your question.

20 Q But as you sit here today, do you recall  
21 ever submitting any kind of a written grievance while  
22 you were employed at Southeastern complaining of  
23 these conditions that you claim Doug McMillan placed  
24 on your continued employment?

25 A Your inquiry is of a written grievance.

1 No, I do not recall at this moment filing a written  
2 grievance in respect to those conditions.

3 Q Did you ever -- after that initial  
4 conversation with Cathy Conway, did you ever have any  
5 further conversations with her about those  
6 conditions?

7 A I don't recall having additional  
8 conversations about those conditions.

9 Q Did those conditions bother you?

10 A Yes.

11 Q Is there any reason why you couldn't have  
12 gone to Cathy Conway and indicated that you were  
13 bothered by those conditions?

14 MS. WEISS: Objection.

15 THE WITNESS: Yes.

16 Q (By Ms. Coffey) What reason?

17 A Fear of loss of employment, fear of  
18 retaliation, fear of unknown consequences.

19 Q So is it your claim that you never  
20 complained to Cathy Conway about any of these  
21 conditions because you were afraid of retaliation  
22 and/or loss of your job?

23 A Those are the -- those are the reasons I  
24 can think of right now.

25 Q How would anybody at Southeastern have

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1           A     Her name escapes me at the moment.

2           Q     What did you tell her?

3           A     She asked me to step into the restroom, and  
4 I told her I was prohibited, I could not do that.

5           Q     Anything else to that conversation?

6           A     Not that I recall.

7           Q     If Cathy Conway testifies that she  
8 suggested perhaps you would be more comfortable using  
9 the unisex bathroom that you have referred to, is  
10 that an inaccurate description of her comment to you?

11           MS. WEISS:  Objection.

12           THE WITNESS:  It is different than the way  
13 that I recall the conversation.

14           Q     (By Ms. Coffey) Do you recall thanking  
15 Cathy Conway for her professionalism in discussing  
16 with you these transgender issues, including the use  
17 of a particular bathroom?

18           A     I don't recall --

19           Q     All right.

20           A     -- stating those words.

21           Q     Something to that effect?

22           A     I may have complimented her on her  
23 professionalism.

24           Q     Okay.  Just now when I asked you that  
25 question, you didn't want to admit that.  You

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1 A There's a certain stigma that goes along  
2 with being denied tenure and promotion.

3 Q And is that the sole basis for why you  
4 claim that Southeastern's respons- -- is partially  
5 responsible for you to not be able to get a job at  
6 one of those universities?

7 A Excuse me, could you restate the question?

8 Q Well, let me ask this this way. Any other  
9 reason why you're claiming that Southeastern is  
10 responsible for you not being able to get another  
11 job?

12 A In addition to the ones that I gave you?

13 Q Yeah, loss of professional relationship,  
14 you said loss of tenure and promotion and loss of  
15 employment.

16 A And the consequences of those things.

17 Q Have you ever received mental health or  
18 psychological counseling concerning your trans- --  
19 being a transgender?

20 A Yes.

21 Q Were any of those sessions covered by your  
22 health benefits offered -- or the health benefits  
23 that you had while at Southeastern?

24 A No.

25 Q Did you submit medical claims for that

1 counseling -- medical -- while at Southeastern, did  
2 you submit medical claims to your insurance company  
3 to cover that counseling?

4 A No.

5 Q Okay. So it's not your claim that the  
6 health benefits at Southeastern were denying you  
7 coverage for counseling; is that correct? That's not  
8 part of your claim?

9 A Excuse me, could you restate the question?

10 Q Well, are you claiming that one of the  
11 exclusions of your health benefits at Southeastern  
12 was counseling for your transgender status?

13 A My understanding is that any trans-related  
14 healthcare was excluded.

15 Q Okay. Did you ever seek coverage for any  
16 counseling while you were at Southeastern?

17 A No.

18 Q Okay. So you had no idea whether or not it  
19 would have been covered; is that right?

20 MS. WEISS: Objection.

21 THE WITNESS: It was my understanding that  
22 it was not covered.

23 Q (By Ms. Coffey) Then how did you come to  
24 have that understanding?

25 A I read the exclusion of the policy.

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

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**PLAINTIFF/INTERVENOR DR. RACHEL TUDOR’S RESPONSES TO  
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA’S  
FIRST SET OF DISCOVERY REQUESTS**

TO: Defendant, Regional University System of Oklahoma  
c/o Kindanee C. Jones, Dixie L. Coffey, and Jeb Joseph  
Assistant Attorneys General  
Oklahoma Attorney General’s Office  
Litigation Section  
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*Attorneys for Defendant State of Oklahoma  
Ex rel. Regional University System of Oklahoma  
& Southeastern Oklahoma State University*

**INTERROGATORIES**

**Interrogatory No. 1:** *Please identify all individuals, (as per definition no. 5, above), to whom you complained about sexual discrimination or harassment perpetrated by SEOSU or its agents.*

**RESPONSE:**

<b>Name</b>	<b>Occupation</b>	<b>Personal Contact</b>	<b>Employer(s)</b>	<b>Employer Contact</b>
Dan Althoff	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Kenneth Chinn	Unknown	Unknown	Unknown	Unknown
Byron Clark	SEOSU Associate Vice President for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Lisa Coleman	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Margaret Cotter- Lynch	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Corie Delashaw	SEOSU Instructor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
William Fridley	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Jeffrey Gastorf	Physician	Unknown	Unknown	1400 Bryan Dr., Suite 208 Durant, OK 74701 580-931-2003
Douglas McMillan	SEOSU Vice President for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Jane McMillan	Unknown	Unknown	Unknown	Unknown
Lawrence Minks	Unknown	Unknown	Unknown	Unknown
John Mischo	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Virginia Parrish	Unknown	The only contact information Plaintiff/Intervenor has for Parrish is this email address: drvparish@gmail.com	Unknown	Unknown
Karen Prus	SEOSU Secretary	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701

Randy Prus	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Lucretia Scoufos	SEOSU Executive Dean for Academic Affairs	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Claire Stubblefield	SEOSU Affirmative Action Officer	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Paula Smith-Allen	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
Mark Spencer	SEOSU Professor	Unknown	SEOSU & RUSO	c/o SEOSU 1405 N 4 <sup>th</sup> Ave Durant, OK 74701
David Tafet	Journalist	Unknown	<i>Dallas Voice</i>	1825 Market Center Blvd. Suite 240 Dallas, TX 75207
Charles Weiner	Unknown	Unknown	Unknown	Unknown

**Interrogatory No. 2:** *Please identify and describe all reports or complaints, (as per definition nos. 8 and 9, above), made by you about sexual discrimination or harassment perpetrated by SEOSU and/or its agents.*

**RESPONSE:** Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has evidence of complaints of discrimination and/or harassment, but she need not produce or exactly describe each and every time she complained about discrimination and/or harassment perpetrated by SEOSU and/or its agents.

Subject to, and notwithstanding this objection, Plaintiff/Intervenor can attest to the following non-exhaustive list of complaints she made between 2007 and 2011:

**Sometime in 2007, oral complaint to Dr. Jeffrey Gastorf.** I began hormone therapy and started getting blood tests to monitor my hormone levels as part of my medically necessary treatment for gender dysphoria sometime in 2007. I recall that sometime in 2007 Dr. Gastorf advised that either he or a member of his staff had run my health insurance and/or checked with

the health benefits administrator and confirmed that there was a categorical exclusion on all care for gender transition, including but not limited to exogenous hormone treatment and blood tests to monitor my hormone treatment. I recall being very upset about this exclusion when Dr. Gastorf explained it to me.

**August 2007 oral complaint to Jane McMillan.** On my first day at work presenting as female, Jane McMillan came by my office to see how I was doing. During this meeting, McMillan asked me if I wanted to step out of the office and “go talk in the restroom.” I then complained to McMillan that I was not permitted to enter any multi-stall women’s restrooms on the SEOSU campus. I advised that SEOSU Human Resources had expressly prohibited me from using all multi-stall women’s restrooms on the SEOSU campus.

**Sometime in 2009, oral complaint to Charlie Babb.** Sometime in 2009 I attended an event on the SEOSU campus that I believe was titled “Respectful Workplace.” Charlie Babb, general counsel for RUSO, was the speaker. Among other things, Babb advised attendees that transgender employees were not a “protected class” and that transgender persons “can no more bring suit [for workplace discrimination] than people who tattoo their faces.” Babb callously laughed after making this remark. Babb went on to say—continuing to compare transgender persons to persons with tattoos on their faces— “you can fire them with impunity.” Continuing the analogy further, Babb said, “you would never hire someone who had tattooed their face, would you?” Babb laughed mockingly again. At that point I raised my hand (as I intended to publicly complain about Babb’s flagrantly offensive remarks), but Babb ignored me and moved on. I felt humiliated by Babb’s remarks as many of my friends and colleagues (including, but not limited to, Jane McMillan and Daniel Althoff) were in attendance. At some point during this event Babb distributed handouts to attendees. The handout was several pages long. After the

event was over, I introduced myself to Babb and complained to him that his statements about transgender persons were deeply offensive. I further complained to Babb that it was inappropriate to mock transgender people during an event billed as addressing issues in a “respectful workplace.” I also requested that Babb not make disparaging comments about transgender persons in future presentations. Though Babb listened to my oral complaints, Babb did not apologize for his remarks or offer any conciliatory words.

**Late August 2009 oral complaint to Lucretia Scoufos.** In late August 2009 I met with Lucretia Scoufos to discuss the process for applying for promotion and tenure during the 2009-10 term. During this meeting Scoufos asked me if there was anyone who I did not want on my committee. In response to Scoufos’ question, I advised that I thought Lisa Coleman had been treating me differently since I started presenting as female at work and that, because of this, I did not want Coleman to sit on my committee. I specifically told Scoufos that I thought that Coleman did not invite me on an honor’s field trip and that I thought I was not invited because of some kind of anti-transgender bias.

**October 27, 2009 email complaint to John Mischo.** On or about October 27, 2009 John Mischo sent me an email advising me that Lisa Coleman, Randy Prus, Paula Smith Allen, Mark Spencer, and Virginia Parrish had been assigned to my committee and that Lisa Coleman had been designated the committee chair. I replied to Mischo’s email and complained that I had already discussed this issue with Scoufos and we had agreed that Spencer would chair my committee. I also complained to Mischo that Scoufos had agreed that Coleman should not be on my committee and that Daniel Althoff would serve instead.

**October 29, 2009 oral complaint to Lucretia Scoufos.** On this day I met with Lucretia Scoufos, Mischo also attended the meeting. During this meeting I complained to Scoufos about

Coleman's placement on my tenure and promotion committee. During this meeting I reminded Scoufos that I had previously complained about what I believed at the time to be a bias incident involving Coleman. Despite my protest, Scoufos insisted on Coleman serving on my committee and chairing the committee.

**January 19, 2010 email complaint to Kenneth Chinn.** I complained to Mr. Chinn (then serving as Faculty Senate Chair at SEOSU) that my 2009-10 application for promotion and tenure was denied and that I believed that the denial violated SEOSU's written policies and procedures concerning applications for promotion and tenure.

**January 19, 2010 email complaint to Jane McMillan.** I complained to Jane McMillan that Dean Scoufos suggested denying my application for tenure and promotion and recommended a one-year terminal contract. In this email, I noted that "I've worked so hard to earn the acceptance of my colleagues and students—I guess administration was a bridge too far."

**February 2010 oral complaints to John Mischo.** I met with Mischo (at the time, Mischo was Chair of the English Department at SEOSU) on several occasions throughout February 2010. During these meetings I told Mischo that I believed that Scoufos and McMillan SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. During these conversations, I indicated that I believed that my application was denied because of sex discrimination.

**February 2010 oral complaint to Mark Spencer.** I orally complained to Spencer sometime in February 2010. I recall that I told Spencer that I believed that Scoufos and McMillan had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. During these

conversations, I indicated that I believed that my application was denied because of sex discrimination.

**February 4, 2010 email complaint to Mark Spencer.** On this day I sent an email reply to Spencer further complaining about Scoufos' decision to vote against my tenure and promotion.

**February 5, 2010 oral complaint to Jane McMillan.** On this day I had lunch with Jane McMillan. During our lunch, I complained to Ms. McMillan that Dean Scoufos had denied my 2009-10 application for promotion and tenure. During this conversation, Ms. McMillan told me that her brother Douglas McMillan was prejudiced against transgender persons. I recall Ms. McMillan expressly telling me that she did not share her brother's prejudices.

**February 16, 2010 email complaint to John Mischo.** On this day I sent an email to Mischo and attached drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Mischo for feedback on my complaint letters.

**February 16, 2010 email complaint to Mark Spencer.** On this day I sent an email to Spencer and attached drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Spencer to give me feedback on my complaint letters.

**February 16, 2010 email complaint to Virginia Parrish.** On this day I sent an email to Parrish with drafts of complaint letters addressed to Douglas McMillan and Scoufos. I asked Parrish to give me feedback on my complaint letters.

**February 19, 2010 email complaint to Corie Delashaw.** On this day Delashaw emailed me advising that she had spoken to Kenneth Chinn about Scoufos and McMillan voting to deny my application for tenure and promotion. Delashaw asked me whether I was given a reason for the denials. I wrote back to Delashaw and advised that "McMillan didn't provide any reason—

just one single sentence: ‘This is to provide notification of my recommendation to the President that you NOT be granted promotion to Associate Professor with tenure’.” I further advised Delashaw that I would be requesting a meeting with Minks the next week “before he makes his decision” and that I planned to write to “McMillan and Scoufos requesting that they provide a rationale for their decisions.”

**February 19, 2010 email complaint to Lucretia Scoufos.** On this day I emailed Scoufos a letter wherein I complained about her vote to deny my application for promotion and tenure and requested that she provide me with a clear explanation of why she voted to deny my application. Mischo was cc’d on this email. Scoufos replied that “I do not discuss these matters over email” and advised me to contact her administrative assistant to make an appointment to see her.

**February 19, 2010 email complaint to Douglas McMillan.** On this day I emailed Douglas McMillan a letter wherein I complained about his vote to deny my application for promotion and tenure and requested that he provide me with a clear explanation of why he voted to deny my application. Mischo was cc’d on this email. McMillan replied that “It is my policy not to handle inquiries [*sic.*] like this by email. You should first make an appointment with [Scoufos], I believe she is fully capable of responding to your inquiry. If you are not satisfied with the answer you receive from Scoufos, you should make an appointment with my assistant . . . I also ask that you invite Dr. Scoufos and Dr. Mischo to the meeting.”

**February 25, 2010 meeting with Lucretia Scoufos and John Mischo.** I met with Scoufos at 2pm on this day. Mischo also attended this meeting. During this meeting I complained to Scoufos that she did not provide me with an explanation for why she voted to deny my 2009-10 application for promotion and tenure. Scoufos refused to give an explanation.

Scoufos advised me that she would not discuss her vote until after Minks voted.

**February 26, 2010 email complaint to Mark Spencer.** On this day I sent an email to Spencer complaining that Scoufos would not tell me why she voted against my application for tenure and promotion and that Douglas McMillan advised me that “he supports Scoufos—but she won’t explain her rationale—so you see the problem.” I then advised Spencer that I would be filing an appeal with the Faculty Appellate Committee and attached a draft of my complaint to the email.

**February 26, 2010 email complaint to Corie Delashaw.** On this day I sent an email to Delashaw advising her that Scoufos and McMillan had refused “to offer any explanation for their decision, so I’m filing an appeal with the faculty appellate committee.” I attached a draft of my complaint to the Faculty Appellate Committee.

**February 26, 2010 written complaint to Lawrence Minks.** I sent Minks (then the President of SEOSU) a written grievance requesting a hearing before the SEOSU Faculty Appellate Committee (FAC) alleging that I had been denied due process when Scoufos and Douglas McMillan refused to explain or otherwise provide substantive explanations for their decisions to oppose my 2009-10 application for promotion and tenure.

**March 2, 2010 attempted oral complaint to Douglas McMillan.** In late February 2010 I made an appointment to speak with McMillan to complain about Scoufos and McMillan not providing me with an explanation as to why they voted to deny my application for promotion and tenure. A meeting was booked for March 2, 2010 at 2.30pm. However, shortly before that meeting was convened I received an email from McMillan’s assistant informing me that, “Dr. McMillan would like to postpone the meeting until after the Faculty Appeals Committee and President make their decision. You will be contacted with a new meeting date and time.” I was

never contacted by McMillan or his assistant to advise of a new meeting date and time.

**April 7, 2010 complaint letter to Lawrence Minks.** On this day I sent Minks a letter complaining about Scoufos and McMillan's votes to deny my 2009-10 application for promotion and tenure as well as their refusal to provide me with explanations as to why they had voted to deny my application.

**April 6, 2010 complaint letter to Lucretia Scoufos.** On this day I sent Scoufos a letter wherein I complained about a meeting I had had with her earlier that day. In my letter, I complained that Scoufos had demanded during the April 6, 2010 meeting that I "withdraw my application for promotion and tenure." Lawrence Minks, Douglas McMillan, and John Mischo were cc'd.

**April 9, 2010 email complaint to Mark Spencer.** On this day I complained to Spencer that I had been called into Scoufos' office earlier that week and was "told to either withdraw my application for tenure or face termination." I advised Spencer that I had written Scoufos a letter complaining about that meeting. I also complained to Spencer that "I have verbally asked President Minks' assistant for an appointment without success" and attached a copy of the letter I sent Minks on April 7, 2010.

**April 29, 2010 written complaint to Kenneth Chinn.** On this day I sent Chinn a letter detailing my concerns about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure. Among other things, I expressly advised Chinn that I believed that I was denied promotion and tenure because of sex discrimination.

