

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 Cauthron
No. 5:15-cv-324-C

SUPPLEMENTAL BRIEF OF DEFENDANTS-APPELLEES / CROSS-APPELLANTS

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On June 15, 2020, the U.S. Supreme Court issued its decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Relevant here, the Supreme Court held that an employer who fires an individual for being transgender violates Title VII of the Civil Rights Act of 1964. *Id.* at 1737. Soon after, this Court ordered Plaintiff and Defendants to file supplemental briefs addressing *Bostock*'s impact on the present case.

As explained below, the parties agree on much, including that *Bostock* partially abrogated this Court's decision in *Etsitty v. Utah Transit Authority*, 502 F.3d 1215 (10th Cir. 2007). But there are significant points of disagreement, as well. Perhaps most critically, Defendants do not concur that Plaintiff proved a transgender status case, such that their insufficient evidence claims are nullified. Unlike the employers in *Bostock*, Defendants have always contended that Plaintiff did not merit tenure for purely academic reasons and that Plaintiff failed to provide sufficient evidence demonstrating otherwise.

I. Agreement: Where Plaintiff and Defendants concur, post-*Bostock*.¹

To begin, there appears to be significant agreement between the parties on what *Bostock* does not touch at all. In regard to Defendants' Principal/Response Brief, filed January 9, 2019, (hereinafter "Principal Brief"), the parties seemingly agree that *Bostock* in no way affects **Part I, Section I.A.** (objecting to Plaintiff's "expert" testimony on tenure decisions), **Section I.C.1.** (addressing several timeliness issues), **Section I.C.3.** (arguing that Plaintiff lacked the necessary qualifications for tenure), and **Part II** (rebutting Plaintiff's remedy-based claims on

¹ For citations to the appendices, this brief uses the same format as Defendants' previous briefs. That format can be found at Footnote 1 of Defendants' Principal/Response Brief (January 9, 2019) and Footnote 1 of Defendants' Reply Brief (March 4, 2019).

appeal). *See* Plaintiff's Supplemental Brief ("Pl's Supp.") at 4-10 (claiming only that *Bostock* affected Sections I.B., I.C.2, and I.C.4.-I.C.6 of Part I of Defendants' Principal Brief). Commonsensically, this agreement carries over to the matching portions of Defendants' Reply, filed March 4, 2019; for example, Part I of this Reply further details objections to Plaintiff's expert witness and the lower court's failure to evaluate his reliability, and is thus unaltered by anything found in *Bostock*.

There is also some agreement for the remaining parts of Defendants' Principal Brief. Most prominently, Defendants agree that *Bostock* abrogated or "overruled *Etsitty* insofar as that case held that discrimination against an employee for being transgender is not sex discrimination" under Title VII. Pl's Supp. at 2.² As such, Defendants generally agree with Plaintiff that any assertions Defendants made (relying on *Etsitty*) that Title VII did not extend to transgender status alone are untenable under *Bostock*. *See, e.g.*, Defendants' Principal Brief ("Defs' Br.") at 26 ("But under Title VII and *Etsitty*, 502 F.3d 1215, transgender identity is irrelevant to a Title VII claim").

Similarly, Defendants' repeated objection that Plaintiff attempted to put on a transgender identity case instead of a sex stereotyping case loses some of its teeth. In light of *Bostock*, Defendants can no longer complain that Plaintiff and Plaintiff's attorneys emphasized transgender identity before the jury. *See, e.g.*, Defs' Br. at 18-20. *Etsitty* said transgender identity

² *Compare Etsitty*, 502 F.3d at 1221 ("[D]iscrimination against a transsexual based on the person's status as a transsexual is not discrimination because of sex under Title VII."), *with Bostock*, 140 S. Ct. at 1737 ("[A]n employer who fires an individual for being ... transgender fires that person for traits or actions it would not have questioned in members of a different sex ... [which is] exactly what Title VII forbids.").

should be “irrelevant” to a Title VII analysis, 502 F.3d at 1222, which was the basis for Defendants’ argument. *Bostock* holds otherwise.

