

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

No. 18-6102

DR. RACHEL TUDOR,
Plaintiff-Appellant/Cross-Appellee,

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY
and THE REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,
Defendants-Appellees/Cross-Appellants.

Appeal from the Judgment of the United States District Court for the Western
District of Oklahoma (Cauthron, J.) No. 15-cv-324-C

***AMICUS CURIAE* THE NATIONAL WOMEN'S LAW CENTER'S
MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT**

Pursuant to Federal Rule of Appellate Procedure 29(a)(8), *amicus curiae* the National Women's Law Center (NWLC) respectfully moves this Court for leave to participate in oral argument in support of Plaintiff-Appellant/Cross-Appellee Dr. Rachel Tudor, who has requested NWLC's participation. Counsel for Defendants-Appellees/Cross-Appellants consents to NWLC's participation if this time is part of Dr. Tudor's present allotment of 20 minutes – currently including 15 minutes by her counsel and five minutes for participation by an amicus party. Argument is scheduled for November 16, 2020 and as detailed below, NWLC seeks either the five minutes originally granted to Lambda Legal, with their express permission and

the agreement of Dr. Tudor, or alternatively, five minutes of Dr. Tudor's own argument time.

Given this request, NWLC understands that the Court may have an open question regarding other *amicus* participation in this argument. As such, the undersigned have conferred both with Dr. Tudor and Lambda Legal, and can represent that, should the Court be agreeable to NWLC being given the time granted previously to Lambda Legal, Lambda Legal will not take part in the argument. We presume that the Court will likely wish the parties to focus on the issue that is likely to remain top of mind after *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020)—namely, the limited remedies awarded by the district court after Dr. Tudor won her discrimination case before a jury. NWLC is providing this update with Lambda Legal's express authorization to inform the Court of its intentions. In the alternative, should the Court still wish to hear from Lambda Legal, Dr. Tudor is prepared to cede five minutes of her 15 minute argument time to NWLC to focus on the question of remedies.

NWLC is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights, and the rights of all people to be free from sex discrimination, including lesbian, gay, bisexual, and transgender (LGBTQ) individuals. Since 1972, NWLC has worked to secure equal employment opportunities, and has advocated to ensure that anti-discrimination

laws are interpreted correctly so that all individuals benefit from federal civil rights protections and related remedies.

NWLC has participated as counsel or *amicus* in a range of cases before the United States Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, and to challenge sex discrimination, including cases addressing Title VII's protections. In this matter, NWLC led a group of 32 organizations in filing an *amici curiae* brief in support of Dr. Tudor and her right to be reinstated after a jury found in her favor. As another example, the undersigned counsel submitted an *amici* brief on behalf of NWLC and 36 other women's rights organizations in support of the LGBTQ workers fired for being gay or transgender in *Bostock*. Most recently, in August 2020, NWLC submitted its U.S. Supreme Court *amicus* brief in *Fulton v. City of Philadelphia*, No. 19-123 (S. Ct.), leading a group of 35 civil rights and gender justice organizations to make clear that entities may not take taxpayer dollars and conduct the government function of conducting homestays for families seeking to take part in foster care, and still, citing religious grounds, turn away same sex couples.

If this motion is granted, NWLC intends to focus on the proper factors for courts to consider in fashioning relief to prevailing plaintiffs to meet the dual remedial goals enshrined in Title VII of making victims of discrimination whole and deterring future illegal discrimination. This case presents legal issues

involving remedies that are of particular interest and importance to NWLC, and implicate all employees facing workplace discrimination, including sex discrimination.

After a jury found in Dr. Tudor's favor, concluding that Defendants violated Title VII by illegally discriminating and retaliating against her, the district court denied Dr. Tudor the presumptive remedy of reinstatement and awarded front pay for solely the short time period before she accepted a significantly inferior job. The district court held that it would be infeasible to reinstate Dr. Tudor primarily due to alleged hostility between the parties during the Title VII litigation, and also due to Defendants' contention that Dr. Tudor was not qualified for the job from which she was fired. Dr. Tudor contends that the district court abused its discretion by failing to properly weigh Title VII's presumption of reinstatement and in awarding front pay for only 14 months as an alternative to reinstatement. NWLC supports Dr. Tudor's position.

NWLC has a strong interest in ensuring that courts interpret Title VII carefully in awarding relief in employment discrimination cases involving all forms of sex discrimination. In all of these settings, NWLC is familiar with the host of substantial barriers employees must overcome as they seek justice. NWLC is highly troubled by denials of reinstatement based in large part on an employer's defense that a hostile work environment prevents the plaintiff's return, despite

taking the opposite position throughout the litigation, and where the jury has found, that there was no hostile work environment.

In this case, NWLC seeks to highlight the critical importance of affording proper weight to Title VII's clear preference for as the presumptive remedy and substantively assess the feasibility of reinstatement. Moreover, workers should not be penalized for mitigating their damages and taking inferior, non-comparable employment out of financial necessity. The disposition of this case will affect the interests of women workers and all workers in this circuit and, if followed in other circuits, across the nation.

At oral argument, NWLC seeks to draw from its considerable experience litigating Title VII sex discrimination cases and evaluating Title VII's reinstatement and front pay requirements to help guide the Court in this case.

CONCLUSION

For all the reasons detailed above, NWLC respectfully requests that it be allowed to participate in oral argument before this Court as *amicus curiae*.

Dated: September 28, 2020

NATIONAL WOMEN'S LAW CENTER

Emily Martin

Sunu P. Chandy

11 Dupont Circle NW, Suite 800

Washington, DC 20036

(202) 588-5180

Of Counsel

Respectfully submitted,

COHEN & GRESSER LLP

/s/ Erica Lai

Erica Lai

2001 Pennsylvania Avenue NW, Suite 300

Washington, DC 20006

(202) 851-2070

Counsel for Amici Curiae

Melissa H. Maxman

2001 Pennsylvania Avenue NW, Suite 300

Washington, DC 20006

(202) 851-2070

Of Counsel

CERTIFICATION OF COMPLIANCE

The motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, 14-point font, and contains only 973 words.

I certify pursuant to 10th Circuit Rule 25.5, all required privacy redactions have been made. I also certify that pursuant to the 10th Circuit ECF User Manual Section II, the electronic submission of this motion was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

Dated: September 28, 2020

/s/ Erica Lai
Erica Lai

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of September 2020, the foregoing motion was filed and served on all counsel of record through this Court's CM/ECF system, which will automatically serve all counsel of record.

Dated: September 28, 2020

/s/ Erica Lai

Erica Lai

Erica Lai
COHEN & GRESSER LLP
2001 Pennsylvania Avenue NW, Suite 300
Washington, DC 20006
(202) 851-2070

*Counsel for Amicus Curiae
National Women's Law Center*