**April 2010 oral complaint to Lisa Coleman.** Sometime in April 2010 I orally complained to Coleman about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written

policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Coleman that I believed that I was denied promotion and tenure because of sex discrimination.

**April 2010 oral complaint to Corie Delashaw.** Sometime in April 2010 I orally complained to Delashaw about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Delashaw that I believed that I was denied promotion and tenure because of sex discrimination.

**May 2010 oral complaint to Virginia Parrish.** Sometime in April 2010 I orally complained to Parrish about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Parrish that I believed that I was denied promotion and tenure because of sex discrimination.

**May 2010 oral complaint to Dan Althoff.** Sometime in May 2010 I orally complained to Althoff about Scoufos and McMillan voting against my 2009-10 application for promotion and tenure and that I believed both Scoufos and McMillan violated SEOSU's written policies and procedures concerning application for promotion and tenure. Among other things, I expressly advised Althoff that I believed that I was denied promotion and tenure because of sex discrimination.

**May 5, 2010 written appeal to Lawrence Minks.** On this day I sent a written appeal to Minks. In my letter I complained about Charles Weiner's decision on April 29, 2010 that Mink's

decision to vote against my 2009-10 application for promotion and tenure “moots the judgment of the Faculty Appellate Committee in regards to the Committee’s decision that Dr. Scoufos and Dr. McMillan should provide detailed written explanations that clearly delineate the factors that led to their decisions to disagree with the Faculty’s Tenure and Promotion Committee.”

**August 30, 2010 written complaint to Lawrence Minks.** On this day I sent a written grievance to Minks requesting a hearing before the Faculty Appeals Committee. Among other things, I alleged that my 2009-10 application for promotion and tenure had been denied because of sex discrimination.

**August 30, 2010 written complaint to Claire Stubblefield.** On this day I sent a written grievance to Stubblefield alleging, *inter alia*, that SEOSU’s decision to deny my 2009-10 application for promotion and tenure was discriminatory and expressly complained that bias was motivated by my sex.

**August 31, 2010 written complaint to U.S. Department of Education.** On this day I sent a letter to the Department of Education (“DOE”). The letter complained that my 2009-10 application for promotion and tenure had been denied and that I believed the denial was motivated by bias. This letter also complained of a hostile work environment. For example, the letter referenced “odious bullying” and “hostile attitude arising from discrimination” and “adversarial and hostile demeanor toward a Native American woman.” I have been advised that this letter was later forwarded by the DOE to the U.S. Equal Employment Opportunity Commission (“EEOC”).

**September 14, 2010 email complaint to Claire Stubblefield.** On this day I emailed Stubblefield and complained that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10

application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Stubblefield that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter. I attached copies of both of Scoufos' letters to this email.

**September 14, 2010 email complaint to Mark Spencer.** On this day I emailed Spencer and that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010.

**September 14, 2010 email complaint to Mark Mischo.** On this day I emailed Mischo that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010.

**September 16, 2010 supplemental grievance to Charles Weiner.** On this day I sent Charles Weiner (then an Assistant Vice President at SEOSU) additional written information supplementing my pending grievance regarding SEOSU's decision to deny my 2009-10

application for promotion and tenure.

**September 24, 2010 oral complaint to Claire Stubblefield.** On this day I orally complained to Stubblefield that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Stubblefield that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter.

**September 24, 2010 email complaint to Byron Clark.** On this day I sent an email to Clark complaining that Scoufos had originally placed a letter dated January 12, 2010 in my folder which did not set forth an explanation for why Scoufos voted against my 2009-10 application for promotion and tenure, and had, at some point between January 12 and September 14, 2010, placed a new apparently backdated letter in my folder that set forth explanations for denying my application that had never before been disclosed to me. I expressly complained that the second letter was different than the one sent to me by Scoufos in January 2010. I told Clark that I was concerned that the new Scoufos letter was manufactured in an attempt to hide Scoufos' original denial letter.

**October 2010 oral complaint to William Fridley.** Sometime in October 2010 I orally complained to Fridley (then serving as Chair of Personnel Policies Committee) that I believed SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. I also

indicated that I believed that my application was denied because of sex discrimination.

**October 2010 oral complaint to Margaret Cotter-Lynch.** Sometime in October 2010 I orally complained to Cotter-Lynch that I believed that SEOSU had denied my 2009-10 application for promotion and tenure in violation of SEOSU's written policies and procedures concerning applications for promotion and tenure. I also indicated that I believed that my application was denied because of sex discrimination.

**October 7, 2010 email complaint to Daniel Althoff, John Mischo, Lisa Coleman, Mark Spencer, Paula Smith Allen, Virginia Parrish, and Randy Prus.** On this day I sent an email complaint to Althoff, Coleman, Spencer, Smith Allen, Parrish, and Prus. In my email I complained that I had received a letter from Douglas McMillan advising me that I was not permitted to re-apply for promotion and tenure during the 2010-11 application cycle. I attached a copy of McMillan's letter to my email.

**October 7, 2010 email complaint to Claire Stubblefield.** On this day I sent an email complaint to Stubblefield alleging that McMillan's October 5, 2010 letter advising me that I was not permitted to reapply for promotion and tenure during the 2010-11 application cycle was retaliatory.

**October 11, 2010 written complaint to SEOSU Faculty Appellate Committee and Lawrence Minks.** On this day I sent a letter to the SEOSU Faculty Appellate Committee and Lawrence Minks, challenging SEOSU's decision to not permit me to re-apply for promotion and tenure during the 2010-11 application cycle.

**October 14, 2010 complaint letter sent to Claire Stubblefield.** On this day I sent a letter to Claire Stubblefield via email wherein I added additional allegations to the grievance I filed on August 30, 2010.

**October 15, 2010 email to Margaret Cotter-Lynch.** On this day I sent an email to Cotter-Lynch complaining about Douglas McMillan's decision to not let me re-apply for tenure and promotion during the 2010-11 application cycle and other matters.

**October 15, 2010 email to John Mischo.** On this day I sent an email to Mischo complaining about Douglas McMillan's decision to not let me re-apply for tenure and promotion during the 2010-11 application cycle and other matters.

**October 28, 2010 amended complaint filed with Claire Stubblefield.** On this day I filed an amended complaint with Claire Stubblefield, formally amending the complaint I filed with Stubblefield on August 20, 2010.

**November 2010 oral complaint to Karen Prus.** I visited Karen Prus sometime in November 2010 at the new Social Science building on the SEOSU campus. During our visit, Prus took me on a tour of the new building. At some point, Prus asked me if I would like to continue our conversation in the nearby women's multi-stall restroom. I then complained to Prus that I was not permitted to enter any multi-stall women's restrooms on the SEOSU campus. I then indicated that SEOSU Human Resources had expressly prohibited me from using all multi-stall women's restrooms on the SEOSU campus.

**November 8, 2010 email to Claire Stubblefield.** On this day I sent Stubblefield an email in connection with my pending grievances that advised her of a "Dear Colleague Letter" Issued by the U.S. Department of Education that explicitly stated that discrimination on the basis of gender identity is prohibited by federal law.

**January 9, 2011 email complaint to Charla Hall.** On this day I sent a letter (attached to an email) to Charla Hall (then serving as Chair of the FAC's hearing committee). This letter complained about Charles Weiner's January 4, 2015 letter wherein he informed me that, in his

capacity as the President's Designee, he disagreed with the findings of the FAC Hearing Committee.

**Spring 2011 oral complaints to John Mischo, Lisa Coleman, Margaret Cotter-Lynch, Virginia Parrish, and Paula Smith Allen.** I orally complained to Mischo, Coleman, Cotter-Lynch, Parris, and Smith Allen about Stubblefield's January 2011 report.

**January 19, 2011 email to Lisa Coleman.** On this day I sent an email to Coleman complaining about Stubblefield's January 2011 report. Among other things, I complained that Stubblefield's report did not mention an interview Stubblefield conducted with Coleman and heavily drew from statements attributed to Randy Prus.

**January 31, 2011 email complaint to William Fridley.** On this day I sent an email to Fridley complaining about an email I received from Byron Clark earlier that day. Specifically, I complained to Fridley that Clark (and other members of the SEOSU administration) did not appear to inform the Faculty Senate of *ex parte* changes to the Policies and Procedures Manual and, without Faculty Senate input, had adopted new policies and procedures by which my grievance would be administered.

**February 7, 2011 email complaint to William Fridley.** On this day I sent an email to Fridley wherein I attached a draft of my response to Byron Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance. I asked Fridley for feedback on my draft letter.

**February 7, 2011 email complaint to Corie Delashaw.** On this day I sent an email to Delashaw wherein I complained about Byron Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance.

**February 7, 2011 email complaint to Byron Clark.** On this day I sent an email to Clark. I attached a letter wherein I complained about Clark's January 31, 2011 email informing me of newly adopted policies and procedures that the SEOSU administration planned on using to administer my pending grievance.

**February 11, 2011 email complaint to William Fridley.** On this day I sent an email to Fridley complaining about an email I received earlier that day from Byron Clark advising me that the SEOSU administration would use the newly adopted policies and procedures outlined in Clark's January 31, 2011 email.

**February 18, 2011 email complaint to Daniel Althoff, John Mischo, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Randy Prus, Virginia Parrish, and Wilma Shires.** On this day I sent an email to Althoff, Mischo, Cotter-Lynch, Spencer, Smith Allen, Prus, Parrish, and Shires. Among other things, I complained about Walkup's decision to issue his own "recommendation" that I not be permitted to apply for promotion and tenure during the 2010-11 application cycle as well as the SEOSU administration's decision to devise new policies and procedures for administering my grievance without input from the Faculty Senate.

**March 4, 2011 appeal of Walkup's January 2011 decision.** On this day I sent Byron Clark an appeal of Ross Walkup's January 2011 decision (made in Walkup's capacity as the President's Designee).

**March 29, 2011 email complaint to Caryn Witten, Daniel Althoff, Janet Barker, John Mischo, Kim McGehee, Lisa Coleman, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Randy Prus, Virginia Parrish, and Wilma Shires.** On this day I sent an email to Althoff, Mischo, McGehee, Coleman, Cotter-Lynch, Spencer, Smith Allen, Prus, Parrish, and

Shires. In my email I advised that a new report shows “how widespread and hurtful discrimination is around the country—it is not just SE or Oklahoma,” and linked to an NPR.org news story that discussed the findings of a new report on transgender discrimination in the United States. That report is: NAT’L CTR. TRANSGENDER EQUALITY & NAT’L GAY & LESBIAN TASK FORCE, INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY (2011), available at [http://www.thetaskforce.org/static\\_html/downloads/reports/reports/ntds\\_full.pdf](http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf).

**April 4, 2011 complaint email to Daniel Althoff, John Mischo, Kim McGehee, Lisa Coleman, Margaret Cotter-Lynch, Mark Spencer, Paula Smith Allen, Virginia Parrish, Wilma Shires.** On this day I sent an email to Althoff, Mischo, McGehee, Coleman, Cotter-Lynch, Spencer, Smith Allen, Parrish, and Shires. Among other things, I complained that on April 2, 2011 Minks “decided to reject the judgment of the Faculty Appellate Committee and the formal request of the Faculty Senate to honor the FAC decision.”

**April 28, 2011 email complaint to Anita Levy.** On this day I sent an email complaint to Anita Levy (then the Senior Program Officer of the American Association of University Professors). Among other things, I complained about the SEOSU administration’s denial of my 2009-10 application for promotion and tenure and the SEOSU administration’s decision to not let me reapply for promotion and tenure during the 2010-11 application cycle.

**May 2011 Oral complaint memorialized in article by David Tafet.** I was interviewed by David Tafet during Spring 2011. Among other things, I complained to Tafet that my 2009-10 application for promotion and tenure had been denied and that I believed the denial was motivated by my sex. A copy of the final article published by the *Dallas Voice* on May 5, 2011.

**July 2011 supplemental charge of discrimination filed with EEOC.** On or about July

6, 2011 I filed a supplemental charge of discrimination with the EEOC.

**Summer 2011 online petition seeking reinstatement.** Sometime during Summer 2011 Margaret Cotter-Lynch launched an online petition hosted on thepetitionsite.com seeking reinstatement on my behalf The petition was addressed to the attention of Sheridan McCaffree and the Regents of the Regional University System of Oklahoma. Upon information and belief, Cotter-Lynch hand delivered a printed copy of the petition with all 4080 signatories to RUSO sometime after October 22, 2011.

**Publicly accessible blog entries calling for assistance and sharing information about discrimination and retaliation by SEOSU and RUSO agents and employees.** Between 2011 and 2012 I wrote several entries on a publicly accessible blog. Among other things, these entries exhaustingly detail many of my experiences of discrimination and retaliation by SEOSU and RUSO and I sought help from members of the public. For example, in an April 18, 2011 entry I asked readers to reach out to the Regional University System of Oklahoma and provided contact information for Sheridan McCaffree.

**Interrogatory No. 3:** *Please identify each RUSO or SEOSU agent or employee who has admitted to you that he or she discriminated against, or harassed, you.*

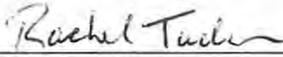
**RESPONSE:** No RUSO or SEOSU agents have admitted directly to me that they have discriminated against and/or harassed me.

**Interrogatory No. 4:** *Please identify each person who has told you that he or she personally witnessed discrimination or harassment directed at you.*

**RESPONSE:** Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has evidence of discrimination and/or harassment, but she need not produce or exactly describe each and

**VERIFICATION FOR RESPONSES TO  
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S  
FIRST SET OF INTERROGATORIES**

I certify under penalty of perjury under the laws of the United States of America that the foregoing Responses to Interrogatories are true and correct.

  
\_\_\_\_\_  
Dr. Rachel Tudor

10/21/15  
\_\_\_\_\_  
Date



1 A. No.

2 Q. When you received tenure at Millsaps, you did  
3 not receive promotion at the same time; is that right?

4 A. That's right.

5 Q. Was that unusual to receive tenure but not  
6 promotion at Millsaps?

7 A. No, because I was already associate professor.

8 Q. Had you been promoted prior to receiving tenure  
9 at Millsaps then?

10 MR. JOSEPH: Object to the form.

11 A. No. I came in as an associate professor.

12 Q. (By Ms. Meyer) Did Millsaps have assistant  
13 professor positions?

14 A. Oh, yes.

15 Q. When you were interim president, what was your  
16 role in the tenure and promotion review process?

17 MR. JOSEPH: Object to the form.

18 Q. (By Ms. Meyer) When you were interim president,  
19 what was your role in the tenure review process?

20 A. I was the final reviewer on campus.

21 Q. Was that also your role with respect to  
22 reviewing promotion applications at Southeastern?

23 A. Yes.

24 Q. What was the role of the administration  
25 generally in the tenure review process at Southeastern?

1 MR. JOSEPH: Object to the form.

2 A. The process is a multi-tiered process and begins  
3 with the dean, who gets the recommendation from the  
4 department chair. Dean reviews it, makes a recommendation  
5 to the vice-president for academic affairs, who then  
6 reviews it and makes a recommendation to the president.

7 Q. (By Ms. Meyer) Is the vice-president of  
8 academic affairs considered a member of the  
9 administration?

10 A. Yes.

11 Q. Is the dean considered a member of the  
12 administration?

13 A. Yes.

14 Q. Is the department chair considered a member of  
15 the administration?

16 A. No, not really, although they have  
17 administrative duties. It's one of those dual.

18 Q. I'm going to direct your attention to what's  
19 been marked in a previous deposition as Plaintiff's  
20 Exhibit No. 6, if you could turn to Plaintiff's Exhibit  
21 No. 6 in the binder, please.

22 A. All right.

23 Q. It's a document that's Bates labeled EEOC000300  
24 to 301. Dr. Snowden, if you could read on the first page  
25 beginning where it says, "3.7.4, Role of Faculty," and

1 time frame there, although normally it takes four or five  
2 years for a person to reach the minimum standards.

3 Q. When you say it was your policy not to be rigid,  
4 what do you mean by that?

5 A. Well, if someone had an exceptional record, it  
6 was the university's advantage to go ahead and promote  
7 them and tenure them as soon as possible to try to keep  
8 them on the faculty.

9 Q. At Southeastern while you were interim  
10 president, could the candidate apply in the fifth year,  
11 get denied by the president, and then reapply in their  
12 sixth year?

13 A. No.

14 Q. Why not?

15 A. Once -- the policy, once you went through the  
16 process, that was it. You were either granted tenure or  
17 not.

18 Q. Was that also true when you were vice-president  
19 for academic affairs?

20 A. Yes.

21 Q. And you said that this was the policy, correct?

22 A. Yes.

23 Q. Was that a policy that was in writing?

24 A. I think it was. I'm not sure.

25 Q. Had this always been --

1           A.    I don't know of any university that allows you  
2 to apply again after you've been denied tenure.

3           Q.    Do you know if this policy that you've described  
4 was always the case at Southeastern?

5           A.    No, I don't.

6           Q.    Was it the case while you were vice-president  
7 for academic affairs at Southeastern?

8           A.    I'm sorry, what was --

9           Q.    You described a policy where somebody cannot be  
10 denied tenure and then reapply subsequently, correct?

11                   MR. JOSEPH: Object to the form.

12           A.    Yes.

13           Q.    (By Ms. Meyer) Was that also the policy while  
14 you were vice-president for academic affairs at  
15 Southeastern?

16           A.    Yes.

17           Q.    So professors cannot apply for tenure more than  
18 once at Southeastern?

19           A.    Now, what happens at the department level, if it  
20 doesn't go beyond that, they absolutely could. But if it  
21 goes through the process, no.

