Nos. 18-6102 / 18-6165

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DR. RACHEL TUDOR,

Plaintiff-Appellant/Cross-Appellee,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
AND REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

Defendant-Appellees/Cross-Appellants.

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

SUPPLEMENTAL BRIEF FOR PLAINTIFF-APPELLANT/CROSS-APPELLEE DR. RACHEL TUDOR

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Plaintiff-Appellant/Cross-Appellee Dr. Rachel Tudor ("Plaintiff") respectfully submits this supplemental brief in connection with this Court's consideration of the impact of the Supreme Court's opinion in *Bostock v. Clayton County, Georgia*, No. 17-1618, 590 U.S. ____ (June 15, 2020), as set forth in this Court's Order of June 16, 2020.

INTRODUCTION

In *Bostock*, the Supreme Court held that discrimination against a transgender employee is discrimination because of sex, ruling that an employer violates Title VII when it intentionally discriminates against transgender persons on the basis of their transgender status. *Id.* The *Bostock* opinion is relevant to the present case because it overruled *Etsitty* insofar as that case held that discrimination against an employee for being transgender is not sex discrimination under 42 U.S.C. § 2000e, et seq. ("Title VII"). *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007). This issue is discussed below in Sections 1 and 2 of this brief. *Bostock* is also relevant to the present case because it overruled *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970 (10th Cir. 2017) insofar as that case held that a plaintiff must prove that discrimination was a "primary factor" in a defendant's adverse employment action. This issue is discussed below in Section 3 of this brief.

In *Etsitty*, this Court agreed with the Seventh, Eighth, and Ninth Circuits, which had held that the definition of sex should be given its "common and traditional interpretation" for the purpose of interpreting Title VII, *i.e.* the physical distinctions between male and female.[1] Noting that the plain language of the statute should guide its interpretation, this Court found that the plain meaning of "sex" encompassed male and female physical distinctions, based on the factual record before the Court. It held that protection on the basis of sex extends to transgender employees "only if they are discriminated against because they are male or because they are female." *Etsitty* at 1222.

Bostock rejects this logic. The Court proceeded on the assumption, for purposes of its opinion, that the meaning of "sex" referred to the physical distinctions between male and female. Nevertheless, it held that an employer who discriminates against an employee for being transgender "necessarily and intentionally discriminates against that individual in part because of sex" and thereby supplies a basis for liability under Title VII. *Bostock*, slip op. at 14. The *Bostock* Court clarified that discrimination against transgender persons for being transgender is *per se* sex

[1] The *Bostock* opinion refers to "biological sex." Because "biology" can refer to physical features, internal anatomy, endocrine systems, brain structures and genetic materials, plaintiff believes the phrase "biological sex" is inexact and may lead to confusion regarding issues of gender identity and gender expression. Therefore, Plaintiff refers to physical sex. In *J.E.B. v. Alabama*, Justice Scalia recognized the distinction between sex and gender, finding that "[t]he word "gender" has acquired the new and useful connotation of cultural or attitudinal characteristics (as opposed to physical characteristics) distinctive to the sexes. That is to say, gender is to sex as feminine is to female and masculine is to male." 511 U.S. 127, 157 n.1 (1994) (Scalia, J., dissenting).

discrimination, explaining that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Bostock*, slip op. at 9. As a result, an employer violates Title VII when it discriminates against an employee on the basis of their transgender status.

To the extent that Defendants-Appellees/Cross-Appellants Southeastern Oklahoma State University and the Regional University System of Oklahoma have argued that Plaintiff was not subject to coverage under Title VII because of her transgender status, that argument must be denied. The Defendants raised this argument in Section 1B at 37-40, Section 1C(2) at 43-46, and Section 1C(4) at 48-49, of Defendants-Appellees/Cross-Appellant's Principal and Response Brief ("Defendants' Brief"), as discussed in more detail below. After *Bostock*, the arguments presented in these portions of Defendants' Brief are untenable.

