

Nos. 18-6102 / 18-6165

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

RACHEL TUDOR,

Plaintiff-Appellant/ Cross-Appellee,

v.

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

Defendants-Appellees/ Cross-Appellants.

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

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

VOLUME 11 – (OMITTED TRIAL TRANSCRIPT)

ZACH WEST

Assistant Solicitor General

ANDY N. FERGUSON

Staff Attorney

OFFICE OF ATTORNEY GENERAL

STATE OF OKLAHOMA

313 N.E. 21st Street

Oklahoma City, OK 73105

Phone: (405) 522-4798

zach.west@oag.ok.gov

andy.ferguson@oag.ok.gov

Counsel for Defendants-Appellees/ Cross-Appellants

TABLE OF CONTENTS
VOL 11 (FILED UNDER SEAL)

No.	Date	Description	Page
T. Tr.	11/17/2017	Trial Transcript Volume 5 pages 827-57	2771-2801

1 Collin College in September of 2012. These damages are
2 intended to put plaintiff in the economic position she would
3 have been in if her employment with defendant had not ended.

4 If you find that plaintiff was retaliated against but did
5 not suffer any actual injuries or losses, you may award
6 nominal damages in the amount of \$1.

7 You may not award nominal damages and back pay, emotional
8 distress, or other compensatory damages.

9 I'll recognize the plaintiff for closing argument.

10 MR. YOUNG: Thank you, Your Honor. I'm going to
11 move the podium. Is that okay?

12 THE COURT: Of course.

13 MR. YOUNG: Ms. Goode, do I press it or does it
14 start running?

15 THE CLERK: It just starts running.

16 MR. YOUNG: Okay. Thank you. I'm just checking.
17 Thank you.

18 The State broke the law, they violated the rules, they
19 changed the rules so that they could break the law. They made
20 up new rules that were only ever imposed on Rachel Tudor.

21 We have been here all week because a few misguided
22 administrators did not want to accept Dr. Tudor's truth, that
23 she is a woman, or at the very least respect her enough to let
24 her live that truth in peace.

25 Instead of honoring Rachel's request, backed up by a

1 therapist's letter which the defendant showed you, they
2 continued to treat Rachel as if she was a man despite her
3 being a woman who happens to be transgender.

4 In all honesty, if Rachel Tudor were not a transgender
5 woman, we would not all be here today.

6 With evidence like this, with witnesses like the ones
7 that you saw this week, any other case would have been settled
8 a long, long, long time ago.

9 The State has gambled that all of you will look the other
10 way and excuse what they did and what they let happen to
11 Rachel Tudor just because of who she is.

12 As I told you on Monday, we've taken a different bet.

13 We have bet that you can't look away from this, that you
14 see what happened down in Durant and can't stand it, that
15 you're disgusted that, after all of these years, the State is
16 still unwilling to step up and take responsibility for doing
17 wrong.

18 Now, I know this week has been very long. There have
19 been more Ph.D.s than you can shake a stick at. You've
20 learned about how university tenure is supposed to work and
21 what it looks like when everything goes wrong.

22 You've met a lot of folks from Durant. Indeed, most of
23 Southeastern's English department has testified at some point
24 during this week. I'm honestly not sure who's teaching
25 classes down in Durant this week, but we appreciate all of

1 them being up here.

2 You have also had to hear a lot of hard things -- and
3 none of us discount that -- a lot of ugly truths that the
4 State has worked very hard to keep under wraps for many years
5 at this point.

6 You heard a good number of folks straight-up lie to your
7 face, a courtesy they didn't even extend to Rachel Tudor when
8 she was still at Southeastern.

9 There are also a good number of exhibits, some that you
10 closely inspected on those fancy screens, and, in all
11 honestly, many that we couldn't figure out how to project to
12 you. Apologies.

13 Don't worry. You'll get all those exhibits when you
14 deliberate. You can look at them closely and carefully and
15 inspect them for yourselves and decide what happened.

16 Now, before we get deeper into the evidence, I want to
17 share a little bit of something with you. But I promise I'll
18 circle back to it and you'll understand why.

19 Trial is hard. It's hard on real people like Rachel
20 Tudor. She has waited many years to tell her story to all of
21 you, to help other folks see the truth of what they -- what
22 she has lived through.

23 Trial is also hard on the witnesses, especially folks
24 like Mindy House, who you met a few days ago.

25 Now, Mindy House walked bravely into this courtroom

1 knowing full well that, if she told the truth, the State would
2 do its best to tear her apart.

3 She did it anyway. She knew she was going to be punished
4 to tell the truth, and she walked into this courtroom, and she
5 told you what her truth is.

6 Now, for my own part, I can say I was absolutely
7 terrified when I stood up here in front of you all on Monday.
8 You probably saw that. And I'll be honest, this is my first
9 jury trial. I'm a civil rights lawyer. We don't do these
10 very often. So I want to come clean with you.