22           Q.    So at what point in the process is there a point  
23 of no return, so to speak, where once the candidate has  
24 reached that point, they can't reapply after that if they  
25 are denied?

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

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

DEPOSITION OF LUCRETIA SCOUFOS

TAKEN ON BEHALF OF THE PLAINTIFF

IN OKLAHOMA CITY, OKLAHOMA

ON AUGUST 9, 2016

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REPORTED BY: ROSIE STANDRIDGE, CSR

## Lucretia Scoufos

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10:26 1 been marked as Plaintiff's Exhibit 149. Are the  
10:27 2 handwritten notes in the bottom half of Plaintiff's  
10:27 3 Exhibit -- let me strike that.

10:27 4 Let me just identify the document for the  
10:27 5 record. Plaintiff's Exhibit 149 is a single-page  
10:27 6 document Bates numbered EEOC 974.

10:27 7 Are the handwritten notes on the bottom half  
10:27 8 of Plaintiff's Exhibit 149 your notes?

10:27 9 A. Yes.

10:27 10 Q. Could you please read them aloud?

10:27 11 A. (Reading) Dr. Mischo and Tudor met with me  
10:27 12 today to clarify the issue of her P&T committee.  
10:27 13 Dr. Tudor readily admitted that she had misunderstood  
10:27 14 my directives and advice. However, during the  
10:27 15 conversation, she told us that she had applied for  
10:27 16 promotion and tenure the year before but Dr. Mark  
10:27 17 Spencer (he was on her committee) -- that's in  
10:27 18 parentheses -- but Dr. -- that -- that the vote had  
10:28 19 been unanimously against her being promoted with  
10:28 20 tenure, attached.

10:28 21 I don't seem to have the attachment.

10:28 22 (Reading) She went on to say that Mark as a  
10:28 23 friend advised her to withdraw her application. Both  
10:28 24 Dr. Mischo and I expressed our shock and extreme  
10:28 25 disapproval that a committee member would break a

Lucretia Scoufos

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11:53 1 A. Yes.

11:53 2 Q. (By Mr. Townsend) And when you made a  
11:53 3 decision not to recommend Dr. Tudor for tenure, was  
11:54 4 one of the reasons that you made your decision the  
11:54 5 fact that her portfolio said she had more  
11:54 6 peer-reviewed publications accepted than she had?

11:54 7 A. Let me restate it so I -- so the question to  
11:54 8 me is, was her discrepancy of putting some in that  
11:54 9 were not, one of -- her discrepancy, was that a reason  
11:54 10 that I -- that I did not recommend her -- one of the  
11:54 11 reasons I did not recommend her? Is that the  
11:54 12 question?

11:54 13 Q. Yes.

11:54 14 A. No.

11:54 15 Q. Why not?

11:54 16 MS. COFFEY: Object to form.

11:54 17 A. Because I don't know if she realized that --  
11:54 18 that they have to be accepted before you put them in  
11:55 19 the -- in the portfolio; although, it was discussed in  
11:55 20 our meeting. Maybe -- I just go by the portfolio, by  
11:55 21 the vita.

11:55 22 Q. (By Mr. Townsend) Could you explain,  
11:55 23 please, why you did not recommend Dr. Tudor to receive  
11:55 24 promotion and tenure in the 2009-'10 academic year?

11:55 25 A. Because she didn't have the credentials.

## Lucretia Scoufos

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14:39 1 been marked Plaintiff's Exhibit 150.

14:39 2 MR. TOWNSEND: I have a copy here for Dixie  
14:39 3 and for you, Ezra.

14:39 4 Q. (By Mr. Townsend) Are these your  
14:39 5 handwritten notes?

14:40 6 A. Yes.

14:40 7 Q. Plaintiff's Exhibit 150 is a one-page  
14:40 8 document Bates numbered EEOC 913. Could you please  
14:40 9 read these notes aloud?

14:40 10 A. (Reading) Met in my office at 12:30 with  
14:40 11 Dr. Tudor and John Mischo at the request of Dr. Doug  
14:40 12 McMillan, interim vice president for academic affairs.  
14:40 13 I extended the offer to Dr. Tudor to withdraw her  
14:40 14 application for promotion and tenure at this juncture  
14:40 15 on this day by 5:00 p.m. In turn, Dr. McMillan would  
14:40 16 extend her an additional -- extend her additional year  
14:40 17 to bring her portfolio into compliance with the  
14:40 18 criteria necessary for promotion and tenure.

14:40 19 This is -- in essence, would avail her to  
14:40 20 two years rather than just one year -- rather than  
14:41 21 just the one year she had after being refused  
14:41 22 unanimously by her promotion and tenure committee in  
14:41 23 2008.

14:41 24 Actually, Dr. McMillan's offer would have  
14:41 25 given her more than a year before resubmitting her

## Lucretia Scoufos

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14:41 1 request again in 2011. This would have allowed  
14:41 2 Dr. Tudor 18 months before having to resubmit her  
14:41 3 application for promotion and tenure again on 10/15/11  
14:41 4 to meet the criteria she was needing -- to -- to meet  
14:41 5 the criteria she was needing.

14:41 6 In essence, this was a gift. And she  
14:41 7 refused it. Summarily, Dr. McMillan was giving her  
14:41 8 overs if she would withdraw her application from  
14:41 9 2009 -- as she had done when Dr. Mark Spencer advised  
14:41 10 her to do the year before in 2008 -- and reapply in  
14:42 11 October 2011, thus allowing her the time she needed to  
14:42 12 meet the university and RUSO requirement.

14:42 13 Neither Dr. Mischo nor I advised her what to  
14:42 14 do, but both of us agreed with my statement that it  
14:42 15 was a gift. Her deadline is 5:00 p.m. today to  
14:42 16 respond to Dr. Minks.

14:42 17 Q. Thank you. And then at the top of that,  
14:42 18 it's dated April 6th, 2010, and at 12:30 p.m.,  
14:42 19 correct?

14:42 20 A. At the top of it, I have 04/06/10.

14:42 21 Q. Right. I think -- well, I didn't say the  
14:42 22 numbers; but that's April 6th, 2010, correct?

14:42 23 A. Yes.

14:42 24 Q. All right. So just for shorthand, I'm going  
14:42 25 to refer to the offer that you made during this

## Lucretia Scoufos

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14:48 1 reasonable request for her to make?

14:48 2 A. I think that it would have been a reasonable  
14:48 3 request for her to make, but I would think that it  
14:48 4 would be a given that she would get it in writing.  
14:48 5 That's the reason it doesn't stand out in my mind that  
14:48 6 she asked for that, because I would have said that  
14:48 7 would be a given.

14:48 8 Q. Why would it have been a given?

14:48 9 A. Well, if I put myself in her place, and  
14:48 10 somebody said we'll do this and this for you, I would  
14:48 11 say, you put it in writing and I'll do it; but not  
14:48 12 until I see it in writing, even though Dr. Mischo was  
14:49 13 there to witness it.

14:49 14 Q. During this meeting on -- strike that.

14:49 15 During the April 6th meeting, was there any  
14:49 16 discussion about Dr. Tudor being able to apply again  
14:49 17 in the 2010-'11 academic year?

14:49 18 A. What the discussion was, that she would not  
14:49 19 apply -- this was a stipulation, that she would not  
14:49 20 apply in 2010 because -- and I'm pretty much quoting  
14:49 21 Dr. McMillan now -- it's not verbatim, but -- because  
14:49 22 he said this will give her a year to -- he said this  
14:49 23 over the phone to me: This will give her a year to  
14:49 24 bring up her portfolio. And then she can apply in  
14:49 25 2011. That will give her more of an opportunity.

UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
et al. )

Plaintiff, )

VS. )

Civil Action No.  
5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA STATE )  
UNIVERSITY, et al. )

Defendant. )

\*\*\*\*\*

ORAL DEPOSITION OF  
DR. RANDY PRUS  
MARCH 9, 2016

\*\*\*\*\*

ORAL DEPOSITION OF DR. RANDY PRUS, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 9th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

1 informed of the decision when I became chair.

2 Q. And that was the first time you heard about her  
3 being -- the vote in '08/'09 was after you became chair?

4 A. Yes.

5 Q. All right. And Dr. Tudor applied for promotion  
6 and tenure in year 2009 as well, correct?

7 A. Yes.

8 Q. How did you first learn that she was intending  
9 to apply for promotion and tenure in 2009/'10?

10 A. Dr. Micho formed the committee.

11 Q. And did he ask you to be on it?

12 A. Yes.

13 Q. And when he asked you, what did you say?

14 A. Yes.

15 Q. Who else was on that committee?

16 A. Drs. Coleman, Allen, Parrish and Spencer.

17 Dr. Coleman chaired the committee.

18 COURT REPORTER: Dr. Coleman what?

19 THE WITNESS: Chaired the committee.

20 COURT REPORTER: Thank you.

21 Q. (By Mr. Townsend) So as a member of that  
22 promotion and tenure committee, you reviewed Dr. Tudor's  
23 portfolio; is that correct?

24 A. Yes.

25 Q. And then after the promotion and tenure

1 committee voted, what was the vote tally?

2 A. I believe it was four to one.

3 Q. So you -- you were the one who voted against?

4 The others voted for promotion and tenure?

5 A. Correct.

6 Q. Was there discussion between the members of the  
7 promotion and tenure committee about how to vote?

8 A. There was extended discussion.

9 Q. How long did that discussion take place?

10 A. An hour.

11 Q. Did some members of the promotion and tenure  
12 committee try to persuade you to support Dr. Tudor's  
13 application?

14 A. Indirectly.

15 Q. So I guess -- strike that. Could you just  
16 explain what was discussed about the application amongst  
17 the promotion and tenure committee during that  
18 approximately hour-long discussion.

19 A. Primarily it had to do with her application  
20 letter and a collection of poetry that wasn't published.  
21 It was in notebook form.

22 Q. It was in a what?

23 A. Notebook form.

24 Q. So what was discussed about the application  
25 letter?

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

1 UNITED STATES OF AMERICA, )

2 Plaintiff, )

3 RACHEL TUDOR, )

4 Plaintiff Intervenor, )

5 vs. ) No. 5:15-CV-00324-C

6 SOUTHEASTERN OKLAHOMA STATE )

7 UNIVERSITY, and )

8 THE REGIONAL UNIVERSITY )

9 SYSTEM OF OKLAHOMA, )

10 Defendants. )

11  
12  
13  
14 DEPOSITION OF DOUGLAS MCMILLAN

15  
16 TAKEN ON BEHALF OF THE PLAINTIFF

17  
18 IN OKLAHOMA CITY, OKLAHOMA

19  
20 ON AUGUST 10, 2016

21  
22  
23  
24 -----  
25 REPORTED BY: ROSIE STANDRIDGE, CSR

Douglas McMillan

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11:27 1 was ready to move it to Dr. Minks' office --

11:27 2 Q. So --

11:27 3 A. -- for his review.

11:28 4 Q. So the date, February 10th, 2010, would have

11:28 5 been the date that you completed your review of

11:28 6 Dr. Tudor's portfolio?

11:28 7 A. Yeah, when I was ready to move the portfolio

11:28 8 down for his review.

11:28 9 Q. Was that also then the date, February 10th,

11:28 10 2010, that you sent the portfolio to Dr. Minks?

11:28 11 A. Typically, yeah.

11:28 12 Q. Then on the president line, it is blank,  
11:28 13 correct?

11:28 14 A. Yes.

11:28 15 Q. Did Dr. Minks ever sign those lines on these  
11:28 16 forms?

11:28 17 A. I don't know.

11:28 18 Q. What would happen to the portfolio  
11:28 19 transmittal form after Dr. Minks was finished  
11:28 20 reviewing the portfolio?

11:28 21 A. I think it stayed in the portfolio,  
11:28 22 typically.

11:28 23 Q. And then what would happen to the portfolio  
11:28 24 after Dr. Minks was done reviewing it?

11:29 25 A. Typically come back to our office. And

Douglas McMillan

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11:35 1 A. That's what they appear to be.

11:35 2 Q. Do you remember whether those were in her  
11:35 3 portfolio when you reviewed it?

11:35 4 A. I -- I don't.

11:35 5 Q. All right. Do you know whether Dr. Minks  
11:35 6 reviewed Dr. Tudor's tenure portfolio that she  
11:36 7 submitted in the 2009-'10 year?

11:36 8 A. I don't know. I assume he did, but I don't  
11:36 9 know.

11:36 10 Q. Why do you assume he did?

11:36 11 A. I brought him down there for him to review.

11:36 12 Q. Did he tell you that he reviewed it?

11:36 13 A. He told me he was done at the end of looking  
11:36 14 at them, so I -- but I didn't see him do that.

11:36 15 Q. Did he tell you what he thought of  
11:36 16 Dr. Tudor's portfolio?

11:36 17 A. I don't recall.

11:36 18 Q. Did he send you anything in writing  
11:36 19 explaining what he thought?

11:36 20 A. I don't recall seeing anything.

11:36 21 Q. So you did not recommend that Dr. Tudor  
11:36 22 receive promotion and tenure, correct?

11:36 23 A. That's correct.

11:36 24 Q. Why did you make that recommendation?

11:36 25 A. If you -- there's a letter where I detail

Douglas McMillan

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11:36 1 the reasons for that. Those -- that explains them.  
11:37 2 It would be easier if we could be looking at that  
11:37 3 letter.

11:37 4 Q. Who did you send the letter to?

11:37 5 A. I'd have to look at the letter again. I  
11:37 6 believe it was to Dr. Tudor.

11:37 7 Q. All right. I'm just asking because there's  
11:37 8 a lot of letters.

11:37 9 A. Yeah. It details what the reasons for my  
11:37 10 not recommending were.

11:37 11 Q. All right. Well, as you sit here today, do  
11:37 12 you remember any of the reasons?

11:37 13 A. Yes.

11:37 14 Q. What do you remember?

11:37 15 A. That the scholarship, in my opinion and my  
11:37 16 professional judgment, didn't reach that noteworthy  
11:37 17 and exceptional standard and that the service did not  
11:37 18 meet the -- the requirement from policy.

11:37 19 Q. Okay.

11:37 20 A. Again, in my professional judgment.

11:37 21 Q. Let's -- let me see if I can guess what  
11:38 22 letter you were talking about --

11:38 23 A. Okay.

11:38 24 Q. -- and direct your attention to it. I think  
11:38 25 I might know what you're talking about.

Douglas McMillan

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15:07 1 So that's why I was also asking her to  
15:07 2 consider a withdrawal, so that we didn't get into this  
15:07 3 situation where we were creating a different practice.

15:08 4 Q. Would you turn back to Plaintiff's Exhibit  
15:08 5 7?

15:08 6 A. 7? It's in the big book?

15:08 7 Q. Yeah.

15:08 8 A. Okay.

15:08 9 Q. Would you turn to page EEOC 332 on that  
15:08 10 page? It's policy 4.6.3. Are you there?

15:08 11 A. Yes.

15:08 12 Q. All right. This policy begins stating: The  
15:08 13 normal procedure for granting tenure is initiated by  
15:08 14 the faculty member during the fifth, sixth or seventh  
15:09 15 year to the university in a tenure track position.

15:09 16 Did I read that correctly?

15:09 17 A. Yes.

15:09 18 Q. Is this the policy that you were just  
15:09 19 saying?

15:09 20 A. Yes.

15:09 21 Q. And is it your understanding that this  
15:09 22 policy prohibited reapplication for tenure after  
15:09 23 denial by the president?

15:09 24 A. Yes.

15:09 25 Q. Does the policy actually say that a



MEMORANDUM

TO: Dr. Rachel Tudor

FROM: Douglas N. McMillan, Ph.D.  
Interim Vice President of Academic Affairs

RE: Denial of Application for Tenure and Promotion

DATE: April 30, 2010

---

It is my understanding that you have been informed by President Minks of his decision to deny your request for tenure and promotion to associate professor. This authority to communicate the reasons for denial of tenure and promotion rests with the president as suggested in the Academic Policy and Procedures Manual Section 3.7.4. However, the President may delegate this authority under the RUSO Board Policy if he so desires. Dr. Minks has delegated the authority to me, as acting chief academic officer, to communicate the reasons for the denial of your application for tenure and promotion.

After careful review of your portfolio, it was determined that you do not currently meet the policy requirements for tenure and promotion in the areas of research/scholarship and contributions to the institution and/or profession. The Academic Policy and Procedures Manual stipulates that in order to be granted tenure and promotion your body of work in these areas should be both excellent and noteworthy.

An examination of the research/scholarship portion of your portfolio listed eight activities during your employment at Southeastern. These eight activities include two publications, one presentation at a regional symposium, one presentation at a local symposium, two editorships of the proceedings papers at a local symposium, and two "open-mic Chapbooks". The first three activities (the two publications and the presentation at the regional symposium) do appear to be examples of work which meet the excellent and noteworthy standard. However, the remaining activities fail to meet these standards. For example, the two Open-mic Chapbooks appear to be self-collected unpublished works which certainly do not reach the noteworthy and excellent standard. Finally, in trying to verify your contribution as editor to the proceedings of the 2006 and the 2008 Native American Symposium, some confusing information was found. In fact, the link you provided to the 2006 symposium did not identify you as an editor and the link you provided for the 2008 symposium did not lead to any proceedings. Just as an aside, editing the proceedings at a local symposium does not meet an excellent and noteworthy accomplishment for a university faculty member. In summary, your efforts in scholarship and research appear to have yielded some appropriate work; however, the body of your work, since being employed at Southeastern, is either unverifiable or falls below the policy requirement for tenure and promotion.