But there are two important caveats to this particular concession. The first is that Defendants’ aforementioned argument—that Plaintiff contravened *Etsitty* by emphasizing transgender identity—was *not* a concession or admission that Defendants discriminated based on Plaintiff’s transgender status. Unlike *Bostock*, where the employers “[did] not dispute that they fired plaintiffs for being homosexual or transgender,” 140 S. Ct. at 1744, Defendants have always contended that Plaintiff’s transgender identity was irrelevant to their decision. *See, e.g.*, Defs’ Br. at 48 (“Defendants put forth legitimate, non-discriminatory reasons for the tenure denial: lack of scholarship and service.”). That is, they have argued all along that they declined to grant Plaintiff tenure for academic reasons entirely unrelated to sex or gender identity, while simultaneously pointing out *arguendo* that Plaintiff was wrongly attempting to make a Title VII case precluded under *Etsitty*. Even if *Bostock* undercuts the latter assertion entirely, the former assertion of evidentiary legitimacy—which permeates Defendants’ Principal and Reply briefs—is still alive. In sum, Defendants’ statements that Plaintiff put on a transgender identity case were not any sort of an admission that such a case was supported by sufficient evidence at trial. Defendants admit only that Plaintiff at times *attempted* to put on a transgender identity claim—not that Plaintiff actually succeeded.

That leads to the second point, which is that *Bostock* did *not* undercut Defendants’ transgender identity arguments entirely. Although Defendants previously stated that Plaintiff attempted to make out a transgender identity case, and *Bostock* held that discrimination on the basis of transgender status is unlawful, we must look deeper than mere labels. *Cf. Bostock*, 140

S. Ct. at 1745-46 (“[N]othing in Title VII turns on the employer’s labels”). Here, Defendants were clear that what they meant by “transgender identity case” was that Plaintiff attempted to make a Title VII case based almost entirely on bathroom guidelines, pronouns, and hostility to religion. Indeed, Section I.B. of Defendants’ Principal Brief—the section most obviously relevant to *Bostock*—was entitled: “The district court misapplied *Etsitty* by holding that Title VII covered claims of transgender discrimination **focusing on bathroom usage, pronouns, and religion.**” Defs’ Br. at 37 (emphasis added).

Bostock did not approve of such a case; that is to say, it did not affirm that transgender identity, if defined broadly to encompass restrooms, pronouns, and the like, is protected under Title VII. To the contrary, *Bostock* expressly *disavowed* that its holding addressed or extended to “sex-segregated bathrooms, locker rooms, [] dress codes ... or anything else of the kind.” *Bostock*, 140 S. Ct. at 1753. It simply held that an employer could not fire an employee because the employee was transgender, *see id.*, not that that sex-segregated bathrooms, pronoun use, and someone else’s religious beliefs are *per se* transgender discrimination. It did not even say these were evidence of transgender discrimination.

Put differently, *Bostock* now permits cognizable *claims* of transgender discrimination, but it did not approve of the *evidence* Plaintiff presented to make such a claim, and many of Defendants’ contentions on these points still stand. Take, for example, Plaintiff’s hostile treatment of Doug McMillan’s religion, and Plaintiff’s attempt to use this as evidence of a Title VII violation. *See* Defs’ Br. at 20-21, 55-56; Defs’ Reply at 21. As a refresher, Plaintiff’s counsel first raised the issue of McMillan’s religion, then accused McMillan of having the audacity to discuss his faith when he was compelled to respond, and then argued in closing that if

McMillan “was a true man of faith” he would “confess to doing the obvious.” Defs’ Br. at 21 (citing, *inter alia*, Tr.Vol.5 at 841³). And in this very appeal Plaintiff attacked McMillan for making “employment decisions premised on his peculiar faith-based gender stereotypes.” Defs’ Reply at 21 (citing Plaintiff’s Reply/Response Brief (Feb. 11, 2019) (“Pl’s Resp.”) at 5). What was the prime example of this? Nothing more than testimony that McMillan **helped a widow find a job**. *Id.*; Defs’ Br. at 21. Rather than allow religious hostility to support a transgender status claim, the same Supreme Court that decided *Bostock* made it clear that anti-religious animus is intolerable. *See, e.g., Epinoza v. Mont. Dep’t of Rev.*, 140 S. Ct. 2246, 2262-63 (2020) (excluding religious schools and religious families from state scholarship program is “odious to our Constitution” (citation omitted)); *cf. Masterpiece Cakeshop v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1729 (2018) (“The neutral and respectful consideration to which Phillips was entitled was compromised here ... [by] a clear and impermissible hostility toward [his] sincere religious beliefs ...”).