11 But I have worked on this case for three and a half
12 years. This has been everything to me. Rachel Tudor has been
13 everything to me.

14 Now, I want nothing more but to help Rachel get a bit of
15 justice. That's part of what makes this so scary .

16 I've learned a lot this week working with my fabulous
17 co-counsel, Marie Galindo and Brittany Novotny, who have
18 helped me tell you Rachel's story. And I am deeply
19 appreciative of them.

20 I've grown a lot this week. It's gotten less scary over
21 time; I've understood things better over time. And I feel
22 like we've gotten to know each other maybe a little bit better
23 over time.

24 I had to grow because Rachel Tudor and her story are too
25 important to not share with you all. And I hope over the

1 course this week that you grew a bit with me.

2 Okay. You have a job to do. Let's talk a little bit
3 about the evidence that you've seen.

4 Really, the only way I can characterize it is, where
5 there's smoke, there's fire.

6 After all these years with all of this evidence, the
7 State has stood in this court this week and lied to your face
8 over and over again. This is what we all saw.

9 Dr. Tudor is an unassuming English professor, the type of
10 person who wanted just nothing more but to do her job in
11 peace. But because she is a different kind of woman, she was
12 subjected to hostilities, she was denied tenure because of her
13 gender, and she was pushed to the curb because she had the
14 gall to complain.

15 Rachel did her best in a bad situation. She endured
16 things that she shouldn't have had to until she reached a
17 breaking point.

18 For four years -- four years -- Rachel was banned from
19 the women's restroom and endured other daily indignities.

20 Of course, things got worse partway through. Things got
21 worse when Rachel had the gall to apply for tenure just like
22 every other professor at Southeastern wants to do.

23 Rachel entered into a waking nightmare in 2009 and 2010.
24 And, like anyone, and like many of the professors that you
25 heard speak on that stand this week, Rachel complained because

1 tenure is important. It's something that's worth stepping up
2 for. It's something worth putting everything on the line for.

3 And when Rachel complained, as you've heard, things got
4 worse and worse.

5 Now, Doug McMillan banned her from applying for tenure in
6 2010-11. That's textbook retaliation. You complain,
7 something is taken away from you because you complained.

8 Eventually, as you heard, Rachel was kicked to the curb,
9 and she has been fighting ever since to fix this wrong. And
10 she'll need your help to do that.

11 Now, Rachel told you the truth. She followed all the
12 rules, and they broke those rules. She even followed the
13 rules that were unfair because it is important to follow
14 rules.

15 She did her best. She had to work harder and do more
16 than everyone else at Southeastern, and she did it anyways.
17 Nevertheless, she was singled out and treated differently
18 because of who she is.

19 Rachel followed the complaint processes, but they were
20 pointless, completely futile. Things were rigged down in
21 Durant.

22 She was never going to get a fair shake. From the moment
23 in 2007 when Rachel was subjected to the bathroom rules and
24 all those other rules that we talked about on Monday morning,
25 it was clear that Rachel was never going to get a fair shake

1 at Southeastern.

2 Those high-up administrators at Southeastern didn't want
3 a different kind of woman like Rachel to be a permanent part
4 of that university. They made that clear to her, and they
5 made that clear to all of us this week.

6 So rather than uplift and mentor her, nurture Rachel,
7 like they did with other faculty, like Meg Cotter-Lynch, who
8 you saw on Tuesday, like Mark Spencer, who you saw later on on
9 Tuesday.

10 Rather than uplift, nurture, and mentor Rachel, they
11 messed with her. They ridiculed her. They joked about her
12 amongst themselves. They mocked her. They played fast and
13 loose with her future, her career, and her good name.

14 Now, you heard from Dr. Meg Cotter-Lynch. Meg is a loyal
15 friend who was so shaken by what she saw happen to Rachel that
16 she was on the verge of quitting her tenured job. That's a
17 huge deal after you've learned how much it means to have a
18 tenured job; right?

19 So shaken on the verge of quitting, but, instead of
20 quitting, Dr. Cotter-Lynch has poured herself into trying to
21 make Southeastern a better place.

22 In spite of all Dr. Cotter-Lynch's efforts, she told you
23 all that things still aren't right at Southeastern.
24 Professors who are transgender women are still scared to apply
25 there, to go there. Things can't ever be right down at

1 Southeastern if Rachel Tudor doesn't get justice.

2 Later on, you met Dr. Robert Parker. I have to admit,
3 I'm a bit smitten with Dr. Parker. He's a really bright guy
4 who's incredibly passionate about his subject area. He's
5 obviously thought more deeply about tenure and those giant
6 portfolios that you saw him juggling than all of those high-up
7 administrators down at Southeastern who you heard from later
8 this week.

9 Dr. Parker told us all that a fair tenure review is
10 supposed to be confined to just those portfolios. He also
11 taught us how to read those portfolios and why those
12 portfolios can speak for themselves.