The Academic Policy and Procedures Manual also requires that your service reach the noteworthy and excellent standard. A review of your university service reveals that since your employment at Southeastern began, until 2009 your service has primarily been limited to serving on Internal

COPY

OAG/DLC/USA v. SOSU - CIV-15-324/001186

departmental committees, such as, a program review committee, an assessment committee and a hiring committee, that clearly do not reach the policy requirement for tenure or promotion. In fact, out of eight activities you listed on your vita, four were Internal departmental committees. Two of the remaining examples of service were not begun until 2009. This does not establish a record of service that is either noteworthy or excellent.

Subsequently, the reasons delineated in this memorandum formed the basis for the denial of your application for tenure and promotion.

OAG/DLC/USA v. SOSU - CIV-15-324/001187

Office for Civil Rights—Kansas City Office  
United States Department of Education  
8930 Ward Parkway  
Suite 2037  
Kansas City, MO 64114

Dr. Rachel Tudor  
Department of English, Humanities & Languages  
School of Arts and Sciences  
Southeastern Oklahoma State University  
1405 N. 4<sup>th</sup> Avenue  
Durant, OK 74701  
580.745.2588  
rtudor@se.edu

SEP 7 10 6:19PM

**Re: Discrimination in Promotion and Tenure**

**Date: 31 August 2010**

Please investigate the administration of Southeastern Oklahoma State University for egregious violations of my civil rights under Federal law. Following is a brief synopsis of the pertinent dates, events, and personnel involved in violating my civil rights:

I was recommended for tenure and promotion by my department's Faculty Tenure and Promotion Committee in the Fall of 2009. Subsequently, Dean Scoufos and Interim Vice President for Academic Affairs McMillan denied my application for tenure and promotion. Dean Scoufos steadfastly refused to disclose her reasons for not supporting the recommendation of EHL's Tenure and Promotion Committee (Exhibit A). Dr. McMillan not only refused to disclose his reasons, he also refused to even meet with me (Exhibit B). I appealed to the Faculty Appellate Committee to review their behavior as inconsistent with Southeastern's policy and practice (Exhibit C). The Faculty Appellate Committee supported my point of view and issued a recommendation that Dean Scoufos and Dr. McMillan explain the rationales for their decisions. However, instead of respecting the common sense approach recommended by the Faculty Appellate Committee and honoring their wisdom, they contacted legal counsel and requested a legalistic legerdemain to avoid extending to me the same spirit of cooperation and collegiality that was recently freely extended to a white male candidate for tenure and promotion in my department (Exhibit D, para 3). At this point, I need to call your attention to Dr. Charles Weiner's (Assistant Vice President for Academic Affairs) role in events. The Faculty Appellate Committee met and rendered a judgment in my favor on March 22<sup>nd</sup>, however Dr. Weiner did not inform me of the Committee's decision until April 29<sup>th</sup> (Exhibit

DOE000013

D, see date). Policy states unequivocally that I have the right to be informed of the Committee's decision within ten days of the rendering of a verdict. It is not only inexcusable that Dr. Weiner waited five weeks to inform me of the Committee's decision, but his deliberate delay in violation of policy is evidence of collaboration between parties in the administration to delay and hinder my rights to due process and equal treatment. As a matter of fact, before I was informed of the Committee's decision the most egregious breach of my right to due process and equal opportunity for advancement in employment occurred. On April 6<sup>th</sup> I was summoned to Dean Scoufos' office. Dean Scoufos demanded that I immediately withdraw my application for tenure and promotion. When I asked for some time to think about it, she said that if I did not immediately withdraw my application, I would not be allowed to reapply in academic year 2010-2011. I mentioned that policy states tenure-track faculty have six years to apply for tenure, and I was only in my fifth year. She responded that the policy simply says tenure-track faculty "may" apply, it does not say that tenure-track faculty "must" be allowed to apply. When I did not immediately fold, she said, "you may think you are safe because the date for non-renewal of your contract without cause has passed, but you may still be non-renewed with cause if you don't withdraw your application." I asked her if she was speaking on her own authority or on behalf of Dr. McMillan. Dean Scoufos said that she was speaking on behalf of Dr. McMillan and President Minks. She said that they had met and decided to demand that I withdraw my application and to inform me of the consequences of refusing to comply with their demand. Although I was taken aback by the threats, I placed my faith in my colleagues' judgment, both the Faculty Tenure and Promotion Committee and the Faculty Appellate Committee, and refused to withdraw my application. To me, withdrawing my application would indicate that I was rejecting the good judgment of my colleagues in my department and did not have faith in the sound judgment of my colleagues in the Faculty Senate as well as surrendering to odious bullying. These events seem incredible, but Dr. John Mischo (Chair of English, Humanities, & Languages) was a witness to the meeting with Dean Scoufos and her attempts to coerce me into withdrawing my application. On April 21<sup>st</sup> President Minks denied my application for tenure and promotion. On April 29<sup>th</sup> Dr. Weiner informed me of the Faculty Appellate Committee's recommendation and of the administration's decision not to respect its judgment (Exhibit D). On April 30<sup>th</sup> Dr. McMillan composed a letter (in response to the Faculty Appellate Committee's recommendation) stating President Minks' reasons for denying my application (Exhibit E). And, here is where another egregious violation of my rights to due process and equal rights occurs, Dr. McMillan fails to mail the letter to me until June 9<sup>th</sup> (Exhibit F), almost six weeks later. Taken individually, any one of these events evidence a hostile attitude arising from discrimination; taken collectively, they demonstrate a pattern of calculated adversarial behavior intended to thwart my equal opportunity to advancement in employment—an opportunity protected by policy and law. As a matter of fact, the actions documented are in contradistinction to Regional University System of Oklahoma (RUSO) Affirmative Action policy

5.2 (c) “to reach out to all persons, including women and racial minority members, in recruitment, placement, development and advancement.” Instead of reaching out to me, I was stonewalled, threatened, and denied timely access to vital information at every step of the process. Finally, note should be made of the purported reasons for President Minks denying my application (Exhibit E). President Minks’ letter does not indicate any “compelling reason or exceptional case” for overruling the Faculty Tenure and Promotion Committee’s judgment as required by policy. Policy states explicitly that faculty are the best judges of what constitutes substantive and meritorious contributions in their area of expertise—policy specifically eschews the type of second guessing and micromanaging described in the letter (*Policy and Procedures* 3.7.4 Role of the Faculty). As indicated by the minutia cited in his letter, President Minks clearly usurped the rights and responsibilities of the Faculty Tenure and Promotion Committee as well as undermined the principles of shared governance defined in the *Policy and Procedures Manual*. Omitted from mention in his letter are many significant contributions I have made to the university, such as designing and co-teaching a course on Native American history, literature, and law under the auspices of OSLEP (Oklahoma Scholar Leadership Enrichment Program). Most telling is his attitude toward any activities and contributions with respect to Native Americans. President Minks minimizes not only my contributions to the Native American Symposium but demeans the Symposium itself. For example, President Minks summarily dismisses my presentation at the Native American Symposium, without so much as reading the text of my presentation in order to assess its merits or consulting the English faculty, as being neither “noteworthy nor excellent” simply because it was presented at the Symposium instead of another, presumably more respectable, venue. In addition, President Minks likewise dismisses the *Proceedings* of the Native American Symposium. Astonishingly, President Minks apparently has never so much as viewed a copy of the *Proceedings* since he repeatedly affirms in his letter that he was unable to verify that I was an editor of two editions of the journal. If he had glanced at the cover of the *Proceedings*, he would have seen my name prominently displayed in bold print on the cover, along with Dr. Spencer, as an editor (Exhibit G). Copies of the *Proceedings* are readily available in Southeastern’s Native American reading room. In re-reading President Minks’ letter, I continue to be startled by the callousness with which he dismisses all things Native American. The lack of cultural appreciation is made more troubling by the fact that the letter was composed by another administrator, Dr. McMillan, who is clearly as dismissive of the value of Native American contributions to Southeastern as President Minks.

In conclusion, please note how different the experience of applying for tenure was for a white man in my department, Dr. Mark Spencer. The university president (who was Dr. Jesse Snowden) and Dr. Doug McMillan repeatedly met with Dr. Spencer, went over his tenure portfolio, instructed him how to revise it, invited him to provide supplemental material which included articles that he had submitted or planned to

submit for publication, and allowed him to fully explain and discuss his contributions to the university as well as providing him ample opportunity to proffer any "verification" required. Dr. Spencer received not only cooperation but a welcoming hand, guidance, and support to shepherd him through, what in the best of times is, a path wrought with anxiety. I do not resent Dr. Spencer's treatment, but affirm his experience as exemplary of the type of cooperation and collegiality between administration and faculty that characterizes a healthy university. With Dr. Spencer's experience as an exemplar, the question must be asked: why did the administration cooperate with and facilitate the tenure and promotion of a white man while adopting an adversarial and hostile demeanor toward a Native American woman? I deserve an answer to that question; but, more importantly, law and justice demands it.

Signed,



Dr. Rachel Tudor

Dept of English, Humanities & Languages  
1405 N 4<sup>th</sup> Ave, PMB 4036  
Durant, OK 74701  
580.745.2588  
rtudor@se.edu

DOE000016

U. S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

REQUEST FOR INFORMATION

Charging Party: Rachel Tudor

EEOC Charge No.: 564-2011-00849

Vs.

Respondent:

Southeastern Oklahoma State University

1405 N. 4<sup>th</sup> Ave., PMB 4236

Durant, Oklahoma 74701

OAG/DLC/USA v. SOSU - CIV-15-324/001942

**4.9.1 Calculation of Teaching Load****Lecture**

Undergraduate—1 Carnegie clock hour per week = 1 semester hour unit

Graduate—1 Carnegie clock hour per week = 1.333 semester hour units

**Laboratory**

2 Carnegie clock hours per week = 1 semester hour unit

**Applied Lessons**

1.5 clock hours per week = 1 semester hour unit

Teacher Education Practicum

(Education 2000, 3000, 4000)

20 students = 1 semester hour unit

**Special Assignments**

Negotiated with appropriate administrators.

**Arranged Classes**

These will not contribute to semester load unless adequate enrollment is obtained to be counted as a regular class (normally, 15 for undergraduate, 12 for graduate).

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

**4.9.2 Office Hours (update)**

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

**4.9.3 Absences from Duty**

Revised 07-01-2006

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

**4.9.4 Outside Employment**

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

**4.10 Selection and Retention of Department Chairs**

denial were documented in the attached memorandum from Dr. McMillan to Dr. Tudor dated April 30, 2010. See Attachment X.

Each year according to Academic Policy and Procedure Manual 4.6.3 Procedure for Granting Promotion and Tenure, the tenure and promotion application process begins as follows:

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

The portfolio is developed by the faculty member and is considered their property. Once the review process is complete, the portfolio is returned to the faculty member and the university does not retain copies of it. Deans often encourage faculty to begin adding to their portfolios as soon as they receive them back in preparation for their next request for promotion. There is no application or resume for the application. Each decision is based on the candidate's qualifications.

2. **State the name(s) of the successful candidate(s). List everyone that was granted tenure and/or promotion during the relevant period. Include:**
  - a. **Name**
  - b. **Gender**
  - c. **Race**
  - d. **Religion**
  - e. **Date of hire**
  - f. **Date tenure and/or promotion granted.**
  - g. **If denied tenure and/or promotion, give every reason for denial.**
  - h. **Person responsible for denial.**

Response: A person's religious affiliation or beliefs are not a qualification, condition or prerequisite for any of the positions at Southeastern Oklahoma State University. Therefore it is Southeastern's policy that there is no inquiry as to an applicant's religious affiliation or belief. Interview committees are not to inquire into a person's religious affiliation or belief as it is irrelevant to a determination whether the person is qualified for employment at Southeastern.

Once employed, an employee's religious affiliation or belief is not relevant to their continued employment or performance and therefore the information is not gathered nor kept. Accordingly, Southeastern respectfully objects to gathering this information.

After sharing Southeastern's concerns with the EEOC, it was advised that this information be collected on the colleagues of Dr. Tudor because religion is one of the charges brought against SOSU. Therefore, Southeastern response is as follows:

## SPRING 2010

Name	Gender	Race	Religion	Date of Hire	Date granted
Adair, Aaron	M	W	No Resp.	8/12/07	8/12/10
Althoff, Daniel	M	W	Unitarian	11/08/98	12/8/02 (P)
Cotter-Lynch, Margaret	F	W	Episcopalian	8/12/05	8/12/10
Frinkle, Karl	M	W	Declined	8/12/05	8/12/10
Jones, Wayne	M	W	No Resp.	8/1/97	8/12/10 (P)
Marshall, Charles	M	W	No Resp.	8/12/04	8/12/10
Ousey, Jack	M	W	No Religion	8/12/02	8/12/10
Topuz, Jack	M	M	Muslim	8/12/02	8/12/10(P)
Webb, Susan	F	W	Declined	11/21/98	8/12/10
White, Marc	M	M	Catholic	8/1/98	8/12/10(P)

## SPRING 2011

Barker, Janet	F	W	Declined	8/12/06	8/12/10
Brewster, Dennis	M	W	Methodist	8/12/08	8/12/10
Chehbouni, Mohammed	M	Other	Declined	8/12/06	8/12/10
Combs, Deborah	F	W	Methodist	8/12/08	8/12/10(P)
Corbett, Erica	F	W	Declined	8/16/99	8/12/10(P)
Golden, Teresa	F	W	Declined	8/12/06	8/12/11
Nichols, Nick	M	W	Baptist	8/12/01	8/12/11(P)
Patton, Tim	M	W	Declined	8/17/98	8/12/11(P)
Qian, Lie	M	A	No Resp.	8/12/06	8/12/11
Weger, Stacy	M	W	Declined	No Resp.	8/12/01(P)

See Attachment Y for additional information.

If denied tenure and/or promotion, give every reason for denial. See Attachment AA.

U. S. EQUAL EMPLOYMENT OPPORTUNITY  
COMMISSION

REQUEST FOR INFORMATION

Charging Party: Rachel Tudor

EEOC Charge No.: 564-2011-00849

Vs.

Respondent:

Southeastern Oklahoma State University

1405 N. 4<sup>th</sup> Ave., PMB 4236

Durant, Oklahoma 74701

OAG/DLC/USA v. SOSU - CIV-15-324/001942

#### 4.9.1 Calculation of Teaching Load

##### Lecture

Undergraduate—1 Carnegie clock hour per week = 1 semester hour unit  
 Graduate—1 Carnegie clock hour per week = 1.333 semester hour units

##### Laboratory

2 Carnegie clock hours per week = 1 semester hour unit

##### Applied Lessons

1.5 clock hours per week = 1 semester hour unit  
 Teacher Education Practicum  
 (Education 2000, 3000, 4000)  
 20 students = 1 semester hour unit

##### Special Assignments

Negotiated with appropriate administrators.

##### Arranged Classes

These will not contribute to semester load unless adequate enrollment is obtained to be counted as a regular class (normally, 15 for undergraduate, 12 for graduate).

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

#### 4.9.2 Office Hours (update)

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

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Revised 07-01-2006

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  - b. **Gender**
  - c. **Race**
  - d. **Religion**
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## SPRING 2011

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Brewster, Dennis	M	W	Methodist	8/12/08	8/12/10
Chehbouni, Mohammed	M	Other	Declined	8/12/06	8/12/10
Combs, Deborah	F	W	Methodist	8/12/08	8/12/10(P)
Corbett, Erica	F	W	Declined	8/16/99	8/12/10(P)
Golden, Teresa	F	W	Declined	8/12/06	8/12/11
Nichols, Nick	M	W	Baptist	8/12/01	8/12/11(P)
Patton, Tim	M	W	Declined	8/17/98	8/12/11(P)
Qian, Lie	M	A	No Resp.	8/12/06	8/12/11
Weger, Stacy	M	W	Declined	No Resp.	8/12/01(P)

See Attachment Y for additional information.

If denied tenure and/or promotion, give every reason for denial. See Attachment AA.

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

UNITED STATES OF AMERICA, and	)	
	)	
DR. RACHEL TUDOR	)	CASE NO. 5:15-CV-00324-C
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SOUTHEASTERN OKLAHOMA	)	
STATE UNIVERSITY, and	)	
	)	
THE REGIONAL UNIVERSITY	)	
SYSTEM OF OKLAHOMA,	)	
	)	
Defendants.	)	

**PLAINTIFF/INTERVENOR DR. RACHEL TUDOR’S RESPONSES TO  
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA’S  
FIRST SET OF DISCOVERY REQUESTS**

TO: Defendant, Regional University System of Oklahoma  
c/o Kindanee C. Jones, Dixie L. Coffey, and Jeb Joseph  
Assistant Attorneys General  
Oklahoma Attorney General’s Office  
Litigation Section  
313 N. E. 21<sup>st</sup> Street  
Oklahoma City, Oklahoma 73105  
Telephone: (405) 521-3921  
Facsimile: (405) 521-4518  
Email: [Kindanne.Jones@oag.ok.gov](mailto:Kindanne.Jones@oag.ok.gov)  
[Dixie.Coffey@oag.ok.gov](mailto:Dixie.Coffey@oag.ok.gov)  
[Jeb.Joseph@oag.ok.gov](mailto:Jeb.Joseph@oag.ok.gov)

*Attorneys for Defendant State of Oklahoma  
Ex rel. Regional University System of Oklahoma  
& Southeastern Oklahoma State University*

expressly counseled that I could not use any multi-stall women's restroom on the SEOSU campus. After setting forth the conditions of continued employment, Conway advised that SEOSU would process my request to change my name and gender on my SEOSU records before the Fall 2007 semester started. Then the call ended.