Or consider bathrooms. Given that *Bostock* explicitly avoided deciding restroom questions, *Etsitty*’s holding that the Tenth Circuit “cannot conclude [Title VII] requires employers to allow biological males to use women’s restrooms,” *Etsitty*, 502 F.3d at 1224, is still binding precedent. *See also id.* (“Use of a restroom designated for the opposite sex does not constitute a mere failure to conform to sex stereotypes.”). Plaintiff doesn’t appear to dispute this. Rather than contend that *Bostock* overruled *Etsitty* in its entirety, Plaintiff claims only that *Bostock* “overruled *Etsitty* insofar as that case held that discrimination against an

³ As a reminder, these specific pages of the trial transcript—Pages 828-857—are found in D.A.Vol.11 at 2771-2801. *See* Defs’ Reply at 6 n.4.

employee for being transgender is not sex discrimination” under Title VII. Pl’s Supp. at 2; *see also id.* at 9-10 (deploying similar language). Moreover, Plaintiff now says the restroom issue is “moot” and “irrelevant to the determination of the questions before this Court” because it only pertained to Plaintiff’s hostile work environment claim, which Plaintiff lost and did not appeal. Pl’s Supp. at 5-6. Defendants agree completely, but they are compelled to point out that this admission conflicts with Plaintiff’s earlier briefs on appeal. In Plaintiff’s Response Brief, Plaintiff *repeatedly* claimed that restroom concerns were evidence to support Plaintiff’s Title VII claims on appeal, with no mention that restrooms were only related to a defunct hostile work environment claim. *See* Pl’s Resp. at 4-6 & n.23, 66-67. This Court should accept Plaintiff’s current concession and ignore the parts of Plaintiff’s Response that argue otherwise.

II. Disagreement: Where Defendants and Plaintiff differ, post-*Bostock*.

Plaintiff makes several assertions based on *Bostock* and the record that Defendants cannot support. Defendants will address these points in turn.

A. Portions of Defendants’ arguments that Plaintiff cites are valid.

Plaintiff contends that “the arguments presented in [certain] portions of Defendants’ Brief are untenable,” initially referencing Section 1.B. at 37-40, Section 1.C.2. at 43-46, and Section 1.C.4. at 48-49. Pl’s Supp. at 4.

1. Section 1.B. at 37-40

For reasons discussed above, Defendants agree with Plaintiff that part of these particular pages are no longer viable because of *Bostock*. There are at least two exceptions, however. First, *Bostock* did not directly address or invalidate Defendants’ argument that (whether transgender status is protected or not) Plaintiff, a biological male, improperly brought

the case as a female, claiming that gender identity and biological status are inseparable. *See* Defs’ Br. at 38-39; Defs’ Reply at 13-14. Instead, in *Bostock* the Supreme Court “proceed[ed] on the assumption that ‘sex’ [in Title VII] signified what the employers suggest, referring only to biological distinctions between male and female.” *Bostock*, 140 S. Ct. at 1739. In short, neither *Bostock* nor *Etsitty* directly addressed or approved of Plaintiff’s maneuver in this case, and Defendants’ arguments on these points must at least be considered.⁴

Second, much of Page 40 (and the Section I.B. title on Page 37) is still valid for reasons discussed above. Namely, *Bostock* did not invalidate Defendants’ argument that Plaintiff’s evidentiary case was insufficient in part because it was wrongly focused on certain “controversies *surrounding* transgenderism” such as pronoun use, religion, and “restrictions on bathroom usage.” Defs’ Br. at 40 (emphasis added).

2. Section 1.C.2. at 43-46

This portion of Defendants’ Principal Brief is even less affected by *Bostock*. Aside from Defendants’ now-obsolete statement that “a transgender identity case ... is not covered by Title VII” and a few similar assertions, this subsection focused on the fact that “Plaintiff did not produce sufficient evidence of sex stereotyping.” Defs’ Br. at 43-44. And that is still true. Plaintiff simply did not produce sufficient evidence of a Title VII violation—whether sex-stereotyping, transgender status, or both. Again, although *Bostock* held that transgender status claims are cognizable under Title VII, this holding did not turn Plaintiff’s evidentiary focus

⁴ Notably, Plaintiff now refers to “physical sex” rather than “biological sex.” Pl’s Supp. at 3 n.1. Plaintiff has not previously deployed this terminology in this case, however.

(on bathrooms, pronouns, religious aspersions, and stray comments years removed from the tenure process) into sufficient evidence of sex discrimination in Plaintiff's tenure denial. Binding precedent holds otherwise. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.) (“[T]he stereotyping in this case did not simply consist of stray remarks.”), and *Etsitty*, 502 F.3d at 1226 (“[T]he isolated and tangential comments about Etsitty’s appearance are insufficient to alone permit an inference of pretext.”). Nor does *Bostock* undermine Defendants’ critical point that no evidence was ever produced showing that former President Minks—the actual tenure decider—acted in any way based on sex stereotypes *or* transgender status when he denied tenure. Defs’ Br. at 17-18, 45-46; Defs’ Reply at 22-24. Minks did not testify, nor did anyone testify about any impropriety in his own decision-making process, leaving an enormous and pivotal gap in Plaintiff’s Title VII case.