13 Now, he wrote you-all a 20-plus-page report, Plaintiff's
14 Exhibit 160. Very important. Dr. Parker told us that he
15 ranked those portfolios for you and that chart that you saw
16 him point to all during his testimony.

17 Now, if you believe in Dr. Parker's logic and his
18 analysis, then all of those folks in the English department
19 earned tenure. And, all things being equal, it's puzzling why
20 Dr. Scoufos and Dr. McMillan singled out Rachel for denial.

21 Of course, other witnesses helped us understand why it's
22 not puzzling at all, why it's not puzzling that Scoufos and
23 McMillan did what they did.

24 They didn't like Rachel Tudor. They didn't want her to
25 be there. They broke the rules, they broke the law, they made

1 new rules so that they could break the law.

2 Now, you also heard from John Mischo. He was the former
3 chair of the English department.

4 John Mischo wanted to give Rachel a chance to prove
5 herself. He wanted to foster success in his department just
6 like any administrator should.

7 But those other Southeastern administrators wouldn't let
8 Dr. Mischo do that. They wouldn't let Dr. Mischo treat Rachel
9 just like everyone else. They wanted her to be treated
10 different. They needed her to be treated differently.

11 Now, I'll be honest with you again. It takes a little
12 bit for you to get used to Dr. Randy Prus. He is a bit of a
13 curmudgeon, but he's an honest curmudgeon. Randy critiqued
14 Rachel, but he ultimately stood behind the department's vote
15 in 2009-10. A true mark of a collegial and respectful
16 colleague is to respect differences of opinion, which Randy
17 does.

18 Now, Dr. Prus also told us a little bit about how he
19 tried to help Rachel when she tried to reapply in 2010-11.

20 He told us that he helped edit her cover letter, gave her
21 specific advice on things that should and shouldn't go in that
22 portfolio.

23 He also told us something very important, that in
24 2010-11, he looked at those materials, and he thought that if
25 Rachel did what she did, did what he said, that she merited

1 tenure.

2 Dr. Prus also told us something else. He told us that,
3 when Rachel and he were called into that meeting with Dean
4 Scoufos in October 2010, he felt blindsided. He was surprised
5 by that meeting. He had no idea that Doug McMillan was going
6 to ban her from applying for tenure again.

7 In fact, he had already composed the committee that was
8 supposed to vote on this new application. He thought it was
9 going all the way. There was no rule at Southeastern that you
10 couldn't reapply. There was only a special rule that was made
11 for Rachel Tudor.

12 Now, you also got to know very briefly Dr. Mark Spencer.
13 And he was a bit eager to tell his story, so you might have
14 missed a little bit. He talked really fast, and he talked
15 over me and I talked over him a few times.

16 But Dr. Spencer did have a few things to share with us.
17 When Dr. Spencer talked about his experience, when he told you
18 his story, he told you that, just a few years prior to all of
19 this, Doug McMillan and then-President Jessie Snowden gave
20 Spencer feedback midstream so that Spencer could improve his
21 own portfolio before the president's vote.

22 Because of that feedback -- and you heard this today from
23 Dr. Snowden -- Spencer ultimately won tenure.

24 Spencer also told us something else that was really
25 important. He told us all and reminded us all how important

1 tenure is, what a big deal it is, that it's something that you
2 fight for if you have to.

3 Spencer also told us that it's academic malpractice what
4 they did down there in Durant, what they did to Rachel Tudor.

5 And Spencer joked that no one gets denied tenure at
6 Southeastern because of service, but, of course, then there
7 was Rachel Tudor. Rachel was treated differently because of
8 her gender.

9 Now, James Knapp is probably the easiest one for you-all
10 to relate to given your current predicament.

11 Knapp drew what is essentially faculty jury duty three
12 times in 2010, all in the faculty appellate committees dealing
13 with Rachel Tudor's grievances regarding the tenure process at
14 Southeastern.

15 Now, you saw Dr. Knapp. He's a careful guy. He read the
16 Academic Policies and Procedures Manual very carefully, just
17 like all of you-all are going to have to do back in that jury
18 room.

19 He knew those rules really well. It was important for
20 him that the faculty got a fair shake, that tenure is that
21 important. There should be transparency when the stakes are
22 that high.

23 Knapp saw many years ago what we all saw this week. All
24 of this, it all went back to Doug McMillan.

25 After Knapp -- after Dr. Knapp, you-all had the privilege

1 of getting to know Mindy House.

2 Do you know how we know that Mindy House is telling the
3 truth? And, again, I'll be honest with you. The truth is
4 powerful and the State knows it.

5 Did you wonder for a while why they kept trying to
6 demonize secretaries? It's because of Mindy House. They knew
7 what she was going to tell you.

8 Now, undercutting those folks, the secretaries, the folks
9 in the offices who get the work done, who are helpful, the
10 same folks who Rachel Tudor lauded when she worked at
11 Southeastern because she cared -- because she respected folks
12 that she worked with and they respected her, tearing down
13 folks like that, hard workers, just because they're
14 secretaries, that's suspicious. It stinks.