I felt alarmed and threatened as a result of Conway's call. I expected that transitioning to female at work might be difficult, but I did not believe that I could be summarily terminated because of my sex. Conway's comments about McMillan's inquiry as well as his open prejudice against transgender persons were deeply disturbing and made me feel very anxious and fearful for my future at SEOSU.

**Interrogatory No. 11:** *Please identify and describe the details of all tenure-track professorships for which you have applied since leaving Southeastern Oklahoma State University.*

**RESPONSE:** Plaintiff/Intervenor objects to this Interrogatory on the grounds that it is unduly burdensome and unnecessarily cumulative or duplicative. Defendants are entitled to seek discovery reasonably calculated to ascertain whether Plaintiff/Intervenor has satisfied her obligation to mitigate damages, but she need not produce or exactly describe each and every application she submitted. *See, e.g., EEOC v. Unit Drilling Co.*, 2014 WL 3572219, \*3 (N.D. Okla. 2014) (holding that party's request for "all job applications" during relevant time period was not proportionate to needs of the case).

Subject to and without waiving these objections, Plaintiff/Intervenor applied for teaching positions at over one-hundred institutions of higher education between Fall 2011 and accepting a position at Collin College in Summer 2012, including, but not limited to:

1. Arizona State University (Tempe, Arizona)
2. Averett University (Danville, Virginia)
3. Bainbridge College (Bainbridge, Georgia)
4. Ball State University (Muncie, Indiana)

5. Baltimore Community College (Baltimore, Maryland)
6. Baylor University (Waco, Texas)
7. Bethel University (McKenzie, Tennessee)
8. Brevard College (Brevard, North Carolina)
9. Bucknell University (Lewisburg, Pennsylvania)
10. Butler County Community College (El Dorado, Kansas)
11. Central New Mexico Community College (Albuquerque, New Mexico)
12. Chabot-Las Positas Community College (Los Positas, California)
13. Colin College (McKinney, Texas)
14. Dallas County Community College (Dallas, Texas)
15. Dickinson College (Carlisle, Pennsylvania)
16. East Central University (Ada, Oklahoma)
17. Edison State College AKA Florida SouthWestern State College (Fort Myers, Florida)
18. Enterprise State Community College (Enterprise, Alabama)
19. Florida Gulf Coast University (Fort Myers, Florida)
20. Florida Institute of Technology (Melbourne, Florida)
21. Florida International University (Miami, Florida)
22. Full Sail University (Winter Park, Florida)
23. George Mason University (Fairfax, Virginia)
24. Georgia Perimeter College (Decatur, Georgia)
25. Georgia Institute of Technology (Atlanta, Georgia)
26. Germanna Community College (Locust Grove, Virginia)
27. Glenville State College (Glenville, West Virginia)
28. Grayson Community College (Denison, Texas)
29. Grinnell College (Grinnell, Iowa)
30. Houston Community College (Houston, Texas)
31. Illinois College, Jacksonville, IL (Jacksonville, Illinois)
32. Illinois State College (Normal, Illinois)
33. Indiana University Southeast (New Albany, Indiana)
34. Jackson Community College (Jackson, Michigan)
35. James Madison University (Harrisonburg, Virginia)
36. Kenyon College (Gambier, Ohio)
37. Lake Sumter Community College (Leesburg, Florida)
38. LeTourneau University (Longview, Texas)
39. Lindsey Wilson College (Columbia, Kentucky)
40. Lone Star Community College (Houston, Texas)
41. Monterey Peninsula College (Monterey, California)
42. Montgomery College (Rockville, Maryland)
43. Moraine Valley Community College (Palos Hills, Illinois)
44. Nevada State College (Henderson, Nevada)
45. New England College (Henniker, New Hampshire)
46. New Mexico Highland University (Las Vegas, New Mexico)
47. North Seattle Community College (Seattle, Washington)
48. Northern Virginia Community College (Springville, Virginia)
49. Oberlin College (Oberlin, Ohio)
50. Ohio Christian University (Circleville, Ohio)

51. Oklahoma Baptist University (Shawnee, Oklahoma)
52. Oklahoma State University (Stillwater, Oklahoma)
53. Oxbridge Academy of the Palm Beaches (West Palm Beach, Florida)
54. Palm Beach State College (Lake Worth, Florida)
55. Pellissippi State Community College (Knoxville, Tennessee)
56. Pensacola State College (Pensacola, Florida)
57. Philander Smith College (Little Rock, Arizona)
58. Pima Community College (Tucson, Arizona)
59. Polk State College (Winter Haven, Florida)
60. Portland State University (Portland, Oregon)
61. Prince George's Community College (Largo, Maryland)
62. Rasmussen College (Minneapolis, Minnesota)
63. Rogers State University (Claremore, Oklahoma)
64. San Jacinto College (Pasadena, Texas)
65. Seminole State College (Orlando, Florida)
66. Seminole State College (Seminole, Florida)
67. Shippensburg University (Shippensburg, Pennsylvania)
68. Slippery Rock University of Pennsylvania (Slippery Rock, Pennsylvania)
69. South University (Highpoint, North Carolina)
70. Southeast Missouri State University (Girardeau, Missouri)
71. Southern Methodist University (Dallas, Texas)
72. Southwestern Oklahoma State University (Weatherford, Oklahoma)
73. St. Louis Community College (St. Louis, Missouri)
74. St. Petersburg College (St. Petersburg, Florida)
75. Tarrant County College (Forth Worth, Texas)
76. Texas A & M-Kingsville (Kingsville, Texas)
77. Tiffin University (Tiffin, Ohio)
78. Towson University (Baltimore, Maryland)
79. Tri-County Technical College (Pendleton, South Carolina)
80. Trinity Valley Community College (Athens, Texas)
81. University of Arkansas (Fayetteville, Arkansas)
82. University of California-Los Angeles (Los Angeles, California)
83. University of Houston-Downtown (Houston, Texas)
84. University of Houston-Victoria (Victoria, Texas)
85. University of Iowa (Iowa City, Iowa)
86. University of Louisiana (LaFayette, Louisiana)
87. University of Maryland (College Park, Maryland)
88. University of Nevada (Las Vegas, Nevada)
89. University of North Carolina (Wilmington, North Carolina)
90. University of North Florida (Jacksonville, Florida)
91. University of Northwestern Ohio (Lima, Ohio)
92. University of Oregon (Eugene, Oregon)
93. University of Pennsylvania (Philadelphia, Pennsylvania)
94. University of Rhode Island (Kingston, Rhode Island)
95. University of South Carolina (Aiken, South Carolina)
96. University of South Florida (Sarasota, Florida)

97. University of Tampa (Tampa, Florida)
98. University of Tennessee (Knoxville, Tennessee)
99. University of Utah (Salt Lake City, Utah)
100. Utah Valley University (Orem, Utah)
101. Volunteer State Community College (Gallatin, Tennessee)
102. Wartburg College (Waverly, Iowa)
103. Webster University (Greenville, South Carolina)
104. Xavier University (Cincinnati, Ohio)

**Interrogatory No. 12:** *Please identify the individual human resources employee whom you contend in Paragraph 50 of Plaintiff/Intervenor's Complaint "was uncomfortable with a transgender woman . . . using a multi-stall women's restroom."*

**RESPONSE:** Paragraph ¶ 50 of my Complaint in Intervention refers to Cathy Conway. Prior to the June 1, 2007 phone call with Conway I had had few interactions with Conway. During the call, Conway advised me about the restroom restriction and repeatedly made references to the restroom restriction and other "conditions" being placed on my continued employment. I believed at the time that Conway's instructions as to my restroom use were improper and that they were likely motivated by Douglas McMillan's bias against transgender persons and/or Conway's own bias against transgender persons.

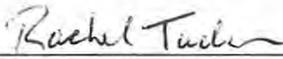
**Name:** Cathy Conway  
**Occupation:** Unknown  
**Personal Contact:** Unknown  
**Employers:** Unknown  
**Employers' Contact:** Unknown

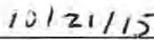
**Interrogatory No. 13:** *Please identify and describe, (as per definition nos. 8, 9, and 10, above), the circumstances and date of the first time you complained to RUSO or SEOSU employees or agents about being forced to use "the single-stall, all genders restroom" described in Paragraph 52 of Plaintiff/Intervenor's Complaint.*

**RESPONSE:** On my first day at work presenting as female (sometime in August 2007), Jane McMillan came by my office to see how she was doing. During this meeting, McMillan asked me if I wanted to step out of the office and "go talk in the restroom" (referring to the women's multi-stall restroom down the hall from my office). I proceeded to complain to

**VERIFICATION FOR RESPONSES TO  
REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA'S  
FIRST SET OF INTERROGATORIES**

I certify under penalty of perjury under the laws of the United States of America that the foregoing Responses to Interrogatories are true and correct.

  
\_\_\_\_\_  
Dr. Rachel Tudor

  
\_\_\_\_\_  
Date

# **Dr. Rachel Tudor's Personnel File at Collin College**

CC 1

**Job Responsibilities/Priorities**

List the employee's primary job responsibilities that require attention and describe the specific improvement that is needed to meet minimum expectations. Note that there may be other performance deficiencies that are not listed but may be addressed with future PIP's once performance in the areas listed below is corrected.

1. **Job Performance Deficiency:** Your service to Collin College does not meet Collin's standard of excellence.

*Specific Results Required for Acceptable Improvement:* Continue providing the service you have provided. In addition to the service you are now providing, as planned, coordinate the multiple meetings of the Interdisciplinary Colloquium. I encourage you to consider providing additional service beyond coordinating the Interdisciplinary Colloquium.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

2. **Job Performance Deficiency:** Your professional development does not meet Collin's standard of excellence.

*Specific Results Required for Acceptable Improvement:* In addition to attending and presenting at district professional development events, please attend (and present at) at least one regional/national professional development event.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

3. **Job Performance Deficiency:** Retool your instruction and improve your classroom management to address the concerns reflected in your student evaluation ratings and comments.

*Specific Results Required for Acceptable Improvement:* Continue selecting appropriate instructional materials for your composition classes, focusing these classes clearly on composition. Continue working on managing your classes so that students are well engaged; so that your instruction is clear, challenging, substantive and interactive; and so that your management of classes is more resolute and collaborative. Continue working with me and other faculty as mentors to adequately address the instructional and class management issues identified in your 2013-2014 annual appraisal and in our discussions.

Date for Improvement to be Completed: Spring 2015 - Spring 2016

---

**Plan Establishment**

- **Support to be provided by Supervisor (e.g. training, equipment, observation, procedures):**
- Review your Fall 2014 student evaluations as soon as possible and meet shortly afterward to discuss them with Dean Weasenforth. Come prepared with an analysis of student concerns and proposals for addressing those concerns.
- Meet with Dean Weasenforth periodically through Fall 2015 to discuss your progress in fulfilling these goals.
- Attend professional development opportunities available in district as well as regional/national professional development events.
- Seek the eLC's assistance with technology-based instructional innovations.
- Confer with Scott Cheney, Co-Chair of English, with regard to any concerns you may have regarding conducting successful dual credit classes.
- Continue to confer with other full-time faculty—including the one who has served as a mentor to

Plan Establishment Signatures:

<b>Employee:</b>	_____	<b>Date:</b>	_____
<b>Supervisor:</b>	_____	<b>Date:</b>	_____
<b>VP/P:</b>	_____	<b>Date:</b>	_____
<b>HR Liaison Received and Recorded</b>	_____	<b>Date:</b>	_____

**Follow-up Review**

**Dates of follow-up discussions:** see dates below

Results of follow-up discussion #1: Professor Tudor met with me on 2/5/15 to discuss her Fall 2014 student evaluations. I noted that while some evaluations spoke highly of her and the instruction that she provided, there were a notable number of evaluations that described her instruction as unclear and her classroom management as inadequate. I noted the need for improvement; referred her to Lisa Roy-Davis, her mentor, and Scott Cheney, English Co-Chair overseeing dual credit classes; and offered my advice and support.

Results of follow-up discussion #2: Professor Tudor met with me on 9/14/15 to discuss her 2014-2015 annual appraisal. At that time, I noted her improvement in professional development and my conclusion that it met standards of excellence. We also discussed my conclusions that she still needed improvement in instruction and service since neither met standards of excellence. I offered my advice and personal support as means of improvement in instruction and service.

Results of follow-up discussion #3: Professor Tudor and I met again on 1/11/16 to discuss her 2014-2015 annual appraisal. At this meeting, with additional information and clarification, I noted that her service was adequate, albeit not outstanding. I pointed out that simply maintaining membership on committees does not constitute substantive service, and I encouraged Professor Tudor to be more proactive in seeking service opportunities and providing service. I also noted improvement in instruction based on student evaluation results from Fall 2015, but I also noted that 6 of 25 ENGL1301.S54 students responded to the evaluation and that no evaluations for ENGL1301.S07 were received by the IRO. I noted that several ENGL1301.S07 students had complained about Professor Tudor's instruction, complaints that were consistent with previous student complaints. The incomplete pool of student evaluations complicated this assessment process.

**Follow-up Review:** *(generally to be completed within 60-90 days of initial review date)*

Employee has achieved the required improvement described above. Professor Tudor's professional development meets standards of excellence. She has engaged in a number of professional development activities, including presenting at the Texas Tech Comparative Literature Conference, presenting at the Trends in Teaching College Composition Conference, attending the Faculty Development Conference (Scott Barry Kaufman) in Fall 2014, attending Faculty Development Conference presentations in Spring 2015, attending eLC training for Blackboard, and meeting with her mentor and chair.

Employee has not achieved the required improvement in the following area(s): Professor Tudor has stated that she does not see a need for improvement in her instruction or classroom management, a stance that is inconsistent with the dean's assessment. The service she has provided continues to be adequate, not outstanding.

CC 270

**Tonya Jacobson**

---

**From:** donotreply@collin.edu  
**Sent:** Thursday, March 17, 2016 1:27 PM  
**To:** Tonya Jacobson  
**Subject:** New Employee Complaint - Rachel Tudor  
**Attachments:** complaint regarding contract nonrenewal 2016.docx

NOTICE OF NEW EMPLOYEE COMPLAINT

Case Number : 55

COMPLAINANT INFORMATION:

CWID : 100139507  
First Name : Rachel  
Last Name : Tudor  
Job Title : Professor  
Campus : Spring Creek Campus

Address : 4595 West Spring Creek  
City : Plano  
State : TX  
Zipcode : 75024

Phone Number : 9728815133

College Email Address : [rtudor@collin.edu](mailto:rtudor@collin.edu)

TYPE OF COMPLAINT FILED:

Wages Hours Conditions of Work :  
Violations of College Policy :  
Unlawful Discrimination or Harassment :  
Unlawful Retaliation :  
Whistle Blower :  
At-Will Termination :  
Contract Termination : Y  
Any Other Complaint :

DETAILS OF COMPLAINT:

Respondent : Collin College, Dean Weasenforth, Dr. Mary McRae Date of Action : March 4, 2015 Details of Complaint :  
See attachment Witnesses : Dean Weasenforth, Dr. Mary McRae Witness Information : Unknown Discussed Complaint  
With : Dean Weasenforth, Mary McRae, Norma Allen

Relief Requested : Renewal of contract for the 2016-2017 academic year.

Uploaded\_Files (if any) : /DGBA\_Uploaded\_Supporting\_Documents/complaint regarding contract nonrenewal 2016.docx

SIGNATURE AND DATE SUBMITTED:

Electronic\_Signature : Rachel Tudor

Signature\_Date : 03/17/2016

Timestamp : 03/17/2016 01:26:56 PM

Link to Admin Login: <https://b6.caspio.com/dp.asp?AppKey=57b130009cd8484b9bfa4cd698e2>

Re: Complaint Regarding Nonrenewal of Contract

The nonrenewal of my contract is a discriminatory and retaliatory act that violates my rights. The assessment on which the decision to not renew my contract was based is flawed and misrepresentative of the facts. The decision to not renew my contract should be reconsidered and a new contract issued to me for the 2016-2017 academic year.

My annual performance review stated that I "Meet Standards for Excellence" in Professional Development and Service, therefore the only area in dispute is Teaching. The only area in Teaching that Dean Weasenforth purports needs improvement is "Facilitates Learning". As a matter of fact, the categories of "Provides Students with the Fundamental Body of Knowledge of Her Discipline," "Teaches Students to Apply That Knowledge," "Responds to the Differing Educational Requirements of Students," "Employs Current Materials in Classroom Presentations and Learning Experiences," "Uses Innovative Teaching and Learning Methods," "Employs Effective Evaluation Techniques," and "Meets Classes as Scheduled" are all assessed as "Meets Standards for Excellence." It is to be noted that "Facilitates Learning" is the only ambiguous and subjective category in the Teaching Assessment section. Each of the other categories refers to specific elements that a faculty member may point to as objective evidence of having been met. Therefore, there is compelling reason to eliminate it entirely from assessment. If it is included, it should be given the least weight of all the categories. An "Improvement Needed" in that one category is certainly no justification or warrant for the catastrophic act of terminating a faculty member's employment thereby depriving a person of their livelihood, health insurance, and dignity.