To be sure, if Defendants could rewrite their prior briefs, the language would be tailored in light of *Bostock*. The briefs would say, for instance, that “Plaintiff did not produce sufficient evidence of sex stereotyping or transgender status discrimination.” And for clarity the briefs would avoid calling a case based on pronouns, bathrooms, and hostility to religion a “transgender identity case.” But labels aside, the merits of Defendants’ underlying case are still readily apparent from their Principal Brief, most of which remains intact post-*Bostock*.

3. Section 1.C.4. at 48-49

Contrary to Plaintiff’s assertion, Defendants see little in Section I.C.4. of Part I that is affected by *Bostock*. In this section, Defendants simply argued that their legitimate, non-discriminatory reasons for tenure denial were not shown to be pretextual by Plaintiff’s expert report, which should have been excluded in the first place, nor by the faculty’s contrary tenure

recommendation. If anything, *Bostock* actually *bolsters* this subsection. As Defendants have pointed out, Plaintiff's own witness (Mark Spencer) testified without contradiction that a positive view of Plaintiff's transgender identity—rather than Plaintiff's qualifications—may have led the faculty to recommend tenure in the first place. *See* Defs' Br. at 49 (citing Tr.Vol.3 at 454). But *Bostock* says that Title VII's "message for our cases is equally simple and momentous: An individual's ... transgender status is not relevant to employment decisions." 140 S. Ct. at 1741. Thus under *Bostock*, Defendants were further justified in disagreeing with the tenure committee's recommendation, as unrebutted evidence shows the committee was potentially urging Defendants to risk violating Title VII by granting an otherwise undeserving candidate tenure *because of* sex and transgender status.

B. *Bostock* did not overrule *DePaula v. Easter Seals El Mirador*.

Plaintiff claims *Bostock* "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." Pl's Supp. at 2. This "primary factor" phrase from *DePaula*, Plaintiff contends, is contradicted by *Bostock*'s emphasis that for Title VII a party need only show that a protected trait was a "but-for" cause of the adverse action. *Id.* at 8-9. This is incorrect.

For starters, *DePaula* and *Bostock* addressed different things: *DePaula* discussed "a primary factor" in the context of "the pretext element of *McDonnell Douglas*," 859 F.3d at 970, whereas *Bostock* explained the basic standard for qualifying under Title VII, cited older cases to do so, and did not reinvent the causation wheel. *See, e.g., Bostock*, 140 S. Ct. at 1743 ("At

bottom, these cases involve no more than the straightforward application of legal terms with plain and settled meanings.”).

In any event, the “primary factor” language from *DePaula* and “but-for” language from *Bostock* aren’t contradictory. It is revealing that Plaintiff doesn’t actually quote *Bostock* on this point, because what *Bostock* actually says is that “the plaintiff’s sex need not be **the sole or primary cause** of the employer’s adverse action.” 140 S. Ct. at 1745 (emphasis added). There is a big difference between “**a** primary **factor**,” as stated in *DePaula*, and “the **sole** or primary **cause**,” as disavowed in *Bostock*. If a person’s termination has multiple “but-for” causes, they could all reasonably be called “primary factors,” a la *DePaula*, even if only one of them could qualify as “the sole or primary cause.” Thus, there is no necessary conflict between *DePaula* and *Bostock*. Moreover, as *Bostock* recognized, Title VII now “allow[s] a plaintiff to prevail merely by showing that a protected trait like sex was a ‘motivating factor’ in a defendant’s challenged employment practice,” *Bostock*, 140 S. Ct. at 1740-41, which was the standard the jury was instructed on below. *See* P.A.Vol.2 at 54 (“Plaintiff is not required to prove that her gender was the sole or exclusive reason for Defendants’ decisions. Plaintiff must prove only that her gender was a motivating factor in defendants’ decisions.”); *see also EEOC v. Abercrombie & Fitch Stores*, 135 S. Ct. 2028, 2032 (2015) (“Title VII ... prohibit[s] even making a protected characteristic a ‘motivating factor’ in an employment decision”). There isn’t much daylight, if any, between a “motivating” factor and a “primary” factor.