15 This is why they did it: I think we all know secretaries
16 see things. A lot of people don't think secretaries are
17 important, and sometimes they're invisible. They see things,
18 and, as Mindy House shared with us all, they most definitely
19 hear things.

20 Well, we saw Mindy House walk into this courtroom. I
21 chatted with her for a bit, and the State then bullied her
22 relentlessly for a really long time.

23 And here's the thing about Mindy House: I warned her
24 before that day exactly how bad it would be, and she told me
25 that was okay.

1 Mindy House can't be bullied. She loves Southeastern.
2 You heard that from her herself.

3 Her husband is buried in a Southeastern security uniform.
4 Her family members have worked and graduated from
5 Southeastern. She was raised and lives her life in Durant,
6 Oklahoma.

7 Mindy House drove up here from Durant, losing pay to do
8 it even though she really couldn't afford it. She paid that
9 penance. And she told us all why, because what's right is
10 right.

11 She had to tell the truth because what happened to Rachel
12 Tudor -- and, by extension, what happened to Mindy, because
13 she wouldn't stop complaining about what happened to Rachel
14 Tudor -- was wrong. It had to be fixed.

15 Mindy is a good, strong woman. Few people can do what
16 Mindy did this week. But, as Mindy taught us all, what's
17 right is right.

18 After Mindy House spilled the beans, we knew we were done
19 with our case. That's why we rested. You had enough right
20 there to see that. Where there's smoke, there's fire.

21 Now I would like to talk to you all a little bit about
22 what the defendants did next.

23 The defendants made a lot of promises to you on Monday
24 morning, none of which they kept. They didn't even try to
25 keep them.

1 The defendants told you this wasn't about Dr. Tudor's
2 gender or her complaints, and they tried to tell you not to
3 look too hard at anything, that there was no problem with what
4 happened down there in Durant. Their witnesses didn't help
5 them much.

6 Dr. Lucretia Scoufos told you it was all Doug McMillan's
7 fault. She was just following orders. Curiously, she told
8 you-all -- and I do believe this -- that Mindy House once
9 saved her life and you could trust her.

10 Now, Mrs. Cathy Conway is an interesting person. She
11 told you point-blank that she is -- it is she that had the
12 issue with Rachel Tudor and the bathrooms.

13 Conway told you that she didn't dislike Rachel, but the
14 evidence shows otherwise. Conway projected her own animus of
15 transgender women onto other folks at Southeastern.

16 Conway was worried that Rachel would use bathrooms, and
17 that would upset other people. But you know the only person
18 who that was going to upset? Cathy Conway.

19 Cathy Conway did something that was really gross. She
20 used the power that she had to push Rachel to the side, to
21 treat her differently, and even privately made fun of her with
22 Claire Stubblefield, the affirmative action officer.

23 Now, when your human resources director and the
24 affirmative action officer are the ones making fun of you --
25 on their work e-mails, no less, as they discuss a draft report

1 on a discrimination investigation involving you -- something
2 has gone horribly wrong. That's not fair.

3 Now, Doug McMillan is the type of guy who obviously sends
4 other people out to do his dirty work. He doesn't take
5 responsibility for his actions.

6 He told you how hurt he supposedly was by Rachel's
7 accusations. And after everything he did to Rachel, he has
8 the gall to tell you that it was he who was hurt, it was his
9 family that was suffering.

10 It's been a decade since Conway and McMillan first
11 conspired to make Rachel miserable. It's been seven years
12 since McMillan pulled the puppet strings to push Rachel out of
13 that university.

14 Frankly, you'd think that a true man of faith might just
15 come out and confess to doing the obvious. Something was
16 rotten at Southeastern. I guess he's not yet ready to admit
17 it. But we all saw it. As Knapp told us, it all went back to
18 McMillan.

19 Now, Claire Stubblefield is friends with Doug, and,
20 ultimately, she did his bidding. She investigated some of
21 Rachel's complaints, but, ultimately, we all saw those were
22 never going to go anywhere.

23 She went through the motions. She didn't follow the
24 trail. This all happened on Claire Stubblefield's watch. She
25 let it happen. She looked the other way.

1 In the middle of her investigation, Rachel was retaliated
2 against by Doug McMillan, Claire Stubblefield's friend.

3 What did Stubblefield do? She waited two and a half more
4 months before she finished that investigation, and she wrote a
5 report that didn't even address the things that Rachel
6 complained about. And she sat there on that stand today and
7 told you, after an eight-hour deposition, after all the prep
8 she had for this trial, that, to date, she can't even point
9 out the things she said she did in that report.

10 You'll see it in the jury room. It's not that long.
11 It's not that hard. She also doesn't want to take
12 responsibility.