Of the twenty-two areas of assessment, there is only one other area of assessment that I received anything less than "Meets Standards for Excellence." That is in the Assisting Students section. The Assisting Students section has four assessment categories: "Understands Current Career and Curriculum Options," "Helps Students with Education-Based Problems and/or Directs Students to Appropriate College Resources," "Assists Students in Accessing Appropriate College and Community Resources for Non-Educational Purposes," and "Is Available to and Approachable by Students." In the first three categories I received "Meets Standards of Excellence." Only in the category of "Is Available to and Approachable by Students" was "Improvement Needed" marked. The objective part of that assessment is whether or not I kept all of my scheduled office hours. I did. That is demonstrable. In the evaluations, many students wrote that I am "nice" and "friendly." In addition, I am a volunteer in the College's student mentoring program. The assessment of "approachable" is subjective from student to student. As in the previous example, the only area of assessment in this category tagged "Improvement Needed" is the subjective portion of one assessment criteria. Likewise, an "Improvement Needed" in that one category is not justification or warrant for the catastrophic act of terminating a faculty member's employment.

I noted in detail in a complaint to Mary McRae the biased and distorted remarks that Dean Weasenforth made in his original assessment of my performance and he was instructed to "re-format the Appraisal to point out both positive comments and constructive criticism based on a larger sampling of student

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comments.” Although he did include a more balanced presentation of student comments, he persisted in distorting and misrepresenting information that I noted in my “comments” because he was unwilling to work with me to make truly equitable changes. As egregious as his continuing bias was in prejudicing the review of my assessment, his patently false claim in his “Follow-Up Review” that “Professor Tudor has stated that she does not see a need for improvement in her instruction or classroom management, a stance that is inconsistent with the dean’s assessment” was probably instrumental in denial of renewal of my contract. When I read Dean Weasenforth’s false claim, I pleaded with him to remove it. He refused. He wrote to me in an email that I could write what I wanted in the “comments” section. I had one class in which EVERY student marked “strongly agree” in all sixteen categories and wrote comments such as: “Great teacher—always knew what to expect” and “Very Nice!!!” I said of that particular class, in a good-humored way, that there was not much room for improvement there. Dean Weasenforth twisted that good-humored comment into an assertion that I never made. As a matter of fact, one of the comments a student wrote in another class was “humble.” If I made the statement he claims I did or believed it—why would I have been so adamant since I read it in the “Follow-Up Review” that it be excised? Dean Weasenforth’s false statement and his refusal to remove it is compelling evidence of bias—bias that may only be explained as discriminatory and/or retaliatory in nature.

Collin College has an institutional and cultural problem addressing discrimination against transgender employees. The discrimination begins with the absence of any explicit policy prohibiting discrimination based on gender identity and excluding any trans-related health care provisions in its insurance. Collin College health insurance even excludes coverage for mental health counseling! Employees who suffer mental health crises because of the absence of an anti-discrimination policy cannot even access health care to help them cope with the problems being a victim of discrimination creates.

Collin College human resource staff and administration are not trained to recognize or deal with trans-related discrimination—even if there were policy to prevent it. For instance, another faculty member, Leslie Richardson, made some trans-hateful remarks in my presence and Dean Weasenforth’s response was to defend her because she claimed she didn’t know I was trans. He did not take my report seriously until verified by three other witnesses. The aftermath was that he removed me from a faculty search committee and replaced me with Leslie Richardson. He and HR representatives met with Leslie Richardson and worked out a “solution” without including me in the discussions. Leslie Richardson was not required to attend or participate in any type of educational program to inform her about being respectful to trans colleagues or trans students. As a matter of fact, the difficulties I have had with Dean Weasenforth and the administration began, I believe not coincidentally, when I complained about Leslie Richardson’s hate speech.

I informed my faculty mentor, Lisa Roy-Davis, of some students’ acts of animus because they discovered that I am trans. I informed her of hateful things they posted on RateMyProfessors, threatening emails, misgendering me in the classroom, and being generally disrespectful. When Dean Weasenforth was confounded why some students in some classes made statements about my teaching proficiency and classroom management that directly contradicted what other students wrote, I explained that the majority of the disparaging comments were based on the animus that these students had towards trans people. He not only routinely dismissed my explanation but quoted these students at length as if they

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were credible in my annual assessment. The standard that Dean Weasenforth and Dr. Mary McRae use to identify trans discrimination is explicit anti-trans remarks in the evaluations—"Dr. Tudor's subjective belief that the dual credit students were purportedly biased against her is not evident in the evaluations." That simply is not how discrimination works. It is important to note that misgendering, disrespectful comments and behavior in the classroom, and harassment in social media (which I reported to my mentor) were not "subjective" but objective and empirical instances of discrimination. Thus, the need for education and training of administration so they may be able to identify the signs of discrimination when evidence is presented—beginning with taking the testimony of trans people seriously.

I presented Dean Weasenforth and Dr. Mary McRae a report, "Injustice at Every Turn," that found discrimination against trans people as being "pervasive" and the "combination of anti-transgender bias and persistent, structural racism [I am also Native American] as especially devastating." For instance, over "90% of trans people experience harassment, mistreatment or discrimination on the job." It is turning a willfully blind eye to reality to believe that this type of pervasive discrimination is not reflected in the student evaluations. The Office of Human Rights released a report in 2015 that found 48% of employers appeared to prefer less qualified applicants perceived as cisgender over more qualified transgender applicants. They also found that 33% of employers offered interviews to one or more less-qualified applicants perceived as cisgender while not offering an interview to more-qualified transgender applicants—this study included community colleges as potential employers. Of particular relevance to my case is a study carried out by Nujavi Bardales in 2013 in "urban areas in Texas" and included positions in "Higher Education" that found a "statistically significant 31.7% level of discrimination against tester applicants." None of the respondents in these studies make explicit anti-trans remarks yet the authors were able to identify the pervasive and harmful effects of discrimination on trans people's employment. Why is Collin College adamant that there is no anti-trans bias in the evaluation of trans faculty? It is simply counterfactual to claim that the students at Collin College are not subject to the bias and discriminatory attitudes that are part of our culture. It is cruel and unjust to terminate a professor because she is unable to single-handedly overcome the bias and discrimination that permeates our culture. I say "singlehanded" because there are no trans-focused educational activities sponsored by the college. I made repeated pleas to my dean and colleagues for trans-related films to be included in the college's film series, for trans-related books to be included in the Book-in-Common program, for trans women to be included in the multi-year Dignity Initiative, for trans-authored texts to be include in the curriculum, and to have a campus activity to mark the Trans Day of Remembrance (a day to remember the people who are murdered every year simply because they are trans), and for the college to train faculty, administrators, and HR personnel on trans-related needs.

The only purported reason for not renewing my contract are some negative evaluations and spurious comments made by a minority of students. In response, it is important to know that there is a large reservoir of data published in peer-reviewed journals documenting the fact that student evaluations are biased based on gender, race, age, and the teaching of social justice issues such as "white privilege." For instance, Heather Laube, Kelley Massoni, Joey Sprague, and Abby Ferber caution in *The Impact of Gender on the Evaluation of Teaching* that "quantitative measures can mask underlying gender bias"

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(87). Alison Bartlett writes in *“She Seems Nice”: Teaching Evaluations and Gender Trouble* that “teaching evaluations are highly debatable instruments with which to measure teaching” and are “mainly acknowledged as unreliable.” Lilian MacNell, Adam Driscoll, and Andrea Hunt found in *What’s in a Name: Exposing Gender Bias in Student Ratings of Teaching* that “instructor gender has been shown to play an important role in influencing student ratings”; “students rated the male identity significantly higher than the female identity”; and that these findings “warrant considerable attention.” In *Student Evaluations and Gendered Expectations: What We Can’t Count Can Hurt Us*, the researchers found that “students hold teachers accountable to certain gendered expectations” and that they found “signs of much greater hostility towards women . . . who do not meet students’ gendered expectations.” Marilyn Chamberlin and JoAnn Hickey wrote in *Student Evaluations of Faculty Performance: The Role of Gender Expectations in Differential Evaluations* that “sex stereotypes influence both the expectations and evaluations of faculty members.” In short, there is overwhelming evidence that gender bias does have a significant impact on student evaluations. Student evaluations may be quantifiable but they are not objective. Dean Weasenforth and company are unwarranted in relying on them to justify not renewing my contract. In light of the irrefutable evidence that there is bias against cisgender women—how much more so trans women?! Julianne Arbuckle and Benne Williams wrote in *Age and Gender Effects on Teacher Evaluations* that young male professors were consistently rated higher in student evaluations than “old” male or “old” female professors in contradistinction to their actual abilities. Likewise, Robert Stonebraker and Gary Stone found in *Too Old to Teach?* that “age has a negative impact on student ratings of faculty.” I am old enough to be included under the protection of anti-ageism laws. Finally, several studies found that including social justice issues in the curriculum has a significant negative impact on student evaluations. Rakhi Ruparelia wrote in *Guilty Displeasures: White Resistance in the Social Justice Classroom* that “Professors who initiate these discussions become the natural targets of criticism and blame as students struggle with their own discomfort. The hostility of resistant white students can be interpreted as racial microaggressions that compromise the psychological well-being and deplete the emotional and physical resources of racialized professors.” And, the authors stress the importance of “understanding negative student reactions in the context of structural racism.” Su Boatright-Horowitz and Sojatra Soeung put it most forthrightly in the title of their work, *Teaching White Privilege to White Students Can Mean Saying Good-bye to Positive Student Evaluations*. They found that “teaching anti-racism [which I explicitly do as well as anti-LGBT discrimination] can have a negative impact” on students evaluations because students “cast their frustrations and emotions towards educators.” My composition classes write papers on the topics of immigration, sexism, civil rights, and wealth inequality.

In sum, my student evaluations are mostly positive and many students make incredibly personal and passionate affirmations of my teaching. I am always looking for ways to improve my teaching, but the fact is that there is demonstrable bias in the student evaluation because of gender, race, age, and subject matter. I am aware of legitimate criticisms and strive to address those, but the areas that may be improved are not so grave as to warrant the nonrenewal of my contract. I have carefully read Dean Weasenforth’s assessment of the student evaluations and I find no awareness of the readily available scientific data and research on student evaluations with which those student evaluations should be weighed. In fact, Dean Weasenforth has been deaf to my efforts to communicate the nuance and art of

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interpreting evaluations in the context of structural gender bias, pervasive discrimination against trans people, racism, and the hostility to including lessons on white, cis, and heteronormative privilege in the curriculum.

For all of the foregoing reasons, my contract should be renewed for the 2016-2017 academic year. There simply is no legitimate or warranted reason to not renew my contract. I am even willing to relocate to one of the other Collin College campuses.

Signed,

Dr. Rachel Tudor

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#### 5.6 SEXUAL HARASSMENT POLICY.

Statement of Policy. RUSO affirms its commitment to ensuring an environment for all employees and students which is fair, humane, and respectful -- an environment which supports and rewards employee and student performance on the basis of relevant considerations such as ability and effort. Behaviors which inappropriately assert sexuality as relevant to employee or student performance are damaging to this environment. Sexual harassment by any member of the university community, including students, faculty and staff, is a violation of both law and the Board policy, and will not be tolerated. Sexual harassment is a particularly sensitive issue which may affect any member of the university community and as such will be dealt with promptly and confidentially by the university administration. The Board reserves the right to deal administratively with sexual harassment issues whenever it deems it appropriate to do so.

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

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

#### Examples of Prohibited Conduct.

Conduct prohibited by this policy may include, but is not limited to:

unwelcome sexual flirtation; advances or propositions for sexual activity;

continued or repeated verbal abuse of a sexual nature, such as suggestive comments and sexually explicit jokes;

sexually degrading language to describe an individual;

remarks of a sexual nature to describe a person's body or clothing;

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**5.6 SEXUAL HARASSMENT POLICY.** (Continued)

display of sexually demeaning objects and pictures;

offensive physical contact, such as unwelcome touching, pinching, brushing the body;

coerced sexual intercourse;

sexual assault;

actions indicating that benefits will be gained or lost based on response to sexual advances.

**Retaliation.** Any attempt to penalize or retaliate against a person for filing a complaint or participating in the investigation of a complaint of sexual harassment will be treated as a separate and distinct violation of the Board policy.

**Sanctions.** Appropriate disciplinary action may include a range of actions up to and including dismissal.

**Complaint Process.** This policy is in addition to the current Board and university policies concerning discrimination, and applies to all students, faculty, staff, guests or visitors. Complaints alleging violation of the sexual harassment policy will be reviewed and investigated by the appropriate university office.

Complaints may be resolved informally or may proceed through the applicable formal complaint proceedings. Complaints may be filed in the following manner:

- a) Complaints against students or student organizations shall be filed with the designated official for review and investigation. The designated official, may assist in the informal resolution of the complaint or in processing a complaint through the applicable campus procedures.

September 2006

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**5.6 SEXUAL HARASSMENT POLICY.** (Continued)

- b) Complaints against faculty or staff shall be filed with the designated official. The designated official may assist in the informal resolution of the complaint or in processing a formal complaint through the applicable campus procedures for faculty and staff.
- c) Complaints against visitors, guests, vendors, contractors, or any other person should be directed to the university human relations department; or
- d) any other appropriate process as established by the university policy.

**5.7 RACIAL AND ETHNIC POLICY.**

**Introduction.** The Board is committed to a multicultural, multiethnic and multiracial environment at each of the six regional universities. Diversity is one of the hallmarks of a great university. Promoting dignity and respect among all members of the university community is a responsibility each of us must share. Acts of racial and ethnic harassment are repugnant to the Board's commitments and will not be tolerated. While the Board embraces the principles of free speech guaranteed by the First Amendment to the United States Constitution, it abhors the abuse of this freedom by those who would provoke hatred and violence based on race and ethnicity. Racial and ethnic harassment is a growing concern across American college campuses. It has taken various forms, from criminal acts (assault and battery, vandalism, destruction of property) to anonymous, malicious intimidation and is most often directed toward persons whose race or ethnicity is readily identifiable. While principles of academic freedom and freedom of speech require tolerance of ideas and opinions, racial and ethnic harassment cannot and will not be permitted at the regional universities. The Board reserves the right to deal administratively with racial and ethnic harassment issues whenever it deems it appropriate to do so.

**Statement of Policy.**

It is the policy of the Board that racial and ethnic harassment is prohibited and is subject to disciplinary action as set forth in this policy. Racial and ethnic harassment is defined as:

Behavior or conduct addressed directly to individual(s) related to the victim's race, religion, ethnicity, or national origin that threatens violence, or property damage, or that incites or is likely to incite imminent lawless action.

September 2006

1. Submission to or rejection of such conduct is made explicitly or implicitly a term or condition of instruction, employment, status or participation in any course, program or other University activity.
2. Submission to or rejection of such conduct is used as a basis for evaluation in making academic or personnel decisions affecting an individual; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work or educational performance, or of creating an intimidating, hostile or offensive environment for work or learning.

Sexual harassment encompasses any sexual attention that is unwanted, and includes sexual harassment based on sexual orientation. (McCaffree 10/2003)

Whenever there is an instance of alleged sexual harassment, or reprisal for reporting same, prompt and corrective action shall be taken.

#### **7.4.2 Policy**

It is the policy of Southeastern Oklahoma State University that sexual harassment of faculty and staff is prohibited in the work place and in the recruitment, appointment, working conditions, and advancement of employees (See Appendix C). Sexual harassment of students is prohibited in and out of the classroom and in the evaluation of students' academic performance.

It is also the policy of the University that accusations of sexual harassment which are made without good cause shall not be condoned. It should be remembered that accusations of sexual harassment are indeed grievous and can have serious and far-reaching effects upon the careers and lives of individuals. This policy is equally applicable to faculty, staff and students.

This policy is in keeping with the spirit and intent of various federal guidelines which address the issue of fair employment practices, ethical standards and enforcement procedures.

#### **7.4.3 Grievance Procedure**

Grievance procedures consistent with the principles of due process have been developed and implemented for faculty, students, and staff. The latter includes all University administrative and professional employees and support staff. The Regional University System of Oklahoma Board of Regents policy on sexual harassment is found in Appendix C.

#### **7.4.4 Complaint Procedure**

Sexual harassment is against the law and requires immediate attention and appropriate disciplinary action.

A complaint must be filed within one year of the incident to be handled under this procedure.

Employees, students, or other individuals who feel aggrieved because of conduct that may constitute sexual harassment should inform the person engaging in such conduct that such conduct is offensive and must stop. If such conduct does not stop, relief should be sought through the procedure described below.

If a student or worker feels uncomfortable about confronting the person engaging in the conduct, they should seek assistance as follows: Anyone who feels victimized by this behavior should contact proper supervisory personnel and/or the affirmative action officer. A supervisor receiving such a complaint should immediately advise the affirmative action officer to confer on appropriate action and determine if the problem can be resolved informally.

If the complaint cannot be resolved informally, the complainant must submit a written complaint for investigation. After investigation, the affirmative action officer may convene a committee in a formal setting to review written charges, hear evidence and testimony, and make a determination on the evidence as to whether harassment did occur. If the finding is that sexual harassment did occur, the supervising vice president in concert with the affirmative action officer will take disciplinary action.

At every step of the procedure, confidentiality will be maintained to protect the individuals involved. Employees or students failing to restrict confidential information or who give false information will be subject to disciplinary action.

## **7.5 Racial and Ethnic Policy**

### Statement of Policy

#### Complaint Process

The Regional University System of Oklahoma Board of Regents is committed to a multicultural, multiethnic and multiracial environment at each of the six regional universities. Diversity is one of the hallmarks of a great University. Promoting dignity and respect among all members of the University community is a responsibility each of us must share. Acts of racial and ethnic harassment are repugnant to the Board's commitments and will not be tolerated. While the Board embraces the principles of free speech guaranteed by the First Amendment to the United States Constitution, it abhors the abuse of this freedom by those who would provoke hatred and violence based on race and ethnicity. Racial and ethnic harassment is a growing concern across American college campuses. It has taken various forms, from criminal acts (assault and battery, vandalism, destruction of property) to anonymous, malicious intimidation and is most often directed toward persons whose race or ethnicity is readily identifiable. While principles of academic freedom and freedom of speech require tolerance of ideas and opinions, racial and ethnic harassment cannot and will not be permitted at the regional universities. The Board reserves the right to deal administratively with racial and ethnic harassment issues whenever it deems it appropriate to do so.