Dr. Tudor maintains that this Court need not review the weight of the evidence for the discrimination claims for which the jury found liability, because Defendants' challenges are not properly before the Court, as set forth in her Reply and Response Brief. However, if this Court were to review the claims, the *Bostock* opinion would provide additional support for affirming the judgment against Defendants. *Bostock* does not change Dr. Tudor's argument. However, *Bostock* does invalidate the arguments presented in the following sections of Defendants' Brief.

1. Section 1B of Defendants' Cross-Appeal

Defendants have argued that the District Court misapplied *Etsitty* by holding that Title VII covered claims of transgender discrimination. Defs' Br. at 37-40. As discussed above, *Bostock* makes clear that Title VII does cover claims of transgender discrimination. Even if the District Court's application of *Etsitty*, holding that Title VII covered Tudor's claims because she was female yet Defendants regarded her as male, were in question, *Bostock* now confirms that the District Court did not err in finding that Dr. Tudor was protected by Title VII for claims of transgender discrimination.

Defendants suggest that this was a case about restrooms, a point which is irrelevant to the determination of the questions before this Court, and subject to no different treatment in *Bostock*. Plaintiff presented evidence regarding restroom restrictions in regard to Count One of the Complaint in Intervention of Plaintiff/Intervenor Dr. Rachel Tudor, found in Plaintiff-Appellant/Cross-Appellee Dr. Rachel Tudor's Appendix ("Tudor Appendix") Vol. 1 at 96, alleging a hostile work environment. Defendants acknowledge that the hostile work environment claim was based on the restroom restrictions. Defs. Br. at 15. ("Largely based on this restriction, Plaintiff filed a hostile work environment claim.") The jury found for Defendants on the claim of hostile work environment in Count One. Verdict Form,

Tudor Appendix Vol. 2 at 71. The evidence of restroom restrictions is not related to Count Two (Unlawful Discrimination Because of Sex), which was about her tenure denial and termination based on sex, *see* Tudor Appendix Vol 1 at 101, or Count Three (Retaliation), which was about her tenure denial and termination based on retaliation, *see id.* at 103. Issues related to Count One, the hostile work environment claim, are not before this Court. Restrooms are subject to no different standards under *Bostock*, and since the restroom evidence related only to Count One, which is not in this Appeal, issues regarding such restroom evidence are moot.

2. Section 1C(2) of Defendants' Cross-Appeal

Defendants have argued that the Plaintiff failed to prove that she was discriminated against on the basis of sex, contending that she did not produce sufficient evidence of sex stereotyping. Defs' Br. at 43-46. However, the *Bostock* court has clarified that discrimination on the basis of transgender identity is *per se* sex discrimination. *See Bostock*, slip op. at 12. Thus, Plaintiff can establish sex discrimination by proving discrimination on the basis of transgender identity. Plaintiff need not rely on evidence of sex stereotyping to prove sex discrimination under Title VII. *See Bostock*, slip op. at 12. Here, the record is clear that there was evidence presented that Dr. Tudor was discriminated against on the basis of her transgender identity. Defendants did not dispute that Dr. Tudor presented sufficient

evidence to present a case of transgender discrimination, as Defendants themselves pointed out that Dr. Tudor made her transgender identity the "centerpiece of this case, from the first complaints through the end of trial." Defs' Br. at 37. *See also id.* at 18-20 (detailing many references to transgender discrimination). As a result of *Bostock's* holding that transgender discrimination is *per se* sex discrimination, Defendants' argument regarding the lack of sex stereotyping evidence is no longer tenable.

3. Sections 1C(4) – 1(C)6 of Defendants' Cross-Appeal

Defendants have argued that the plaintiff did not produce sufficient evidence of pretext on the discrimination claim, nor sufficient evidence of a causal nexus to retaliation. They argue that Plaintiff needed to prove that these were a "primary factor" in the Defendants' decision, citing *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970 (10th Cir. 2017). Plaintiff provided ample evidence of both pretext and causal nexus to retaliation, as detailed in her Reply And Response Brief Of Plaintiff-Appellant/Cross-Appellee Dr. Rachel Tudor (Third Brief On Cross-Appeal) (Tudor Reply Brief) at 59-60, 71-72 and 74-76. It was within the purview of the jury to disbelieve Defendants' explanations and to believe Plaintiff's evidence of pretext. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1230 (10th Cir. 2000), *aff'd*, 532 U.S. 588 (2001) ("It is within the virtually exclusive

purview of the jury to evaluate credibility and fix damages," citing *Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir.1985)). Post-*Bostock*, however, the Defendants' arguments directly contradict the causation standard articulated by the *Bostock* Court, as explained below.