13 Rachel was never going to get a fair shake at
14 Southeastern. It was rigged.

15 Now, Dr. Snowden testified earlier today --

16 THE COURT: Mr. Young --

17 MR. YOUNG: Yes.

18 THE COURT: Your time is up.

19 MR. YOUNG: Thank you.

20 THE COURT: I need to see counsel at the bench,
21 please.

22 (The following proceedings were had at the bench and out
23 of the hearing of the jury.)

24 THE COURT: You used up all your time too.

25 MR. YOUNG: I'm sorry, Your Honor.

1 THE COURT: It's your time.

2 MR. YOUNG: Thank you, Your Honor.

3 THE COURT: No, no, no. That's not the reason we're
4 up here.

5 I confess, I hadn't even looked at the verdict form
6 because nobody objected to it, but I object to it.

7 I don't see -- I mean, they're permitted to give a
8 different amount of damages for each claim. And if they do --
9 if they came back with, like, \$50,000 for hostile work
10 environment and 10,000 for the 2009-10 -- how will we know if
11 those are --

12 I would propose that we just ask the A questions. And
13 then at the end, we have a thing that said, "If you find for
14 plaintiff on any of 1, 2, 3, 4," set the amount for damages,
15 because there's no claim that has a different measure of
16 damages, is there?

17 MS. COFFEY: No.

18 THE COURT: Do you-all understand what I'm talking
19 about?

20 MS. COFFEY: Yes, Your Honor.

21 MR. JOSEPH: Yes, Your Honor. That makes sense.

22 THE COURT: Mr. Young is still thinking.

23 MR. YOUNG: So they're all subject to the same cap,
24 Your Honor. But to the extent that -- I'm just saying in the
25 event that the damages go over that cap and you have to decide

1 on a remittitur, I'm not sure if it's relative to you if
2 they're under different things.

3 THE COURT: I'm talking about if they come back --
4 if they came back with the same amount of damages on all four
5 claims, we'd be fine. That's a fair amount of damage.

6 MR. YOUNG: Yes.

7 THE COURT: Juries sometimes do things you don't
8 expect them to do. If they come back with four different
9 amounts of damages, did they mean those should be totaled or
10 did they mean they found different damages for different
11 claims? I don't know.

12 I told them earlier in the instructions that they can't
13 award essentially a double recovery. So this is what this
14 would look like, Mr. Young.

15 MR. YOUNG: Yes.

16 THE COURT: Question 1A. Yes, no. This would come
17 out.

18 Question 2A. Yes, no. This comes out.

19 And, likewise, all that.

20 And at the end there would be the instruction, if you
21 found for plaintiff on one or more of those claims, set the
22 amount of her damages here.

23 MR. YOUNG: We're fine with it, Your Honor.

24 THE COURT: Did you hear all of that? Can you get
25 that done?

1 MR. JOSEPH: Yes.

2 THE COURT: I wonder also why we -- why we call it
3 monetary damages. When I read that the first time, I thought,
4 oh, okay, this is the pecuniary damages and we're going to get
5 to nonpecuniary later, and I thought maybe that word would
6 confuse them. I don't understand why we don't use it.

7 MR. YOUNG: I don't recall, honestly, Your Honor.
8 I'm sorry.

9 MS. GALINDO: I'm sorry, Your Honor. One additional
10 matter while we're up here. I couldn't see very well, but I
11 understand that the 20 minutes may have been --

12 THE COURT: It's gone.

13 MS. GALINDO: Your Honor, I would respectfully ask
14 for a short rebuttal.

15 THE COURT: Well, yesterday I asked you if you
16 wanted -- you wanted to use your time or if you wanted a red
17 light or you wanted time to sit down. You said the red light
18 would be fine. The red light has been on five minutes and the
19 yellow light for two minutes before that. And that's it. You
20 got 20 minutes, and you took 20 minutes. Sorry.

21 MS. GALINDO: I wanted to put that on the record.

22 MR. YOUNG: Thank you, Your Honor.

23 Your Honor, may I thank the jury before I sit down, and
24 that's it?

25 THE COURT: No.

1 (The following proceedings were had in open court with
2 all parties present and within the hearing of the jury.)

3 MS. COFFEY: Ladies and gentlemen, as I told you
4 during opening, this case is not about transgender
5 discrimination. This case is about someone, Dr. Rachel Tudor,
6 that had not yet earned her tenure, and she refused the
7 opportunity to do so.

8 In opening statement, counsel said Oklahomans don't care
9 about people's differences.

10 Our witnesses showed you this week that Oklahomans care
11 more about a job well done than worrying about picking on
12 someone who's just different.

13 Southeastern did the right thing.

14 President Minks had the offer made to Dr. Tudor. Your
15 tenure is going to be denied. Please don't make me deny you
16 tenure. Withdraw it. Withdraw it. We will give you an extra
17 year so you will have 18 months to strengthen that portfolio
18 so that you can come back and reapply for tenure.

19 I also said that, throughout this trial, you're going to
20 wonder, why would anyone refuse that? What was the reason?
21 And I said then and I say now, there was no justifiable
22 reason.