Whatever standard is applied, Plaintiff did not provide sufficient evidence to show that Defendants denied Plaintiff tenure because of transgender status or sex. Thus, Plaintiff’s final statement that “Defendants’ arguments in Sections 1B, 1C(2), 1C(4), 1C(5) and 1C(6) ... are

no longer tenable” is groundless. Pl’s Supp. at 10. *DePaula* or no *DePaula*, Defendants’ arguments on the lack of evidence and the lack of pretext must still be considered under whatever test this Court deems appropriate. *Bostock* doesn’t undermine Defendants’ factual points, because Defendants never conceded that these points would fail applying *any* test, “but-for” or otherwise.

Again, President Minks is the quintessential example. He was indisputably the decision-maker who denied Plaintiff tenure, and there was no evidence whatsoever that he was motivated by sex or transgender animus, or that any such animus was the “but-for” cause of his denial. *See* Defs’ Br. at 17-18, 45-46. There is no evidence that if you change Plaintiff’s biological sex, President Minks would have granted tenure. Nor, as Defendants have shown, was a “cat’s paw” theory possible given that Plaintiff never argued this theory below, never sought a jury instruction on the theory, and never pointed on appeal to plausible evidence that Minks was a mere “dupe” of his subordinates. *See* Defs’ Reply at 21-23.

C. *Bostock* did not invalidate Defendants’ evidentiary arguments.

Plaintiff claims that “[a]s 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.” Pl’s Supp. at 7. The “record is clear,” says Plaintiff, that Defendants discriminated against Plaintiff on the basis of transgender identity; indeed, Plaintiff even claims that “Defendants *did not dispute* that Dr. Tudor presented sufficient evidence to present a case of transgender discrimination.” *Id.* at 6-7 (emphasis added). This is incorrect.

Again, Defendants never conceded that sufficient evidence supports a case of transgender discrimination; rather, they argued that Plaintiff attempted to put on an “identity”

case that wasn't permitted under Tenth Circuit precedent, *Etsitty*, and that insufficient evidence supported a Title VII violation in general. Although the former part of that argument was partially nullified, much of the rest of it has not, as *Bostock* plainly did not reach the evidentiary questions relating to bathrooms, pronouns, or religion. So Plaintiff's purported evidence concerning bathrooms, pronouns, and religious beliefs still does not count as "clear" or sufficient evidence that Plaintiff was denied tenure based in part on sex or transgender status.

It is telling that, in claiming the evidence of transgender discrimination is "clear", Plaintiff doesn't reference, cite, or discuss a single specific piece of record evidence. *See* Pl's Supp. at 6. In an earlier brief, Plaintiff admitted this was not enough under Title VII. *See* Pl's Resp. at 64 ("[A]s with all claimants, a transgender worker must do more than simply allege the bare facts of her gender to sustain her claim—i.e., she must show that her gender or gender stereotypes played some role in the adverse action."). The best Plaintiff can muster at present is a subsequent "see also" citation to the pages in Defendants' Principal Brief that detailed the many references to transgender status during trial. *See id.* at 7 (citing Defs' Br. at 18-20). As Defendants acknowledged above, *Bostock* undermines their basic objections to several of these statements; per *Bostock*, Plaintiff's transgender status is not relevant to employment decisions but *is* relevant to a Title VII sex discrimination claim, and thus could be emphasized at trial by Plaintiff and Plaintiff's attorneys. But crucially, that doesn't make the statements themselves sufficient evidence of transgender discrimination—or even evidence at all.⁵

⁵ That is to say, Defendants' objection to the statements' entry into the record was not a concession about their substance, sufficiency, and weight.

In fact, 12 of the 15 statements cited at Pages 18-20 were made by Plaintiff's *attorneys* during examination of witnesses and opening and closing arguments. *See* Defs' Br. at 18-20. Twelve statements of counsel are not evidence. *See, e.g., United States v. Rogers*, 556 F.3d 1130, 1141 (10th Cir. 2009) (“[T]he jury was properly instructed that closing arguments are not evidence ...”). Of the remaining three statements, one was Plaintiff testifying about an alleged restroom restriction, from years before Plaintiff's tenure denial, Defs' Br. a 19 (citing Tr.Vol.1 at 43); *Bostock*, of course, did not reverse *Etsitty* and hold that such statements are sufficient to make a Title VII case,⁶ and regardless, Plaintiff has now disavowed relying on them. *See* Pl's Supp. at 5-6. Another statement was Plaintiff testifying that a single administrator, unconnected with the tenure denial itself, initially didn't “seem to know how to handle a complaint involving a transgender person” and “didn't seem concerned” about pronoun usage, Defs' Pr. at 19 (citing Tr.Vol.1 at 99), innocuous and ambiguous pseudo-actions that in any event came *after* the tenure denial and in no way show that the denial itself was “because of” sex or gender identity.⁷ The final statement was Plaintiff's testimony that Defendant's then-HR director (Conway)—years before the tenure denial—said when Plaintiff first transitioned that McMillan had told her that “he wanted to summarily fire” Plaintiff “when he