Defendants argue that Plaintiff's evidence was insufficient because Defendants were strictly bound by their rules and precedents not to allow more than one application for tenure, and, contradictorily, that they allowed Plaintiff to make more than one application. Defs' Br., Section 1(C)5, at 49. Defendants point out, correctly, citing *DePaula*, that they need only produce these legitimate, non-discriminatory reasons, and need not prove them. Defendants also point out, correctly, again citing *DePaula*, that the burden of proof is on the Plaintiff to show that these were not the real reasons. However, Defendants err in relying on *DePaula* for the proposition that Plaintiff must prove that unlawful discrimination was a "primary factor." Defs' Br., Section 1(C)5, at 49. The *Bostock* opinion explicitly states that Plaintiff need not show that discrimination was a "primary factor." Rather, Plaintiff need only show that discrimination was "a but-for factor." *Bostock* supersedes and overrules the "primary factor" test used in *DePaula*, stating of but-for causation:

> This can be a sweeping standard. Often, events have multiple but-for causes. So, for example, if a car accident occurred both because the defendant ran a red light and because the plaintiff failed to signal his turn at the intersection, we might call each a but-for cause of the collision. Cf. *Burrage v. United*

> *States*, 571 U. S. 204, 211–212 (2014). When it comes to Title VII, the adoption of the traditional but-for causation standard means a defendant cannot avoid liability just by citing some other factor that contributed to its challenged employment decision. So long as the plaintiff 's sex was one but-for cause of that decision, that is enough to trigger the law. See ibid.; Nassar, 570 U. S., at 350.

Bostock, slip op. at 6. As Congress did not write "primarily because of" into the law, the prohibited factor need not be the main cause of the defendant's challenged employment decision. *Bostock*, slip op. at 6. The *Bostock* holding teaches that but-for cause is "a sweeping standard." *Bostock*, slip op. at 15. It need not be a primary factor, but may be one element in a chain of causation, *id.* at 14, 21 and 22, "the straw that broke the camel's back," as stated in *Burrage v. United States*, 571 U. S. 204, 211 (2014), cited by the Court, *id*. at 6. Therefore, the requirement set forth in *DePaula* that the discrimination or retaliation be a "primary factor" is no longer good law. This invalidates Defendants' argument to the extent that it claims that Plaintiff failed to prove that discrimination or retaliation was a "primary factor."

CONCLUSION

In *Bostock*, the Supreme Court held that discrimination against a transgender employee is discrimination because of sex, ruling that an employer violates Title VII when it intentionally discriminates against transgender persons on the basis of their transgender status. *Bostock* overruled *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) with regard to its holding that transgender people are not protected

by Title VII, and *DePaula v. Easter Seals El Mirador*, 859 F.3d 957, 970 (10th Cir. 2017), with regard to its holding that discrimination or retaliation must be a "primary factor." Therefore the Defendants' arguments in Sections 1B, 1C(2), 1C(4), 1C(5) and 1C(6), relying on these cases, are no longer tenable, and must be denied.

Respectfully submitted this 15th day of July, 2020,

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CERTIFICATE OF COMPLIANCE

This document complies with the page limit of 15 pages as ordered by the Court on June 15, 2020 because, excluding the parts of the document exempted by Fed R. App. P. 32(f), this document contains 9 pages. This document also complies with the typeface requirements of that Order because this document has been prepared in a proportionally spaced serif typeface using Microsoft Word 2016 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I certify that on July 15, 2020, I caused the foregoing to be filed with this Court and served on all parties and amicus curiae via the Court's CM/ECF filing system. Seven hard copies of the foregoing, which is are exact copies of the document filed electronically, will be dispatched pursuant to 10th Cir. R. 35.1 and 10th Cir. CM/ECF User Manual, Sec. III, Part 5 via commercial carrier to the Clerk of the Court for receipt within 2 business days.

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