23 As Dr. Scoufos said, what did she have to lose? She had
24 nothing to lose. She only had her career to gain. However,
25 she had an awful lot to lose.

1 She knew the ramification. She knew her career would be
2 over, yet she refused. She just refused the opportunity to
3 strengthen her portfolio.

4 I will direct you that, when you're back deliberating, to
5 look at Defendants' Exhibit 59. That is Dr. Tudor's letter
6 rejecting the offer made.

7 Dr. Tudor testified that one of the reasons that she
8 turned the offer down, a significant reason, was because they
9 refused to put it in writing.

10 Dr. Tudor never asked for it to be in writing. And if
11 she had, surely she would have set forth that complaint in the
12 letter in which she's rejecting the offer.

13 Dr. Scoufos and Dr. Mischo were both present at that
14 meeting. Neither of them testified that she had requested
15 that that offer be made in writing.

16 And Dr. Tudor knew, if she were to reject that offer and
17 tenure was ultimately denied, she was done. It is a
18 one-and-done. You are not given the opportunity, if you are
19 denied tenure at the president's level, to reapply.

20 If you were, there would be no reason why all these other
21 people that have testified about times when they withdrew
22 their applications, including Dr. Tudor in 2008, if you could
23 always reapply, no matter where the denial occurred, then why
24 would anybody withdraw it?

25 You would always keep it in there under the hopes that

1 somebody along the way would just decide to recommend it, and
2 ultimately it was.

3 Southeastern's tenure process of one-and-done is the same
4 as nationwide. You heard in particular Jesse Snowden talking,
5 after being at seven different universities, the process is
6 always the same. You can withdraw your portfolio. But if you
7 don't and if it's denied, that's it.

8 Southeastern's administrators also concurred, they
9 testified. Doug McMillan and Lucretia Scoufos.

10 Now, Chip Weiner just told you earlier today that he
11 thought you could reapply, but neither Chip Weiner nor anybody
12 else has given a single example of anybody at Southeastern
13 that was ever denied tenure at the president's level and was
14 not allowed to -- and then was allowed to reapply.

15 Now, Dr. Tudor's tenure process, you heard an awful lot
16 about it. And I will take pity on you, and I will not go back
17 through and rehash everybody's testimony.

18 But what I will tell you or remind you that it was a
19 multilevel process, that many, many people were involved, most
20 of whom concluded that she wasn't qualified. She was -- no
21 one concluded that she would never be qualified for tenure,
22 but she was not qualified based upon her 2009 portfolio
23 application. Randy Prus told you in detail why he believed
24 that she didn't merit tenure.

25 These are some of the descriptions that the people that

1 reviewed Dr. Tudor's portfolio said about her portfolio.

2 It was sloppy. It was lacking. It was weak. It was
3 insufficient. It was unprofessional. It was inadequate.

4 She turned down the offer, and she decided she was going
5 to stand by, as she said in her letter of April 6th of 2010,
6 "I will stand by the decision" of her tenure and promotion
7 committee.

8 Well, that tenure and promotion committee included
9 Dr. Prus. You heard his criticisms of her portfolio.

10 It also -- you heard Dr. Spencer's description, that
11 Dr. Tudor had ignored his advice. He told her she needed two
12 publications to go up for tenure. She ignored it. She only
13 had one publication, and everybody determined that that wasn't
14 sufficient.

15 Two of Dr. Tudor's tenure review committee members
16 testified that the tenure review committee vote was getting
17 ready to go south. It seemed, based on the conversation in
18 the room, that they were going to vote as a committee to deny
19 tenure. But then the topic of Dr. Tudor's transgender status
20 came up, and she received a positive vote.

21 Southeastern is not criticizing that vote today, but that
22 decision was -- that decision, based upon her transgender
23 status, was a positive decision. It wasn't a negative one.

24 Now, you heard from Dr. Tudor's closest friend, Meg
25 Cotter-Lynch. She did her best to convince you that

1 Southeastern discriminated against Dr. Tudor.

2 But you also heard Dr. Cotter-Lynch tell you that she
3 never once witnessed anything discriminatory toward Dr. Tudor.
4 Yes, she tells you that, in her mind, her opinion, the
5 decision to deny her tenure was discriminatory.

6 Yet, when specifically asked, "Did you ever witness
7 anything discriminatory toward Dr. Tudor?" her answer was no.
8 "Did Dr. Tudor ever come to you and complain of any type of
9 discrimination at Southeastern?" The answer was no.

10 The conditions supposedly placed on Dr. Tudor, that I'll
11 readdress in just a moment, Dr. Cotter-Lynch never heard about
12 a single one of those conditions being placed on Dr. Tudor.

13 You heard a lot about -- in plaintiff's opening statement
14 and in closing, about the villain, Doug McMillan.

15 Dr. McMillan is no evil person. He is no villain. He's
16 the empathetic person that made sure that Mindy House wouldn't
17 be without a job.