#### **7.5.1 Statement of Policy**

It is the policy of the Board of Regents and Southeastern Oklahoma State University that racial and ethnic harassment shall be prohibited and is subject to disciplinary action as set forth in this policy. Racial and ethnic harassment is defined as:

REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA	CHAPTER 5 GENERAL POLICIES	Page 5-1
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## 5. GENERAL POLICIES

**5.1 EQUAL OPPORTUNITY.** RUSO, in accordance with Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Vietnam Era Veterans Readjustment Assistance Act of 1974, the Americans With Disabilities Act and to the extent required by these and other federal laws and regulations, does not discriminate on the basis of race, color, ethnicity, national origin, sex, age, religion, disability, political affiliation or status as a veteran in any of its policies, practices, or procedures. This includes but is not limited to admissions, employment, financial aid, and educational services.

**5.2 AFFIRMATIVE ACTION.** The Affirmative Action Plan at each university serves to supplement the Regents' policy on equal opportunity as it pertains to employment, and is an integral part of the employment policies of the Board. The principal objectives are:

- a) to assure all persons equal opportunity for employment and advancement in employment regardless of race, religion, disability, color, ethnicity, national origin, sex, age, political affiliation, or status as a veteran;
- b) to meet institutional responsibilities under the Civil Rights Act of 1964; commitments as a federal contractor under Executive Order 11248 and Executive Order 11375; and Oklahoma State Regents for Higher Education policies.
- c) to reach out to all persons, including women and racial minority members, in the recruitment, placement, development and advancement of university personnel.

Each person having administrative or supervisory responsibilities is expected to provide leadership in applying the Affirmative Action Plan.

**5.3 REGENTS' INSURANCE PROGRAM.** RUSO provides the following types of insurance to eligible employees. Coverage requirements and limitations are delineated in the contracts between the Board or the regional universities and the insurer.

**5.3.1 Group Health Insurance Program.** Pursuant to 70 O.S. § 3510(k), RUSO provides continuous group health insurance coverage for all full-time employees

September 2006

UNITED STATES DISTRICT COURT  
FOR THE  
WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, )  
et al. )

Plaintiff, )

VS. )

Civil Action No.  
5:15-CV-00324-C

SOUTHEASTERN OKLAHOMA STATE )  
UNIVERSITY, et al. )

Defendant. )

\*\*\*\*\*

ORAL DEPOSITION OF  
CATHY CONWAY  
MARCH 10, 2016

\*\*\*\*\*

ORAL DEPOSITION OF CATHY CONWAY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and -numbered cause on the 10th day of March, 2016, from 8:58 a.m. to 4:52 p.m., before Chrissa K. Mansfield-Hollingsworth, CSR in and for the State of Texas, reported by machine shorthand, at the offices of U.S. Attorney's Office, located at 600 East Taylor Street, Suite 2000, Sherman, Texas, pursuant to the Federal Rules of Civil Procedure.

1 June 1st.

2 A. Yes.

3 Q. What do you remember?

4 A. I told Dr. Tudor about the two policies,  
5 reminded her that those were for her and everyone at the  
6 university. I'm sure I told her like I tell -- told  
7 everyone that she should contact me if she had any  
8 concerns or questions, that the sexual harassment  
9 include -- policy included how to report. I advised her  
10 that she should let her department chair know about the  
11 name change and her dean, and that if she had questions  
12 about people's opinions as to gender presentation, which  
13 one to use, that she should discuss that with her  
14 counselor, such as Feleshia Porter.

15 I told her that this was new to all of us  
16 and that there was a restroom available, the handicapped  
17 restroom, on the second -- I believe it was the second  
18 floor of the building where she worked, that it was not  
19 mandatory, that it was her option, and there was another  
20 restroom that was a family restroom in the student  
21 union. She thanked me for my professionalism and I  
22 believe that was the end of the conversation.

23 Q. The two policies that you went over with her  
24 were the nondiscrimination and harassment policies that  
25 you talked to Mr. Babb about?

# No. 15-3775

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In the United States Court of Appeals  
for the Second Circuit

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MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR. AS CO-INDEPENDENT  
EXECUTORS OF THE ESTATE OF DONALD ZARDA,  
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, D/B/A SKYDIVE LONG ISLAND AND RAYMOND MAYNARD,  
Defendants-Appellees.

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On Appeal from the  
U.S. District Court  
for the Eastern District of New York

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Brief *Amicus Curiae* of  
Conservative Legal Defense and Education Fund,  
Public Advocate of the United States, and  
United States Justice Foundation  
in Support of Appellees and Affirmance

---

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July 26, 2017

## DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Conservative Legal Defense and Education Fund, Public Advocate of the United States, and United States Justice Foundation, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. *Amici* are non-stock, nonprofit corporations, which have no parent companies, and no person or entity owns them or any part of them.

/s/ William J. Olson  
William J. Olson

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## INTEREST OF *AMICI CURIAE*<sup>1</sup>

*Amici* Conservative Legal Defense and Education Fund and United States Justice Foundation are exempt from federal income taxation under Internal Revenue Code (“IRC”) section 501(c)(3). *Amicus* Public Advocate of the United States is a nonprofit organization exempt from federal income taxation under IRC section 501(c)(4). Each entity is dedicated, *inter alia*, to the correct construction, interpretation, and application of the law. These *amici* filed *amicus curiae* briefs in numerous other cases involving homosexual and so-called “transgender” rights, as well as application of the Civil Rights Act, most recently including:

- G.G. v. Gloucester County School Board (4<sup>th</sup> Cir. No. 15-2056), [Brief \*Amicus Curiae\*](#) of Public Advocate of the United States, *et al.*, in Support Petition for Rehearing *En Banc* (May 10, 2016) (involving application to Civil Rights Act Title IX to transgender access to bathrooms and locker rooms of the opposite sex);
- Gloucester County School Board v. G.G. (Supreme Court No. 16-273), [Brief \*Amicus Curiae\*](#) of Public Advocate of the United States, *et al.*, in Support of Petitioner (Jan. 10, 2017);
- G.G. v. Gloucester County School Board (4<sup>th</sup> Cir. No. 15-2056), [Brief \*Amicus Curiae\*](#) of Public Advocate of the United States, *et al.*, in Support of Defendant-Appellee and Affirmance (May 15, 2017) (on remand); and

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<sup>1</sup> No party’s counsel authored this brief in whole or in part. No person, including a party or a party’s counsel, other than *amici curiae*, their members, or their counsel, contributed money that was intended to fund preparation or submission of this brief.

- E.E.O.C. v. Harris Funeral Home (6<sup>th</sup> Cir. 16-2424), [Brief Amicus Curiae](#) of Public Advocate of the United States, *et al.*, in Support of Appellee and Affirmance (May 24, 2017) (involving application of Title VII to a transgender employee).

## STATEMENT

On April 18, 2017, a panel of this Court decided that it was bound by Second Circuit precedent<sup>2</sup> that Title VII of the Civil Rights Act of 1964 does not prohibit discrimination based on sexual orientation. Zarda v. Altitude Express, 855 F.3d 76 (2017). On May 25, 2017, this Court granted rehearing *en banc*, and invited *amicus curiae* briefs, to decide the following question:

Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination “because of ... sex”?

## ARGUMENT

### **I. ZARDA WAS FIRED FOR HIS INAPPROPRIATE BEHAVIOR, NOT HIS SEXUAL ORIENTATION.**

Even before this Court considers the legal question it posed in its Order of May 25, 2017, it must ensure this case is an appropriate vehicle to decide whether discrimination based on “sexual orientation” is actionable. It is not. The Appellant urges this Court to assume that the discrimination alleged in this case was about “sexual orientation.” It was not. Rather, as Zarda’s own brief makes

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<sup>2</sup> See Simonton v. Runyon, 232 F.3d 33 (2<sup>nd</sup> Cir. 2000).

clear, the reason he was fired was not for his sexual orientation, but for his overt sexual behavior.

Zarda made no secret about his sexuality with his boss and coworkers. In fact, for many years prior to Zarda's firing, "Maynard [knew] plaintiff was gay" and "never told Zarda to cover his sexuality." Aplt. Br. at 15. In fact, among coworkers at the office, "Zarda's orientation was subject of humor." *Id.* Based on the oversharing that is rampant in Zarda's brief, it is clear that everyone at his office (including Maynard) knew of and accepted his sexuality, even if he was the subject of "testosterone-crammed" jokes. *Id.*

Rather, it was only when Zarda chose to act in an unprofessional manner and openly discuss his sexuality with customers (rather than his coworkers), that Maynard was forced to take action. In fact, as the Zarda brief further notes, he had a bad habit of unprofessionally sharing details about his sexuality with anyone who would listen (including some customers who did not make objections), and still Maynard did not fire him. *Id.* at 12. However, it seems clear that when a customer finally complained about Zarda's unprofessional behavior, Maynard was forced to take action.

Zarda's brief essentially claims that his homosexuality permitted him to engage in unprofessional behavior with customers, and that to require a certain

minimum level of professionalism from employees is actionable. As the Zarda brief alleges, the main reason he chose to reveal his homosexuality to this particular customer was because he was strapped to her. *Id.* at 9. Although the panel opinion notes that “Zarda alleged that another skydiving instructor had disclosed that he was heterosexual but was not punished,” Zarda at 80 n.3, it would seem a matter of common sense that this disclosure was not made to a woman to whom the instructor was strapped. It also seems clear that an employer has the right to dismiss straight male skydivers who took the opportunity to tell every woman customer to whom they were strapped to how straight they were, and the employer should have the same authority over homosexual employees.

In fact, Zarda’s brief actually admits that he was not fired because of his sexual orientation, but rather because of his indiscriminate chit chat — “Zarda lost his job because he told Orellana that he was a gay man.” *Aplt. Br.* at 8.

The record is clear, then, that Zarda was not fired for being homosexual, but for his apparent need to openly profess his gayness to everyone with whom he came into contact — so they would celebrate it along with him. For such manifestly unprofessional behavior, Title VII provides no protection.

## II. SEXUAL ORIENTATION IS NOT SEX.

What appears to be appellant’s principal *amicus curiae*, Lambda Legal Defense and Education Fund (“Lambda”), filed an *amicus* brief which claims that discrimination based on sexual orientation “**is**” and “**must be recognized as**” discrimination based on sex. Lambda Brief at 3, 4, 6, 8 (emphasis added). However, when the time came to cite authority to back up that bald assertion, Lambda quickly backed off, opting instead to obscure by laying out a laundry list of terms such as:

- “involves sex-based considerations”
- “inseparable from” sex
- “inescapably linked to sex”
- “in relation to sex”
- “takes account of an individual’s sex” and
- “inherently rooted in gender<sup>3</sup> stereotypes.” *Id.* at 4, 5 & n.3, 8.

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<sup>3</sup> It is quite interesting that Lambda here uses “sex” and “gender” interchangeably. *Id.* at 8, 11, 23. However, “sex” is biological and fixed by nature, “sexual orientation” is psychological, variable by how a person feels about others, while “gender” is existential in relation to how a person feels about himself at any moment of time. There are two sexes — male and female. However, there are several “sexual orientations” — heterosexual, homosexual, bisexual, asexual, and perhaps more. As for “gender,” the list of types is endless, subject only to human imagination, and for some includes things like “pedophilia” and “zoophilia.” The idea of “gender” is evolving to the point where it can encompass anything the mind can conceive. In February of 2014, Facebook added 58 gender options to its users’ profiles. By June of that year, UK Facebook users could select from 71 options. By February of 2015, Facebook no longer defines gender at all, allowing each person to choose one’s own gender instead of being “pigeon-holed” by only 71 options. In a blank space provided, a Facebook user

Upon more careful examination, Lambda is not arguing that sexual orientation discrimination “must be recognized as” sex discrimination, but only that ““there is no reason why’ discrimination because of an individual’s sex ‘cannot include’ sexual orientation discrimination.” *Id.* at 15. As Lambda is finally forced to admit, “sexual orientation” is **not actually** the same thing as “sex.” *Id.* at 5 n.3 (“This is not to say that ‘sex’ and ‘sexual orientation’ are interchangeable concepts or terms....”). However, Lambda discards this flaw in its argument as “irrelevant,” hoping to deflect this Court into believing that “it is wholly unnecessary for Plaintiffs-Appellants to demonstrate that ‘sexual orientation’ and ‘sex’ are synonyms or that they are interchangeable....” *Id.* at 12. Lambda should not be allowed to bootleg “sexual orientation” into the list of categories protected by Title VII from discrimination, especially when it admits the two are not at all the same.

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can become any “gender” that one wishes, subject only to the limits of expression on the ASCII keyboard. Perhaps one of the most interesting genders offered is the Native American “two-spirit” gender, which includes both male and female elements. Nevertheless, although it is easy to be diverted into gender studies, the task at hand is to discover the meaning of “sex” as used in a federal statute, not as used in an academic discussion.

### III. LAMBDA’S CASE THAT SEX COMPREHENDS SEXUAL ORIENTATION IS LEGAL SOPHISTRY.

Citing the Seventh Circuit’s recent decision in Hively v. Ivy Tech Cmty College of Ind., 853 F.3d 339, 341 (7<sup>th</sup> Cir. 2017), the Lambda brief claims that “discrimination on the basis of sexual orientation is a form of sex discrimination.” Lambda Br. at 3. In support, the Lambda brief offers three reasons, all of which seem superficially plausible, but actually are completely fallacious.

#### A. Lambda’s “Sex-Plus” Theory Is Based on a Fallacious Comparison.

The Lambda brief rests, first of all, on its “sex-plus” proposition that sexual orientation:

necessarily involves sex-based considerations because the discrimination endured by a man based on his attraction to men is not suffered by any woman with an **identical attraction** to men. [*Id.* at 3-4 (emphasis added).]

This statement presupposes that the sexual relationship of a man and another man is identical to the sexual relationship of a woman and a man. They are not now, and never have been, identical. Therefore, the proper comparison would be to pair the man, or the woman, each to a person of the opposite sex so that each is similarly situated. By making that comparison, there would be no sex

discrimination because the man and the woman would be treated exactly the same. The simple fact is that a man who is in a sexual relationship with another man is not “similarly situated” with a woman who is in a sexual relationship with a man. Rather, they are dis-similarly situated.

That is why it is commonly stated that a man married to another man is in a same-sex marriage, but a man who is married to a woman is in a marriage. In Obergefell v. Hodges, 135 S.Ct. 2584 (2015), for example, the Supreme Court was careful not to declare that a same-sex marriage was identical to an opposite-sex union, but only that whatever benefits the government confers upon a heterosexual union must also be conferred on a homosexual union.

So it is the Lambda Brief, and the court opinions upon which it relies, that are illogical, not the other way around. Again, this is so because of Lambda’s fallacious comparison. Consider this illustration from the Lambda brief: ““If a business fires Ricky because of his **sexual activities** with Fred, while this action would not have been taken against Lucy if she did **exactly the same things** with Fred, then Ricky is being discriminated against because of his sex.”” *Id.* at 6. No, Ricky is not being discriminated against because of his sex (prohibited by Title VII), but because of his sexual orientation (not prohibited by Title VII). By the very nature of the biological differences between males and females, because two

men cannot do “exactly the same things” with each other as would one man and one woman.<sup>4</sup> Biologically, then, Ricky is not — indeed cannot — be similarly situated vis-a-vis his sexual relationship with Lucy as he would be with Fred. So the firing of Ricky is not discrimination because of his “sex,” but because of his “sexual orientation” — a distinction that even the Lambda Brief acknowledges when it admits these are not “interchangeable concepts or terms.” *Id.* at 5 n.3. Therefore, “sex” does not — indeed, cannot — include “sexual orientation,” the two being very different terms or concepts.

Indeed, under the Lambda Brief’s creative “sex-plus” theory, the action taken against a person on the basis of his “sexual orientation” is necessarily discrimination based on the “plus” add-on — not the “sex” part of the theory. And Title VII only bans discrimination based on sex. Lambda’s “sex-plus” theory, by

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<sup>4</sup> Since time immemorial, the existence of a marriage is not based only on consent of the parties, or a civil or religious ceremony, but on the “consummation” of that marriage by sexual intercourse. As Chancellor James Kent explained:

**If** the contract be made *per verba de praesenti*, or if made *per verba de futuro*, **and be followed by consummation**, it amounts to a **valid marriage**, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiae*. [J. Kent, *Commentaries on American Law* (1826-30), Claitor’s Publishing Div. [Lecture 26](#), section 6 (emphasis added.)]

Although it appears a concerted effort has been made to politicize and broaden the dictionary definition of “sexual intercourse” to include acts of sodomy, from time immemorial, sexual intercourse has required penile-vaginal sexual penetration. Clearly, basic anatomy makes the comparisons made by Lambda inapt.

its very definition, proves that “sexual orientation” discrimination is not “sex” discrimination. Rather, it asserts “‘sex-plus’ is the term for discrimination occurring **not categorically** against all members of one sex, but only those members sharing a certain **trait**” that is unrelated to their sex. *Id.* at 4 n.2 (emphasis added). Indeed, Zarda’s homosexuality is not “inseparable from and inescapably linked to sex,” *id.* at 4, but rather had nothing to do with his sexual orientation — as Lambda is so quick to point out, both men and women may be attracted to men. *Id.* at 4. Rather, it was Zarda’s homosexuality — a trait not shared by most men — which is the **alleged** basis for the **alleged** discrimination.