⁶ *See Etsitty*, 502 F.3d at 1225-26 (“Although the specific statements cited by Etsitty address Etsitty's appearance, they fall within the larger context of an explanation of UTA's concerns regarding Etsitty's restroom usage ... [and] are insufficient to alone permit an inference of pretext.”).

⁷ Plaintiff elsewhere testified to being the first transgender professor, employee, or student, at Southeastern, Tr.Vol.1 at 40-41, which make this administrator's alleged uncertainty about how to process a transgender complaint even more understandable.

discovered that I'm transgender.” Defs’ Br. at 19 (citing Tr.Vol.1 at 42). This was denied by Conway and McMillan, *see* Tr.Vol.4, at 651, 682, and Plaintiff did not mention it in written complaints at the time, Tr.Vol.1 at 138-39; but regardless, a secondhand non-decision-maker comment from years before the tenure denial is not enough to show a Title VII violation.

Finally, in response to *Bostock*, it appears Plaintiff may be abandoning arguments about sex stereotyping entirely to focus on transgender status alone. *See, e.g.*, Pl’s Supp. at 6 (“Plaintiff need not rely on evidence of sex stereotyping to prove sex discrimination under Title VII.”). This would be a questionable maneuver, given that the jury was instructed in the opposite direction. As Plaintiff previously emphasized, the jury was told that “Title VII does not protect people because they are transgender” and that discrimination based on sex or stereotyping was required. Pl’s Resp. at 67 (citing P.A.Vol.2 at 47); *see also* Tr.Vol.5 at 722-723, 818-19. According to Plaintiff, this instruction means that the jury is presumed not to have “found for Tudor on some other basis.” Pl’s Resp. at 71. If Plaintiff wants to formally pursue “some other basis,” then, it would seem that a new trial is appropriate.

D. Plaintiff misconstrues an important fact of the case.

Plaintiff claims that it is contradictory for Defendants to argue that: (1) they were “strictly bound by their rules and precedents not to allow more than one application for tenure” and (2) “they allowed Plaintiff to make more than one application.” Pl’s Supp. at 8 (citing Defs’ Br. at 49). Nothing about this is contradictory; Plaintiff simply misunderstands the facts and the argument. Reapplication for tenure *after a denial* was not allowed. *See* Defs’ Br. at 49-50. Defendants allowed Plaintiff to reapply for tenure once, in 2008, because Plaintiff abandoned and withdrew the first application before it got to the stage of a final ruling. *See id.*

Defendants then in 2009 again offered to let Plaintiff withdraw before complete denial and reapply later. Plaintiff declined, and thus was barred from reapplying after receiving and full and final denial of tenure. There is no conflict here.

CONCLUSION

Defendants concede that portions of their Principal Brief and Reply Brief relied on an *Etsitty* view of Title VII that has been abrogated. Other portions could or should be labeled differently in light of *Bostock*, although the substance of the arguments is still relevant and compelling. The bulk of Defendants' arguments are unaffected by *Bostock*, however, and Defendants' overall request for relief has not changed. *See* Defs' Br. at 74.

Respectfully Submitted,

s/ Zach West

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CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements set forth in this Court's Order dated June 16, 2020, because it was prepared in a proportionally spaced font (Garamond, 13-point) using Microsoft Word 2016. It also complies with the 15-page limit set forth in the aforementioned Order, excluding the parts traditionally exempted.

s/ Zach West

ZACH WEST

CERTIFICATE OF DIGITAL SUBMISSION

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. No paper copies are required pursuant to this Court's Order dated June 16, 2020. Additionally, this filing was scanned with Symantec Endpoint Protection antivirus using the latest version (14.2), most recently updated on August 14, 2020.

s/ Zach West

ZACH WEST

CERTIFICATE OF SERVICE

I certify that on August 14, 2020, I caused the foregoing to be filed with this Court and served on all parties via the Court's CM/ECF filing system.

s/ Zach West

ZACH WEST