18 Now, plaintiff brought in Mindy House, and they asked
19 her -- you heard her testify -- "Did Dr. McMillan rely upon
20 his faith in making an employment decision about you?"

21 And she sat up there and she looked at everyone and she
22 said, "Yes," as if Dr. McMillan had done something so awful.

23 But when asked what that decision was -- not by
24 plaintiff's counsel, of course, but when Ms. House was asked
25 what that decision was, she said, "Dr. McMillan said you are

1 to take care of widows," and Dr. McMillan found Mindy House a
2 job.

3 And then Mindy House refused to acknowledge that that was
4 a positive thing.

5 Dr. McMillan testified, sure, he has a strong faith. He
6 also testified that he considers himself professional, and
7 other witnesses testified how professional he is and that he
8 would never let his faith get in the middle of making a
9 professional decision.

10 He's a kind man that played a role in giving Dr. Tudor
11 another opportunity to earn her tenure. He's also the kind
12 man that works every day with handicapped children. He's not
13 the evil person that Dr. Tudor's attorneys are trying to
14 convince you that he was. And you heard that.

15 You also heard from a tenure expert, Dr. Robert Parker.
16 Dr. Robert Parker testified he was basing his opinions that
17 Dr. Tudor was qualified to receive tenure from Southeastern in
18 2009 on his belief that Dr. Tudor had two qualified -- quality
19 published -- I'm sorry. Two significant publications.

20 Now -- and that was the reason. That was the reason he
21 believed that she was qualified for tenure. However,
22 Dr. Parker admitted the portfolio that he was given by
23 Dr. Tudor was incomplete.

24 You'll see, when you go back in the jury room, the other
25 portfolios that Dr. Parker had reviewed, very thick.

1 Dr. Tudor's portfolio, 27, 28 pages.

2 He acknowledges he reviewed an incomplete portfolio, and
3 he has no idea how accurate or inaccurate the document he
4 reviewed was compared to what Dr. Tudor actually submitted in
5 2009.

6 However, you heard Dr. Scoufos testify she could
7 specifically identify things that were missing and things that
8 had been added.

9 More importantly, Dr. Parker's opinion that she was
10 qualified because of two publications, you heard testimony
11 from several witnesses that were involved with that review of
12 her portfolio.

13 Dr. Spencer. Dr. Spencer said, She had one publication.
14 I told her she needed two, she had one, but I went ahead and
15 voted for her anyway.

16 Dr. Prus: She had one publication. That wasn't enough.

17 Dean Scoufos: She only had one publication. That wasn't
18 enough.

19 Dr. McMillan: She only had one publication. That wasn't
20 enough.

21 So there is no legitimate basis for Dr. Parker's opinion
22 regarding whether or not she was qualified.

23 Dr. Parker also said, though, that it was a really big
24 deal to have peer letters of review -- I mean, peer letters of
25 recommendation, but Dr. Tudor had none. You may recall the

1 testimony -- and you'll see it back there -- she had no
2 recommendations from any professor in the English department.

3 She had recommendations from staff at Southeastern. And
4 contrary to what plaintiff's counsel said, we certainly
5 haven't demonized department secretaries this week. They are
6 wonderful people. They are -- play significant roles at
7 Southeastern. And I daresay the work every day could not be
8 done without their work.

9 But what you have heard is that they are not qualified to
10 determine whether somebody deserves tenure. And, therefore,
11 inclusion of that type of letter in a portfolio was
12 inappropriate; it was unprofessional.

13 But as Dr. Scoufos said, it's not so much what was in
14 there as what wasn't. And that was recommendations from
15 tenured professors.

16 Contrary to what counsel said in closing, there has been
17 no evidence of hostilities that Dr. Tudor was subjected to, no
18 evidence at all.

19 Cathy Conway testified that shortly after she learned of
20 Dr. Tudor's transition -- in fact, that very same day -- she
21 consulted with legal counsel so that she would address with
22 Dr. Tudor issues that need to be addressed with her to do what
23 was right for Dr. Tudor.

24 She dealt with the situation with empathy. She was
25 highly concerned about Dr. Tudor. But it was a new situation

1 for them. As she said, she'd never dealt with a transgender
2 faculty member, and she wanted to get it right.

3 Dr. Tudor sat up there on that witness stand and told you
4 that she received this threatening, scary call, dark one
5 night, dark, and the call was from Southeastern's human
6 resources office.

7 Now, honestly, I mean, does anybody really think the
8 Southeastern human resources office was making calls late at
9 night?

10 But more importantly, you saw Cathy Conway's notes. She
11 called at 3:45 in the afternoon on a summer day.

12 Cathy Conway told you that in that call she dealt with
13 various issues. And her notes go over each policy that she
14 discussed with Dr. Tudor. She discussed the discrimination
15 and sexual harassment policy with Dr. Tudor because she wanted
16 Dr. Tudor to know that, if she was suffering problems, she
17 would know how to address those.