**B. Lambda’s Analogy That Sex Is Like Race Is Fallacious.**

Lambda claims that sex is like race because Title VII “‘on its face treats [race and sex] **exactly the same.**’” Lambda Br. at 7 (emphasis added). It does not. While discrimination because of race is not subject to any exceptions, sex decidedly is. *See* 42 U.S.C. § 2000e-2(e). Even the Lambda Brief concedes this point in a footnote, but insists that these “limited, narrow exceptions” “are **not relevant here.**” Lambda Br. at 7 n.5 (emphasis added). But the Lambda Brief never explains why the existence of these exceptions is not relevant — it just asserts it.

Instead of establishing its point that sex and race are “exactly the same,” the Lambda Brief enlists the “associational discrimination” theory articulated by this Court with respect to racial discrimination, in which it ruled that if Title VII is violated by an employer by action taken against the employee for being in a sexual relationship with a person of **another race**, then it is considered to be a violation of the employee’s own race. Anonymous v. Omnicom Group, Inc., 852 F.3d 195, 204 (2<sup>nd</sup> Cir. 2017) (emphasis added). Similarly, Lambda argues, if an employer takes action against an employee on the basis of a sexual relationship that the employee has with a person of the **same** sex, then the employee is discriminated against on the basis of “sex” and so the same rule should apply — the employee is being discriminated against because of his own sex. The problem with this argument is that it rests upon a dissimilar premise, not an analogous one. In the race case, the associational theory applies only to an employee who is associated with a person of another or different race, whereas in the sex case, the associational theory is applied only when the person is in a relationship with a person of the same sex. If the employee and the associate are of the same race, then there could be no violation of Title VII. Thus, the two cases are not analogous. Further, as discussed above, a relationship between a man and a man cannot possibly be considered the same as one between a man and a woman,

because they are not capable of “doing the same things” with one another. An interracial relationship, however, is capable of doing the same thing. A white man and a black woman, however, are similarly situated to two white people or two black people. To equate interracial relationships to homosexual activity is fallacious.

**C. Lambda’s Claim that Sexual Orientation Is Like Sexual Stereotyping in Price Waterhouse v. Hopkins Is Fallacious.**

Neither Zarda’s brief nor Lambda’s brief presents thoughtful analysis as to why Price Waterhouse v. Hopkins, 490 U.S. 8 (1989), supports the view that Title VII prevents sex discrimination. In fact, Zarda’s brief gives almost no attention to Price Waterhouse v. Hopkins except to hold it up as an illustration of the admirable creativity of the federal courts in applying Title VII beyond the text and authorial intent of that law: “Congress adopted Title VII without suggestion that sex stereotypes were illegal, *see Price Waterhouse...*” Aplt Br. at 44. Zarda makes only one reference to Price Waterhouse in a way that relates at all to the question posed by the Court on *en banc* reconsideration:

But because the decision [in Simonton] based its holding on only a pleading, it left open the question for another day as to whether a plaintiff may allege subjugation to sex stereotypes, as recognized by *Price Waterhouse* ... as a basis to proceed under Title VII. *Simonton*, 232 F.3d at 37-38. [Aplt. Br. at 20.]

Zarda leaves it there. There is no argument in support of why Price Waterhouse would decide this issue — a complete failure of advocacy.

The Lambda brief tries to fill this void with these few sentences:

discrimination based on [gender] stereotypes indisputably violates Title VII. *See Price Waterhouse*, 490 U.S. at 251 (“As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match [] the stereotype associated with their group.....”).

An individual’s same-sex attraction “represents the ultimate case of failure to conform to [a sex] stereotype.... It is thus untenable to suggest that Title VII does not cover discrimination based on this attraction. [Lambda Br. at 8-9 (citations omitted).]

The Lambda brief takes great liberties with the Price Waterhouse decision, asserting that it somehow was meant to decide that discrimination based on sexual orientation was banned by Title VII. To the contrary, Justice Brennan’s theory of sex discrimination based on sex stereotypes was quite narrow:

In saying that **gender** played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a **woman**. In the specific context of **sex stereotyping**, an employer who acts on the basis of a belief that a **woman** cannot be aggressive, or that she must not be, has acted on the basis of **gender**.... “Congress intended to strike at the entire spectrum of **disparate treatment of men and women** resulting from **sex stereotypes**.” [Price Waterhouse at 250-51 (emphasis added).]

One can see that Justice Brennan employs the word “gender” as a synonym to the statutory term “sex,” and in explaining “gender” to mean “sex” (*i.e.*, male or female), the narrow scope of Price Waterhouse is made clear. Based on the text of the statute and a fair reading of Justice Brennan’s opinion, the rule of that case must be that unlawful discrimination under Title VII must be based only on either (i) sex or (ii) “sex stereotyping,” where that later term is understood to reveal an underlying bias against a woman (or man) because of her (or his) nature and characteristics.

In sum, the Price Waterhouse decision simply clarified that Title VII barred not only discrimination against women as such, but also discrimination against women for how they may act as women — a thinly veiled version of opposition because a person is a woman. However, in no way does this doctrine establish a free-floating cause of action based on a right to be free of any sort of sex-stereotyping that does not reveal categorical discrimination against a real biological man or woman.

To understand the psychological (not therefore legal) term “sex-stereotyping,” it is necessary to examine the derivation of that term in Price

Waterhouse. There, the term was attributed to Dr. Susan Fiske, a psychologist<sup>5</sup> who testified at trial for plaintiff Hopkins regarding statements made about the plaintiff by others at Price Waterhouse. Importantly, her testimony was designed to establish unlawful discrimination and was not limited to “the overtly sex-based comments of partners but also on gender-neutral remarks....” Price Waterhouse at 235. Justice Brennan summarized her testimony as follows:

According to Fiske, Hopkins’ **uniqueness** (as the only woman in the pool of candidates) and the **subjectivity** of the evaluations made it **likely** that sharply critical remarks ... were the product of **sex stereotyping**. [*Id.* at 235-36 (emphasis added).]

Justice Brennan on behalf of a minority of four justices lamely attempted to demonstrate the reliability of Dr. Fiske’s imputation of discriminatory motives to

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<sup>5</sup> Courts must be very wary of grounding legal decisions on the social sciences, especially when it relates to sex. Recently, two social scientists demonstrated the openness of psychologists and other social scientists to the most irrational and foolish notions that fit their personal sexual and political views. See P. Boghossian & J. Lindsay, “The Conceptual Penis as a Social Construct: A Sokal-Style Hoax on Gender Studies,” [http://www.skeptic.com/reading\\_room/conceptual-penis-social-construct-sokal-style-hoax-on-gender-studies/](http://www.skeptic.com/reading_room/conceptual-penis-social-construct-sokal-style-hoax-on-gender-studies/). The two authors created a “paper” entitled “The Conceptual Penis as a Social Construct,” consisting of 3,000 words of utter nonsense posing as academic scholarship. Then a peer-reviewed academic journal in the social sciences accepted and published it. The two scholars who perpetuated this hoax asserted “that the *conceptual penis* is better understood not as an anatomical organ but as a gender-performative, highly fluid social construct.” The authors stated, “[w]e assumed that if we were merely clear in our moral implications that maleness is intrinsically bad and that the penis is somehow at the root of it, we could get the paper published in a respectable journal.” *Id.*

Price Waterhouse personnel — despite the fact that she never “met any of the people involved in the decisionmaking process,” by pointing out that “it was commonly accepted practice for social psychologists to reach this kind of conclusion” without any personal contact with the persons allegedly being demeaned. Price Waterhouse at 236. Justice Brennan thereby implicitly adopted for the Court an unreliable standard of proof just because Dr. Fiske said it was “commonly” used in the world of social psychology.

In dissent, Justice Kennedy, Chief Justice Rehnquist, and Justice Scalia exposed that Dr. Fiske’s testimony was grounded in sand:

The plaintiff who engages the services of Dr. Susan Fiske should have no trouble showing that sex discrimination played a part in any decision. Price Waterhouse chose not to object to Fiske’s testimony, and at this late stage we are constrained to accept it, but I think the plurality’s enthusiasm for Fiske’s conclusions unwarranted. Fiske purported to discern stereotyping in comments that were gender neutral — *e.g.*, “overbearing and abrasive” — without any knowledge of the comments’ basis in reality and without having met the speaker or subject. “To an expert of Dr. Fiske’s qualifications, it seems plain that no woman could *be* overbearing, arrogant, or abrasive: any observations to that effect would necessarily be discounted as the product of stereotyping. If analysis like this is to prevail in federal courts, no employer can base any adverse action as to a woman on such attributes.” [*Id.* at 293 n.5 (citations omitted).]

#### **IV. THE LAMBDA BRIEF IS BASED UPON A FALLACIOUS EVOLUTIONARY JURISPRUDENCE.**

Audaciously, Lambda contends that it is “irrelevant” and “wholly unnecessary for [Zarda] to demonstrate that ‘sexual orientation’ and ‘sex’ are synonyms or that they are interchangeable concepts or terms.” *Id.* at 12. Thus, the Lambda Brief rejects any and all efforts by courts to discern the ““original public meaning”” of the phrase and word. *Id.* at 13 n.10. Indeed, the Brief argues that Title VII was “not enacted in the same legal era” as subsequent attempts to enact legislation that proscribes “sexual orientation” in addition to or separate from existing statutes aimed at discrimination on account of “sex.” *Id.* at 13-14. Therefore, Lambda insists that it is “anachronistic to rely on recent legislation specifically enumerating ‘sexual orientation’ to justify a narrow interpretation ... ‘because of ... sex.’” *Id.* at 14.

Instead, Lambda urges this Court to ignore the “flaw[ed] ... arguments that emphasize what words are *not* in the statute, rather than ‘the scope of the language that already is in the statute.’” *Id.* at 9. With this argument settled, Lambda uncovers the common denominator of all its arguments (sex-plus, comparisons to race, sex stereotypes) — an “evolving legal landscape.” When legal evolution is glorified, every principle known to man can be jettisoned such as here, where “the

changed “backdrop of the Supreme Court’s decisions”” opens the door to a “broader [view of] discrimination on the basis of sexual orientation.” *Id.* at 10. Lambda simply proclaims that “sex” now encompasses “sexual orientation” because “the right of same-sex couples to marry is now recognized as fundamental” and “intimate relations between same-sex couples” can no longer be criminalized. *Id.* It is, Lambda asserts, a “post-*Lawrence*, post-*Obergefell* world” and past “perspectives must be reconsidered.” *Id.*

In harmony with Lambda, as Chief Judge Katzmann of this Circuit had already forecasted, this Circuit’s rulings and comparable rulings of sister circuits — “that discrimination ... did not encompass discrimination on the basis of sexual orientation” — were not erroneous when made, just out-of-date today. Omnicom Grp. at 206 (Katzmann, C.J., concurring). Now that the Supreme Court has “afford[ed] greater legal protection to gay, lesbian, and bisexual individuals,” the Chief Judge asserts, the lower federal courts need not wait for the Supreme Court to act, as the “societal understanding of same-sex relationships has **evolved** considerably.” *Id.* at 206 (emphasis added).

In his search for a rationale to justify ignoring the repeated failed efforts to persuade Congress to add sexual orientation to Title VII, the Chief Judge has wittingly or unwittingly adopted the view of Oliver Wendell Holmes, Jr., as

documented by Yale political science professor Fred V. Cahill, Jr. in his book, Judicial Legislation (Ronald Press Co.: 1952):

[L]aw is a growing thing and ... its growth is determined, not by logic, but by the ‘felt necessities of the time.’ In this growth, the judge is bound to play an active part. The law moves, according to Holmes, in a climate of opinion made up of **moral and political beliefs**, judgments of **policy** and even **prejudices** — all of which affect the **judge**. [Cahill at 39 (emphasis added).]

In sum, as Cahill concluded, Holmes asserted that “[j]udges really make law ... because they are motivated by the same considerations as is the legislator.” *Id.*

There is one overriding glitch in that philosophy. As newly installed Supreme Court Justice Neil Gorsuch explained in his very first Supreme Court opinion:

If a statute needs repair, there’s a constitutionally prescribed way to do it. It’s called legislation. To be sure, the demands of bicameralism and presentment are real and the process can be protracted. But the **difficulty of making new laws** isn’t some bug in the constitutional design: it’s the point of the design, the better to **preserve liberty**. [Perry v. MSPB, 198 L.Ed.2d 527, 545 (2017) (Gorsuch, J., dissenting) (emphasis added).]

Consonant with this separation of powers principle, this Court must decline Lambda’s invitation to disregard the original meaning of “because ... of sex,” as it appears in Title VII of the 1964 Civil Rights Act, simply because the Supreme Court gave approval to same-sex sodomy in 2003 and same-sex marriage in 2015. *See* Lambda Br. at 10-11. While the latter two rulings no doubt have “enjoyed

wide and **enthusiastic** judicial support,”<sup>6</sup> that should not be the standard by which this Court should measure its own precedents, as Lambda urges. *Id.* at 2-3.

Rather, as Sir William Blackstone has reminded us, a court precedent should not be abandoned unless “the former determination is most evidently contrary to reason, much more if it be contrary to the divine law.” 1 W. Blackstone,

Commentaries of the Laws of England at 69-70 (Univ. Chi. Facsimile ed.: 1765).

In today’s postmodern, evolutionary world, however, the temptation for judges to rule lawlessly is enormous, as judges and lawyers “wrestle with the problem of proving to mankind that the law was something fixed and settled, whose authority was beyond question, while at the same time enabling it to make constant readjustments and occasional radical changes under the pressure of infinite and variable human desires.” *See* R. Pound, Introduction To The Philosophy of Law at 3 (Yale: 1922). Should the judges of this Court succumb to the temptation to appoint themselves as super legislators who can amend statutes based on their superior wisdom and power, they would do grave damage to the inherent authority of the law.

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<sup>6</sup> *See* Lambda Br. at 17 n.12 (emphasis added).

Lacking any support for its position in the text of Title VII or authorial intent of that law,<sup>7</sup> the Lambda brief invites the Court to ignore those two touchstones and come join its campaign for “legal evolution.” It perceives an evolution that would bring us toward a modern, secular state, loosed from the chains of morality. Doubtless, the evolutionary trend toward sanctioning immoral behavior is occurring in the federal courts, but that does not mean that it is correct, constitutional, or without consequence. Indeed, with an evolutionary view of “law,” society moves away from anything resembling the “rule of law,” to “rule by man” exercised by unelected lawyers, acting as “philosopher kings,” holding office as federal judges. Unable to obtain legislation fast enough to satisfy their appetites for change, those who embrace sexual immorality appeal to judges to usurp the power to legislate for the nation:

Western society, in turning away from Christian faith, has turned to other things. This process is commonly called *secularization*, but that conveys only the negative aspect. The word connotes the turning away from the worship of God while ignoring the fact that something is being turned *to* in its place. [Herbert Schlossberg, Idols for Destruction (Crossway Books: 1990) at 6.]

Dr. Schlossberg explains that to which society is turning are idols — “properly understood as any substitution of what is created for the creator.” *Id.* “When the society ... turns away from God to idols, it is an idolatrous society and therefore is

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<sup>7</sup> See Hively at 353 (Posner, J., concurring).

heading for destruction.” *Id.* “With their silver and gold, they made idols for their own destruction.” Hosea 8:4. Various judges, drawn from “the highly secularized intellectual elite” have appointed themselves to lead the society toward the idol of sexual liberty. The temptation, Schlossberg concluded, is as old as the Garden of Eden, where the serpent told Eve:

“You will be like God, *knowing good and evil....*” The biblical view is that God informs humanity about what is good and what is evil, and the form this information takes is law... The alternate view is in the temptation, succumbed to by Eve and her humanist descendants, to make autonomous judgments about good and evil and so to be like God. [Schlossberg, *supra*, at 48-49.]

There is nothing new under the sun. Indeed, Professor Robert Lowry Clinton puts the matter in perspective:

In the Old Testament, the Book of Judges tells the story ... of idol-worshipping peoples with ineffectual gods confounded by the presence of a people whose God was invisible yet effectual. It is also a story of ... idolatry, as shown in the repeated lapses of God’s people and their consequent deliverance into the hands of their enemies. [R.L. Clinton, God & Man in the Law at 227-28 (U. Press Kan.: 1997).]

Professor Clinton explains that there is a way back:

In the end, it was the judge who emerged to show the people the error of their immersion in visible matter and to deliver them back to the invisible God from the hands of their oppressors. The method was, and is, always the same: the judges accomplish their task not by calling the people to follow them into a hypothetical, abstract future but by calling them to reclaim the traditions of a real and concrete past. [*Id.*]

**CONCLUSION**

For the foregoing reasons, the Court should find, yet again, that Title VII of the Civil Rights Act of 1964 does not cover discrimination on the basis of sexual orientation.

Respectfully submitted,

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July 26, 2017

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**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amici Curiae* Conservative Legal Defense and Education Fund, *et al.* in Support of Appellees and Affirmance complies with the type-volume limitation of Rule 32(a)(7)(B), Federal Rules of Appellate Procedure, because this brief contains 5,440 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 18.0.0.200 in 14-point Times New Roman.

/s/ William J. Olson  
William J. Olson  
Attorney for *Amici Curiae*  
Conservative Legal Defense and  
Education Fund, *et al.*

Dated: July 26, 2017

## CERTIFICATE OF COMPLIANCE

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## 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. A single hard copy of the foregoing, which is an exact copy 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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