18 Cathy Conway said she never heard another word from
19 Dr. Tudor about that. And she also said that she believed
20 that, as a result of that phone call, had Dr. Tudor had
21 questions or concerns, she would have felt comfortable coming
22 to her and talking to her about it.

23 Dr. Tudor testified -- well, I'll just -- Cathy Conway
24 refuted all these conditions that were supposedly placed on
25 Dr. Tudor.

1 Nobody told Dr. Tudor how to wear her makeup. Nobody
2 told Dr. Tudor how to dress. And nobody testified that they
3 ever heard about that -- either heard from Dr. Tudor about it
4 or heard any complaints about it.

5 Yes, Cathy Conway admits she discussed the use of the
6 bathroom with Dr. Tudor. She thought she was presenting
7 Dr. Tudor with options. She told Dr. Tudor it was her choice.
8 She felt like she was doing -- handling it in the best way
9 that it could be handled.

10 At the end of that call, Dr. Tudor thanked Cathy Conway
11 for her professionalism.

12 Now, Dr. Tudor told you on the witness stand that that
13 wasn't really what she said. She said that she thanked Cathy
14 Conway for her professionalism for not firing her.

15 Nobody does that.

16 She claims that Dr. McMillan -- or that Cathy Conway told
17 her Dr. McMillan said, "Can we fire her?" And when Cathy told
18 him no, according to Dr. Tudor, that Dr. McMillan said, "Okay.
19 Well, if we can't fire her, then let's place these three
20 conditions on her."

21 Dr. Tudor said Cathy Conway said, "As long as you live by
22 these conditions, you can keep your job at Southeastern."
23 That was the makeup, the dress, and the bathroom.

24 That conversation never took place.

25 You've heard several people talk about the environment at

1 Southeastern, that it's -- there's open-door policies. You
2 heard Cathy Conway talk. You heard Jesse Snowden talk about
3 it. If Dr. Tudor really had been experiencing some of these
4 issues, this discrimination, why would she not have complained
5 to anybody?

6 Hopefully, she would have -- if it had really happened,
7 one would think she would have complained and Southeastern
8 would have had the opportunity to address it.

9 Why didn't she complain? Because it just didn't happen.

10 I told you that one reason why the case wasn't about her
11 transgender status is because it's about her refusal to take
12 the opportunity that Southeastern offered her.

13 The second reason, though, that it is not about
14 transgender status is because, as the judge has instructed you
15 in jury instruction No. 6, transgender itself is not a
16 protected class under Title VII.

17 In this case, Dr. Tudor complains that she was
18 discriminated against because she's female or that she failed
19 to conform to traditional notions of the female stereotype.

20 I ask you to think long and hard what possible evidence
21 was there presented in this courtroom of any of that.

22 There was none. There was no discrimination against
23 Dr. Tudor. Every decision made was based upon legitimate
24 reasons. She just had not earned her tenure.

25 This is a case where opportunity and advice were ignored.

1 When Dr. Tudor was faced with the likelihood of tenure denial,
2 she simply refused to take advantage of the opportunity that
3 they offered her. And, by doing so, Dr. Tudor made the
4 choice, only Dr. Tudor. And that choice was to end her career
5 at Southeastern.

6 Ladies and gentlemen, plaintiff has failed to prove her
7 case. She's failed to prove hostile work environment, she's
8 failed to prove discrimination, and she's failed to prove that
9 Southeastern retaliated against her. Therefore, we ask that
10 you return a verdict in favor of defendants.

11 Thank you.

12 THE COURT: Counsel, come up. My apologies.

13 (The following proceedings were had at the bench and out
14 of the hearing of the jury.)

15 THE COURT: I have a closing instruction to read,
16 and then the bailiff will be sworn, and then I will give them
17 some informal instructions.

18 If you have any objection to this, you let me know before
19 I send the jury out. I'm not going to call on you because I
20 don't want to interrupt us again, but let me know before any
21 leave here.

22 MS. COFFEY: Okay.

23 MR. JOSEPH: Thank you, Your Honor.

24 (The following proceedings were had in open court with
25 all parties present and within the hearing of the jury.)

CERTIFICATE OF COMPLIANCE

This document was scanned for viruses using Symantec Endpoint Protection version 14.2. Any required paper copies to be submitted to the court are exact copies of the version submitted electronically. Additionally, all required privacy redactions have been made in accordance with Fed. R. App. P. 25(a)(5) and 10th Cir. 25.5.

/s/ Zach West

CERTIFICATE OF SERVICE

I certify that on March 4, 2019, I filed the foregoing with this Court and served a copy 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

ZACH WEST, OBA #30768

Assistant Solicitor General

ANDY N. FERGUSON

Staff Attorney

OFFICE OF ATTORNEY GENERAL

STATE OF OKLAHOMA

313 N.E. 21st Street

Oklahoma City, OK 73105

Phone: (405) 522-4798

zach.west@oag.ok.gov

Counsel for Defendants-Appellees/Cross-Appellants